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History, despite its wrenching pain,
Cannot be unlived, but if faced
With courage, need not be lived again.

Maya Angelou
excerpted from,
On the Pulse of Morning

I. A TYPICAL DAY

Everyday in Florida children are placed in foster care because of suspected abuse or neglect at the hands of their parents. The intent is to protect, nurture, and restore these children, while either helping their families become healthy and safe for reunification or, where that is not possible or safe, placing the children with new permanent families. However, on any given day the very system intended to protect these children will neglect or abuse many of them, emotionally and physically. On any given day, Florida’s foster children will have the following types of experiences: 1) A child will go to bed curled up in anguish because yet another day went by, more than thirty now, in which he has not seen his mother. A court-approved case plan, written by the Department of Children and Families ("DCF" or "Department"), dictates that mom be at work during all of the hours that supervised visitation is offered. For the same reason, another foster child hardly knows her mom and dad because she has seen them only a handful of times in the last three years. Knowing this, today her parents will give up and surrender
their parental rights without a trial; 2) A child will awake in foster care, very excited, anxiously expecting the arrival of her mother. She has counted the days. She may go to bed tonight weeping. Her DCF case worker will never arrive to supervise visitation; 3) A child’s health and progress in the Department’s care will be reviewed in court. The review will consist of about forty seconds of testimony from two witnesses. Coordinating calendars for the next review will take four minutes. The lawyers, guardian ad litem, parents, and caseworker will spend forty minutes waiting for the hearing to begin; 4) A two-year-old child will have spent five months with strangers in state care. No one has started the process of providing her father with constitutionally required legal notice of the case. As of today, neither the DCF nor its attorneys have asked anyone where her father is. They have not even asked for his name. Today, the Department, through its attorney, will ask for and receive from the court permission to take another sixty days to give him notice, for a total of seven months, even though the law requires this process to be completed in the first twenty-eight days of the case; 5) If she could understand, a child would see her mother offered a case plan for rehabilitative services today, five months after the infant was taken from her mother. By law, these services should have been offered no later than sixty days after the Department took the baby; 6) A nine-year-old child will conclude her ninth month without seeing or speaking to her mother. A DCF case worker felt that the mother’s alcoholism recovery was not advanced enough to allow any contact. Today, a judge will find out for the first time that the case worker has violated state law which requires court approval to block visitation; 7) A child’s mother will still not have met her attorney, even though the attorney was appointed by the court four months ago; 8) A child will awake in foster care, having been taken from his parents several months ago because of bruising. Today, the DCF will admit in court that they have “no basis to prove the source of the bruising;" 9) A child’s mother will be in violation of her case plan because she lacks transportation to reach the services required in the plan, a fact known when the case plan was written and approved by the court; 10) A child’s volunteer guardian ad litem will not appear for a statutorily-required shelter review to report on the child’s condition and progress of the child’s welfare; 11) An infant child will spend his fifth month in State care away from his mother, recovering from an injury alleged to have been caused by abuse at her hands. Today, the DCF’s attorney will brag in the mother’s presence that she is going to terminate the mother-son relationship at trial because of the alleged abuse. Tomorrow, for the first time, that attorney will obtain the child’s medical records from before he was taken from his mom, records which may vindicate her; 12) A child’s protective care will almost be ended when a DCF attorney, with the child’s caseworker sitting silently at her side, assures a judge the case can be dismissed. The Department, she says, is satisfied the child can be safely
returned to her mother. The mother’s attorney will sit idly by. The child’s
guardian ad litem will not attend the hearing, sending an unknowledgeable
sit-in. A cautious judge will ask probing questions of the case worker, only
to learn that the child’s mother not only failed to complete required counsel-
ing and evaluation, but expressly refused to do so. The Department’s attor-
ney did not know. She did not speak with the caseworker before the court
hearing; 13) A judge will order that a child’s best interests be overseen by the
Guardian Ad Litem Program. The child may not have an actual volunteer
guardian for months. Today, the program is assigned to over 1000 cases, for
which it does not have volunteers to serve as guardians, in just one judicial
circuit; and 14) A brother and sister will be escorted from the home of foster
parents they lived with for two and a half years. The foster parents had
intended to adopt them. The adoption fell through because the foster parents
could no longer stand the agony and uncertainty of waiting for the system to
terminate the birth parents’ rights to clear the case for adoption, and the
children had become unmanageable, acting out on their frustrations with an
uncertain future. The most recent continuance of the termination trial was
for ten months. Given the advancing age of the children and their current
disposition, child welfare professionals will comment that the children will
likely be separated from each other if even one of them is lucky enough to be
adopted.

These are real cases from a typical day in August 2000.1 These types of
things, and perhaps worse, will likely happen again today all over Florida to

1. The cases were observed by or reported to the author on August 7, 2000, or
August 18, 2000, in the Broward County Courthouse, Florida’s 17th Judicial Circuit (notes on
file with author). Various child welfare professionals, including guardians ad litem, attorneys,
and judicial officers confirmed on those dates that the cases and circumstances were typi-
cal. Interviews with child welfare professionals experienced in other Florida judicial circuits
confirmed that the observations in the Seventeenth Circuit are relatively typical of other
judicial circuits. Interview with Jeanette Wagner, Circuit Director, Seventeenth Judicial
Circuit Guardian Ad Litem Program in Ft. Lauderdale, Fla. (Aug. 7 & 18, 2000); Confidential
Interview with child welfare professional, private sector service provider (May 23, 2000);
Interview with Howard M. Talenfeld, child attorney/class action attorney (Sept. 14, 2000);
Interview with Ann C. Jones, Staff Attorney, Sixth Judicial Circuit in Orlando, Fla. (Aug. 30,
2000); Interview with Russell Querry, Staff Attorney, Sixth Judicial Circuit in Orlando, Fla.
(Aug. 30, 2000); Confidential Interview with child welfare professional, public sector supervi-
sory employee, in West Palm Beach, Fla. (Oct. 17, 2000); Telephone Interview with Victoria
A. Vilchez, birth parent attorney, in West Palm Beach, Fla. (Aug. 25, 2000); Interview with
Karen Gievers, child attorney/class action attorney, in Tallahassee, Fla. (June 26, 2000);
Fourth Annual Dependency Court Improvement Summit, Aug. 30–Sept. 1, 2000, Orlando,
Fla., pertinent public comments from a variety of child welfare professionals statewide were
obtained at the DCF District 10 breakout sessions; Innovations in Dependency Practice
workshop; Lawyers in the Courtroom workshop; and Case Conferencing workshop) (notes of
summit and all interviews on file with author).
children who the state is supposed to be protecting, nurturing, and restoring. These types of things, and worse, have been happening to Florida’s foster children for decades, and Florida’s children are not alone.2

Despite typical days like these, the DCF, the agency principally responsible for the welfare of Florida’s dependent children, proclaims on its Internet site on the same typical day in August 2000 that some ninety-eight percent of the children receiving Department services are safe from abuse or neglect.3 Were the observed cases simply among the remaining two percent? Apparently not. Ample evidence indicates that far more than two percent of foster children are not safe from, at the very least, passive abuse or neglect by the dependency system of their basic needs and their interest in reunification with their families, or in achieving other permanent family arrangements. These problems are so endemic to the system that the child welfare community recognizes them with widely used terms, like “foster care drift” and “program abuse.” For foster children, all too often the problems are viewed simply as a way of life.4 The problems are simply not defined officially as rendering children “unsafe,” but they should be.

II. A STUDY OF FLORIDA’S DEPENDENCY SYSTEM

This article reports the findings of a study of Florida’s child welfare and dependency system. The recommendations which follow propose legislative action to ensure that foster children in all cases can be expected to achieve the permanent and stable family placements that they need to thrive, and to ensure that dependency proceedings resolve as quickly as possible. These are not new or novel goals. These are long-held, existing goals of child welfare law which, this study finds, escape fruition in far too many cases. Tragically, child after child still spends excruciatingly long periods of time in foster care to the detriment of their safety and health—on average, over three years. Many children spend five, six, or even seven years of their childhood

2. Jill Chaifetz, Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (1999), noting, inter alia, recognition within the child welfare community of the term, “program abuse,” to describe the failure of foster care systems to provide stable homes and needed services for foster children. Also noted is the fact that by 1995, the foster care system in 22 states and the District of Columbia were under some form of court supervision for inadequate or inappropriate care of foster children. Id. at 8.

3. FLA. DEP’T OF CHILDREN & FAMILIES, AUGUST 2000 SITUATION REPORT M0077, available at http://www.state.fl.us/cf_web/news/mspt/sitr/0800.html. Of note, approximately the same statewide average is reported for children being safe from abuse and neglect while their families are receiving in-home services. Id. at FSP-017.

4. Confidential Interview with attorney for dependent children in Broward County, Fla. (July 26, 2000) (notes on file with author).
in foster care, leaving them day after typical day with uncertain futures, depriving many of them of nurturing childhoods. The children may survive physically, but far too many reach adulthood damaged, scarred, and weak.

To understand why our legislative and social goals for child welfare are not met in so many cases, this study examines extensive statistical and anecdotal evidence of a consensus in Florida's child welfare community that many foster children suffer from protracted uncertainty for their future in lengthy dependency proceedings, leaving them at risk of significant psychological damage. The study also looks across the nation and at the history of child welfare law and public policy to understand why, despite decades of efforts and better intentions, the dependency systems in Florida and elsewhere seem impervious to federal and state government efforts and mandates to expedite cases to ensure the safety and stability of children. Principally, the study concludes that the statutory assignment of responsibilities in the system itself fundamentally and adversely prevent efficacy on a case-by-case basis. This conclusion may well be contrary to the belief of many readers that the primary culprits are inadequate funding, failures of child welfare officials within the Department, or insufficient action by the judiciary. These matters will be explored, but placed in perspective.

The proposed solutions keep in mind two practical constraints of public policy. First, not all problems are best redressed by legislative action. Statutory reform will not always help when a problem arises and greater funding appropriations are not always needed simply because a problem exists. Second, problems of public policy typically take time to redress, often more time than is comfortable. Efforts to redress problems which are underway need to be considered, evaluated and given a respectful opportunity to succeed. Finally, the problems identified in this study are not all which are present in Florida's dependency system, but are limited to those which call into question the effectiveness of child welfare policy imposed statewide by statute.5

5. Other studies have concluded that child welfare system problems require the concerted efforts of the several participating groups, including a variety of non-legislative efforts. Donald N. Duquette et al., We Know Better Than We Do: A Policy Framework for Child Welfare Reform, 31 U. MICH. J.L. REFORM 93 (1997).

Our central message is that child welfare reform must be broad-based and interdisciplinary. No single group and no single element of a system or a community—social agencies, family advocacy groups, the courts, the state legislature, or a state administrative agency—has the ability to meaningfully improve foster care on its own.

Id. at 101. See also Donald N. Duquette et al., U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE; GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (June 1999), available at http://www.acf.dhhs.gov/programs/cb/publications/adopt02/index.htm;
III. CONCERNING METHODOLOGY AND HUSHED DISCLOSURES

The study was conducted by the author from May to November 2000. Interviews were conducted with over sixty public and private sector child welfare professionals throughout Florida, though many had experience in both. Included were attorneys and guardians ad litem for children, as were birth parent attorneys. Birth parents were interviewed, including one who had prevailed in litigation brought by the Department and two whose parental rights were ultimately terminated at trial. Foster parents were interviewed. Input was received from attorneys for the state at the circuit and statewide level, and from low and high-level supervisory officials and case-level workers at the DCF. Child protection investigators were interviewed, as were supervisory protective investigation officials. Court officials, including dependency judges, at the statewide and circuit level were also consulted. Citizens and parents who have made reports to the Child Abuse Hotline provided their perspectives and experiences. Professionals involved in the delivery of social services to dependent children and their families of origin were also interviewed. Some persons were interviewed multiple times as the study progressed.

Observations were made in visits to dependency court hearings in one Florida circuit and to Department service centers. Additional information, perspectives, and first hand accounts of what is and is not working in the dependency system were obtained over a three-day period at Florida’s 2000 Annual Dependency Court Improvement Summit, co-sponsored by the Department and the Office of the State Courts Administrator and attended by over 1000 child welfare professionals from across Florida.

Applicable Florida and federal laws were examined, as were statutory approaches to child welfare in other states. Problems with child welfare experienced by other states and their reform efforts were also studied through written materials and interviews. State and federal government reports and studies of child abuse and neglect and the overall performance of the child welfare system were reviewed. Data, forms, various planning documents, and reports obtained from the DCF were examined. Several articles, commentaries, and books on the topic were considered.

In some instances, persons interviewed for this study asked not to be identified in any oral or written findings. Maintaining these confidences does not compromise the value of the information and perspectives received for two reasons. One, it appeared in each instance that confidentiality provided the reporter desired safety to discuss candidly facts and impressions from extensive experience in the dependency system. There was no sugges-

tion of malice. Two, information and perspectives provided in confidence proved to be consistent with the statistical data relied upon in this study, and anecdotal information and impressions tended to repeat themselves among reporters in varied parts of the state and of varied levels of authority. It is left to the reader to assess any significance of so many child welfare professionals requesting anonymity in this report. This study draws no conclusions from this fact.

IV. A NOTE ON DATA

While federal law requires that states, like Florida, which receive federal funding for their foster care system, maintain an information system which tracks, among other things, placement goals for all children in foster care, Florida is apparently having problems with the reliability of its data. Even basic data currently maintained and reported by the DCF, such as the number of children in foster care, can be significantly unreliable, though efforts are underway to solve this problem. For example, recently, children in one DCF District were reportedly uncounted by as much as 1000, depriving the system of funding opportunities. DCF reports reviewed for this study also revealed disparities in baseline performance measures and statistics. For example, the DCF Agency Strategic Plan for fiscal year 2000–2001 reports that in fiscal year 1997–1998, the rate of child protective investigations were 37.2 per 1000 children. The DCF Agency Strategic Plan for fiscal years 1999–2000/2003–2004, issued earlier, indicates that the rate was 36.2 per 1000 children. Similarly confusing is Department data reflecting that ninety-five percent of children who exited foster care over the past two years did not re-enter within twelve months, while data collected by the


7. Interview with Peggy Sanford, Assistant General Counsel, Fla. Dep’t of Children & Families and Mary C. Allegretti, Chief, Child Protection Policy, Fla. Dep’t of Children & Families, in Tallahassee (June 27, 2000).

8. Jacqueline Charles, Foster Kids Often Lost in Shuffle, MIAMI HERALD, Nov. 3, 2000, at 7B.


federal government reports that this was the case with only eighty-seven percent of Florida's cases.11

V. PART I—CHILD WELFARE LAWS—AN EFFORT TO ENSURE THE BEST INTERESTS OF CHILDREN

A. Legal Tender—The Influence of Federal Money

State government intervention in cases of child abuse, neglect, and abandonment began in the late 1800s, when state governments joined private charitable and religious organizations for the first time in their efforts to protect and care for children. By the 1950s, all states had agencies to redress child abuse, neglect, and abandonment. Federal involvement began in 1935 with the expansion of the Social Security Act to include a child welfare services program. Notwithstanding a relatively minimal financial commitment up to the 1970s, totaling approximately $200 million annually by the close of that decade, the last two decades have seen explosive growth in the federal commitment to approximately $4.5 billion in 2000.12 With that growth, the influence of federal policies on state child welfare laws and practices has become very significant.

Under Title IV-E of the Social Security Act, federal funding is to provide for “foster care and transitional independent living programs” for appropriate foster children, as well as assistance and incentives for adoption of special needs children.13 To be eligible for any federal funding, a state must submit a child welfare services plan (the “state plan”) to the United States Department of Health and Human Services, which has been jointly developed by the state agency and the federal Department’s Secretary.14 The state plan must meet several requirements, including that the applying agency “administers or supervises” the state’s child welfare services and various other matters demonstrating compliance with the substantive and procedural requirements discussed here.15

15. § 622(b)(1).
Substantively, federal influence begins with the primary guiding principle of child welfare law. In accord, the health and safety of children are to be the paramount concerns in dependency cases under Florida law, while providing that state intervention into families is to be "constructive," "nonadversarial," and respectful of "the integrity of families." Receipt of federal funding is contingent on states pursuing reunification of families where "safe and appropriate;" alternatively, children are to be placed for adoption or "other planned, permanent living arrangement."

With the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), the federal government sought to better ensure that children are only removed from their families of origin if "reasonable efforts" are made to prevent the need for removal and, likewise, that permanent termination of parental rights only follows efforts to create a safe environment for the children to return home. This effort was inspired in part by a concern that states were overusing foster care, both as an intervention method and as the ultimate solution to familial problems. Concerns that AACWA's provisions were promoting protracted and futile efforts at reunification to the detriment of foster children, and that reunification efforts were being made in cases of aggravating circumstances which warranted immediate termination of parental rights, contributed to the Adoption and Safe Families Act of 1997 ("ASFA"), which further amended the Social Security Act.

This act is credited with fundamentally changing the national approach to foster care, in particular targeting the problem of how long children stay in foster care. The legislation recognized that a better balance was needed between efforts to ensure a child's safety, employing reasonable efforts to preserve a child's family of origin while achieving permanency for a child in each case. The goal was to address the problem of children languishing in foster care while protracted efforts were made to reunify their families of origin. In accord with federal funding eligibility requirements, Florida law indicates that the child welfare system is supposed "[t]o preserve and strengthen . . . family ties whenever possible." Children should only be removed from their homes and remain in shelter care if "the department has made reasonable efforts to prevent or eliminate the need for removal . . . ."

18. See Chaifetz, supra note 2, at 4–5; Davidson, supra note 12, at 770–73.
22. § 39.402(10).
Reasonable efforts are not to be required if a parent has subjected a child to an "aggravated circumstance." Such circumstances are to be defined by state law, but federal law offers as possible examples abandonment, torture, chronic abuse, and sexual abuse. For example, reasonable efforts are not to be required where a parent has committed murder or voluntary manslaughter of another child of the parent, where a parent has committed a felony assault resulting in serious bodily injury to the child or another child of the parent, nor where a parent's parental rights have been involuntarily terminated as to a sibling of the child at issue. Reasonable efforts to keep families together are presumed if an emergency exists at the time of the Department's first contact. Similarly, a presumption arises from a "substantial and immediate danger" to a child's health or safety which preventative services can not mitigate or, in cases of extreme abuse, where grounds for expedited termination of parental rights are apparent. Significantly, while the law prohibits children being removed or kept from their homes pending disposition if in-home intervention or preventative services can not render the home safe, reasonable efforts are nonetheless presumed if there are no preventative services available which can ensure the child's health or safety in the home. Thus, the standard will keep a child away from his or her family and in shelter care if preventative services are simply not available.

Among other things to promote "reasonable efforts" to prevent the need for removal or termination of parental rights, federal law requires a tailored case plan for each child aimed at achieving permanent, safe placement. Federal law permits so-called "concurrent planning," that is, that reasonable efforts to reunify a family may be made at the same time that efforts are being made to place the child for adoption, a practice that Florida has adopted. Florida law seeks to implement these conditions, requiring that unless a statutory exception for expedited termination of parental rights exists, the Department must demonstrate that it has made "reasonable efforts to reunify" a family where a child is in out-of-home care. Significantly, this includes "the exercise of reasonable diligence and care... to provide the services... delineated in the case plan." Florida law must provide for compliance with federal requirements to support its heavy reliance on federal funding of the dependency system. Almost one-third of Florida's $724 million child welfare budget comes from federal sources through Title IV-B, which supports family preservation, and Title IV-E, which supports foster care. Significant mandates related to children in foster care are found in Title IV-E, which provides federal funding for states to provide services to children in out-of-home care, including reunification services, adoption, and guardianship. The statutes set out requirements for placing children in foster care and for placing children for adoption, including the use of "concurrent planning." The statutes include provisions for ensuring that children are returned to their families if it is determined that it is in the best interest of the child. Federal law requires that states maintain records of foster care placements and that children in foster care receive regular reviews of their individual needs and plans for their care.

25. See generally Davidson, supra note 12, at 771; Chaifetz, supra note 2, at 4–5.
from two parts of the Social Security Act, twenty-five percent from Title IV-E and approximately four percent from Title IV-B. Title IV-E provides for partial reimbursement of the costs of foster care in return for making reasonable efforts to prevent removal or termination of parental rights. Title IV-B of the Social Security Act addresses services to be provided through the dependency system. Accounting for all sources, a full fifty percent of all foster care expenditures in Florida are from the federal government. Almost ten thousand foster children in Florida are relying on Title IV-E funding. Title IV-E funding pays for many costs of foster care, including food, clothing, shelter, visitation travel expenses, and the like. Similarly, administrative and operational expenses connected with institutional care are recoverable.

The time it takes for dependency cases to conclude is a significant federal concern which has been met with specific case goals. Safe, permanent homes for children are supposed to be found more quickly as a result of ASFA's enactment; cases were supposed to end where children wait eighteen months or more before adoption or other alternatives to reunification are pursued. ASFA employs several measures to attempt to ensure that its goals are met, some substantive in nature, others procedural. Types of extreme abuse cases are identified in which no reunification efforts are required (though these cases are relatively rare) and in those cases alternative permanent homes must be sought within thirty days of the determination that such circumstances apply, provisions which Florida law now contains. In other cases where reunification might be appropriate, but cannot be accomplished in a reasonable amount of time, time frames are set in which proceedings to terminate parental rights are to begin. This includes cases where children have been in foster care for fifteen of the previous twenty-two months, though Florida has adopted a more restrictive twelve-month standard. Federal law allows exceptions for cases where children are in relative care or where the state has failed to provide sufficient services for improving

28. The precise percentages are 24.29% for IV-E dollars and 3.81% for IV-B dollars. See Letter from Margaret Taylor, Financial Administrator, Fla. Dep't of Children & Families (enclosures) (Aug. 29, 2000) (on file with author).

29. Id.


the home of origin such that it is safe for the child to return, standards of which Florida law takes advantage.\textsuperscript{34}

ASFA contains a number of other strict substantive and time standards from the inception of a case to its close which are designed to achieve the balance between a child’s need for permanency and an interest in maintaining familial ties, and which Florida law embodies. With ties to receipt of federal funding, the standards include: 1) At the first hearing regarding the removal of a child from his or her home, the court must find that return to the home is “contrary to [his or her] welfare.” Failing this, the case is ineligible for Title IV-E funding, a failure which cannot be remedied at a later hearing.\textsuperscript{35} Florida law includes this standard to allow for funding eligibility;\textsuperscript{36} 2) Within sixty days of a child’s actual removal from his or her home, a written and tailored case plan must be prepared, a requirement also embodied in current Florida law.\textsuperscript{37} In this same time frame, a court must enter a finding that “reasonable efforts” were made to prevent the child’s removal from the home in the first instance, barring which the case becomes completely ineligible for Title IV-E funding, a standard Florida has actually expanded to require three such findings in sixty days;\textsuperscript{38} 3) Within twelve months of a child’s entry into foster care,\textsuperscript{39} and thereafter each twelve months if necessary, federal law requires that the state’s child welfare agency make reasonable efforts to finalize a permanency plan, evidenced by a court finding that this has occurred. While the failure to do so violates the state plan, it does not permanently disqualify the individual case for Title IV-E funds.\textsuperscript{40} It would appear that failure to meet these requirements renders the child’s case ineligible for Title IV-E funding until the proper court finding is made.\textsuperscript{41} The permanency hearing is to determine whether and when the child will be returned to their birth parent or placed for adoption, under legal guardians or other permanent living arrangement, as well as the related issue of whether

\begin{itemize}
\item \textsuperscript{34} 42 U.S.C. § 675(5)(E); FLA. STAT. § 39.703(2) (2000); U.S. \textit{General Accounting Office}, \textit{supra} note 19, at 4.
\item \textsuperscript{35} 45 C.F.R. § 1356.21(a), (c) (2000).
\item \textsuperscript{36} See FLA. STAT. § 39.402(2), (6), (8)(h) (2000).
\item \textsuperscript{38} 45 C.F.R. § 1356.21(b) (2000); FLA. STAT. §§ 39.402(8)(h)5., .506(7), .521(1)(f) (2000).
\item \textsuperscript{39} The date of entry into foster care is the earlier of the date of the first judicial hearing finding that abuse or neglect has occurred or 60 days after the child is removed from his or her home. 42 U.S.C. § 675(5)(F) (Supp. IV 1998).
\item \textsuperscript{40} 45 C.F.R. § 1356.21(e) (2000). See also Davidson, \textit{supra} note 12, at 772.
\item \textsuperscript{41} 45 C.F.R. § 1356.21(a) (2000); see 42 U.S.C. § 675(5)(C) (1994 & Supp. IV 1998).
\end{itemize}
the state will file a petition for termination of parental rights. Florida law calls for these matters to occur; and 4) That the child’s status is reviewed at least every six months by the court or by administrative review for purposes of assessing the safety and appropriate nature of the child’s placement, the need for ongoing placement, case plan compliance, and progress towards reunification or other permanency goals. Florida law requires court review. Aside from the foregoing, federal law leaves to the states development of legal procedures and assignment of responsibilities within the dependency system. While adopting the federal time standards, Florida sets forth in its statutes rather detailed time standards and hearing schedules to direct dependency litigation. Responsibility for various aspects of dependency proceedings and the substantive content of proceedings is also set forth in great detail in Florida law.

B. Florida Dependency Law—Scrutinizing Every Move

A dependency case begins with a report of suspected child abuse or neglect. By law, every person has the responsibility to report suspected child abuse or neglect at the hands of a parent, custodian, care giver, or other person responsible for a child’s welfare. Reports are made to the Department through its central abuse telephone hotline. Acting through its fifteen districts, the Department then becomes primarily responsible for the welfare of these children in a variety of ways and in an extensive manner.

After receiving a report, DCF is responsible for undertaking a protective investigation to determine whether the child has been subjected to, or is at risk of, abuse or neglect, except where that responsibility is transferred to a county Sheriff’s office (as it has been in four counties). Immediate investigations are required if the immediate safety of a child is at risk or if the family may flee from the investigation. In all other cases, an investigation must begin within twenty-four hours, in conjunction with law enforcement if warranted. Unannounced, onsite investigations are required, with specific statutory requirements that in-person interviews must be had with the child.

44. 42 U.S.C. § 675(5)(B) (1994 & Supp. IV 1998); Fla. Stat. § 39.701(1)(a), (2)(a) (2000); Fla. R. Juv. P. 8.410(e). “Administrative review” refers to a process, which is to be open to the parents, of case review involving a panel of persons where at least one member is not responsible for case management or service delivery to the child or parents. 42 U.S.C. § 675(6) (1994).
46. See §§ 39.201, 301, 3065.
47. § 39.201(5).
48. Id.
any siblings, parents, and any other adult household members.\textsuperscript{49} The investigation must also include various records checks on each household member.\textsuperscript{50} A standardized risk assessment instrument must also be completed within forty-eight hours of the initial report.\textsuperscript{51}

Where abuse or neglect is confirmed, the Department must decide whether voluntary in-home services should be offered to the children and parents involved or whether the child must be removed to ensure his or her safety.\textsuperscript{52} A child must be removed in "high-risk" cases, loosely defined as those involving young parents or custodians, the use of illegal drugs, or domestic violence.\textsuperscript{53} The Department is required to complete its child protective investigations within sixty days, with no exceptions provided at law.\textsuperscript{54} A child may be taken into protective custody for up to twenty-four hours by law enforcement or Department agents based on a probable cause belief that abuse, neglect, or abandonment has occurred, or that there is imminent danger of the same.\textsuperscript{55} Beyond twenty-four hours, a court order finding probable cause is required, typically as a ruling on a "shelter petition" at a "shelter hearing."\textsuperscript{56} The court must specifically find that removal is necessary and that "appropriate and available services" would not change that necessity.\textsuperscript{57} "Shelter" care is intended to be a "temporary" placement "of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication," with a relative or nonrelative, or a licensed home or facility.\textsuperscript{58} Without an adjudication of dependency a child is not supposed to remain in shelter care for more than sixty days.\textsuperscript{59} Similarly, a child is not to remain in shelter for more than thirty days after adjudication unless an order of disposition has been entered.\textsuperscript{60}

Following a shelter determination, a dependency case proceeds with the filing of a dependency petition, followed by an arraignment, an adjudication, and a disposition. Following or during an ongoing child protective investigation, formal dependency proceedings can be initiated in a circuit court by the Department or any other person with pertinent information by filing a peti-
tion for dependency in the name of the child. 61 A petition to terminate parental rights may be filed at any time, but at the least, a dependency petition must be filed within twenty-one days of a hearing in which a child is placed in shelter by court order, or within seven days of any party filing a demand for early filing of a petition. 62 In any other case, a dependency petition is to be filed within a "reasonable time" of the referral for protective investigation. 63

Arraignment hearings are to be conducted for any parent within twenty-eight days of a child being placed in shelter care by court order, or within seven days of filing a dependency petition if demand for early filing has been made. 64 Likewise, in cases where a child is in shelter care, disposition hearings are to be held within fifteen days of the arraignment if a parent admits or consents to the findings of a dependency petition, absent a continuance. 65 If there is a denial, an adjudicatory hearing to determine whether a child is dependent must be held within thirty days of the arraignment, absent a continuance granted in accord with the law. 66 Adjudication is necessary for a child to remain in out-of-home placement. 67

Within thirty days of the adjudicatory hearing, a disposition hearing for the purpose of receiving and considering a case plan and predisposition study must be held. 68 The Department prepares the case plan and predisposition study. 69 A predisposition study includes, among other things, an assessment of the parents’ ability to meet a child’s basic needs and care; an assessment of the child’s historical stability, including exposure to domestic violence; the mental and physical health of the parents; the child’s conduct at home, school, and in the community; an assessment of the child’s risk at home; and resources available to address those risks, including prevention and reunification services. 70

Disposition hearings are to be held as to any child adjudicated dependent, at which time the case plan is supposed to be approved, though the court may opt to do so at a second hearing within thirty days of the disposition. A diligent search should have been completed for any parent who cannot be located before a disposition hearing can go forward. At disposition, the court

61. §§ 39.501(1), .802(1); FLA. R. JUV. P. 8.220.
63. Id.
64. § 39.506(1).
65. Id.
66. Id.
68. § 39.507(7).
69. §§ 39.507(7), .521(a); see discussion infra Part V.C.
70. § 39.521(2).
must approve several things. This includes approving the child's continued placement in out-of-home care or custody, if this is the case, and setting any special conditions on same, setting any "[e]valuation, counseling, treatment activities, and other actions to be taken by the parties;" and identifying supervisors or monitors of services; and child support matters.71

Virtually every move in a dependency case is reviewed and approved by the circuit court. As noted, there is almost immediate court involvement when a child has been removed and placed in a temporary shelter. The court reviews and approves continued placement in a shelter, and then conducts shelter reviews at least within thirty days after the shelter hearing, and every fifteen days thereafter, each time to review the child's status and approve the continuation of the shelter placement.72 These hearings continue beyond arraignment and no more than fifteen days thereafter until a child is either returned home or a disposition hearing is conducted.73 Written determinations regarding a child remaining in a shelter are required within twenty-four hours of any time violation for filing a dependency petition or before granting a continuance for holding a disposition hearing.74

At the disposition hearing, the court is to schedule the initial judicial review essentially within ninety days, though the case plan review and approval may be postponed for thirty days from the disposition hearing.75 In no event is the initial judicial review to occur more than six months after the child is removed from the home.76 Under all circumstances, the court is required to review the status of any dependent child at least once every six months, including as to case plan progress.77

Under state law, there are to be no fewer than eight court hearings in a year in every dependency case, presuming that all statutory deadlines are met, no continuances are sought or granted, and no extraordinary circumstances arise requiring any hearing not otherwise dictated by law. Particularly because of required shelter reviews every fifteen days, the number of hearings can be much greater if the filing of a case plan is delayed or arraignments are not timely held, problems which regularly occur as discussed below. Due to delays, cases reviewed in this study would have required as many as sixteen court hearings in a year.

Under concurrent case planning, the Department may be responsible for simultaneously providing rehabilitative services to abusive or neglectful parents and preparing to terminate the parental rights. The Department is

72 § 39.506(8).
73 Id.
74. §§ 39.402(14), .506(8).
75. § 39.521(1)(a), (c).
76. §§ 39.521(1)(c), .701(3)(a).
77. § 39.701(1)(a), (2)(a); FLA. R. JUV. P. 8.410(e), 8.415(b).
directed that when children are removed from their homes, permanent placement with a biological or adoptive family is to be “achieved as soon as possible” and in no case are children to “remain[] in foster care longer than 1 year.” As the foregoing indicates, the court is to ensure that these goals are met.

C. Case Plans as a Guiding Light Under Florida and Federal Law

Under federal and state law, the Department is responsible for developing a case plan with input from all parties. The plan is intended to be a tool to direct a rehabilitative plan for parents and to coordinate services for children, birth parents, and foster parents, whether or not a child is removed from his or her home, or termination of parental rights is sought. Case plans are to be prepared within sixty days of a child’s removal from his or her home. Only for good cause shown should this be extended, and if so, for no more than one extension of thirty days. Amendments, even with the consent of all the parties, require court approval.

In accord with the goal that children spend no more than twelve months in foster care, case plans may only continue in effect for more than twelve months if an extension is granted by the court. The twelve-month period begins the earlier of the child’s removal from the home or date of court approval of the case plan. Case plans may be extended due to the Department’s failure to provide necessary services to the parents, but extensions are limited to six months. There is no provision to extend a case plan based on a parent’s failure to meet plan requirements. Indeed, failure to comply substantially is grounds to terminate parental rights.

D. Florida and Federal Law on Concluding Dependency Cases

In addition to the time standards of state and federal laws, a number of substantive provisions apply to the conclusion of dependency cases. In cases where reunification is an option, it is contingent on a showing that the parent has “substantially complied with the terms of the case plan to the extent that

78. § 39.001(1)(h).
79. §§ 39.01(11), .601(1)(a); FLA. R. JUV. P. 8.400(a)(1), (2).
80. §§ 39.601(9)(a), .603(1); FLA. R. JUV. P. 8.400(a), 8.410(a).
81. § 39.601(9)(a); FLA. R. JUV. P. 8.400(a)(3), 8.410(c).
82. § 39.601(9)(f); FLA. R. JUV. P. 8.400(b).
83. § 39.601(7).
84. Id.
85. § 39.701(f); FLA. R. JUV. P. 8.415(e)(3).
86. §§ 39.601(3)(k), .703.
the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home.\textsuperscript{87} However, termination of parental rights must be sought if a child is not returned home by the twelve-month judicial review hearing, and the petition for same must be filed within thirty days of that hearing.\textsuperscript{88} The standard for court waiver of this requirement and extension of the case plan is extreme, "[o]nly if the court finds that the situation of the child is so extraordinary" and in accord with the child's best interests.\textsuperscript{89} The petition need not be filed if the child is being cared for by relatives who choose not to adopt, or where the state has failed to make reasonable efforts at reunification by providing appropriate services to the parents.\textsuperscript{90}

Once a petition for involuntary termination of parental rights is filed, an advisory hearing is to be held as soon as possible, followed within forty-five days by an adjudicatory hearing on the petition's merits, barring consent of the parties otherwise, or based on a reasonable continuance for preparation or attendance of witnesses, or under court rules, for good cause.\textsuperscript{91} At the advisory hearing, parents are informed of their right to counsel and receive appointed counsel, if appropriate.\textsuperscript{92} The court must also consider whether the parents will admit or deny the petition, or otherwise consent to the petition; and appoint a guardian ad litem.\textsuperscript{93} At the adjudicatory hearing, the court determines whether clear and convincing evidence exists to terminate parental rights.\textsuperscript{94}

In cases where the birth parents' rights are to be terminated, the permanency options authorized by law include the favored goal of adoption, with four other options if that is not achievable or in the child's best interest, including: 1) legal guardianship; 2) long-term custody with an adult, whether or not a relative of the child; 3) long-term licensed custody for certain children over the age of fourteen; and 4) independent living.\textsuperscript{95} Long-term custody can be a permanency option for any dependent child over fourteen who has been in foster care for more than six months, reunification at a later date is not precluded, and protective services or supervision are no longer indicated.\textsuperscript{96} Long-term licensed custody may be a permanency option for children over fourteen years of age who have been in a stable foster care

\begin{itemize}
\item \textsuperscript{87} § 39.522(2).
\item \textsuperscript{88} § 39.703(2).
\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} \textit{Id}.
\item \textsuperscript{91} § 39.809(1), (2); FLA. R. JUV. P. 8.525(b).
\item \textsuperscript{92} FLA. R. JUV. P 8.510(a)(2).
\item \textsuperscript{93} \textit{Id}.
\item \textsuperscript{94} FLA. R. JUV. P. 8.525(a).
\item \textsuperscript{95} §§ 39.621-.624.
\item \textsuperscript{96} § 39.622(1)-(4).
\end{itemize}
placement for more than twelve months, and continue the foster placement until the child's majority. Independent living may be a permanency option for children over the age of sixteen if found to be the most appropriate option consistent with the child's safety.

E. Representation of the Parties Under Florida and Federal Law

Court proceedings significantly influence how dependency cases impact the parties. Providing for legal representation of the interests, perspectives, and responsibilities for the various participants is rather disparate under Florida law. The Department must be represented by an attorney in all proceedings. Depending on the particular district, the Department may be represented by an in-house attorney, the state attorney's office, or the state attorney general's office.

Birth parents are entitled to legal representation at all stages of dependency proceedings, including appointed counsel if they are indigent, which they typically are. By state law, the right to counsel arises at the time of the shelter hearing such that if a parent arrives at a shelter hearing without counsel, but requests one, the shelter hearing may be continued for up to seventy-two hours to obtain and consult with counsel. During that time, the child remains in shelter care. The fees paid to court appointed attorneys for parents in dependency cases are limited by statute. They are to be paid by and as established by the county. In termination of parental rights proceedings, compensation is capped at $1000 at the trial level and $2500 at the appellate level, though these caps are raised at least in some counties where warranted by the demands of the case. There are no such caps under state law on the expenditure per case by Department attorneys.

Under state law, the best interests of children are to be represented by a guardian ad litem. Like their parents, an appointment is to be made at a shelter hearing, unless the court finds it unnecessary. However, unlike their parents, there is no provision in state law to continue a shelter hearing

97. § 39.623.
98. § 39.624.
100. § 39.013(9)(a).
102. Id.
103. See § 39.0134.
104. § 39.0134(1).
105. § 39.0134(2); Telephone Interview with Mary Ann Scherer, birth parent attorney, in Ft. Lauderdale, Fla. (Aug. 16, 2000) (notes on file with author).
106. § 39.402(8)(c)1.
107. Id.
because a guardian is not available or has not had time to consult with the child or otherwise learn of the details of the case. A guardian ad litem is a volunteer who need not be a licensed attorney competent to address a child's legal interests. 108 The guardian him or herself, or another guardian ad litem program representative, becomes a party to the proceedings, required to be present for "all critical stages of the dependency proceeding," to review disposition recommendations, and any proposed changes in a child's placement. 109 The duties of a guardian ad litem in representing "the interests of the child" include: 1) investigating and reporting in writing to the court as to the allegations of abuse or neglect and any other subsequently arising matters; 2) reporting to the court as to a child's wishes; and 3) making recommendations to the court. 110 The Guardian Ad Litem Program does have a limited number of staff attorneys. However, due to either a shortage of volunteers or shortage of paid and skilled staff to supervise more guardians, many children do not have a guardian to monitor their progress and safety, or evaluate and report to the court on their best interests. 111 In the limited instances where an attorney ad litem is appointed for a dependent child, there are no statutory directives as to representation of a child's legal interests, nor are there any directives in court rules, with the exception of a pilot program for attorneys ad litem, discussed below. 112

Federal law does not require the appointment of an attorney to represent a child in dependency cases, nor a court appointed special advocate, known as a "CASA." 113 Commentators suggest that this leaves the child's interests lacking for a need of an attorney or similar advocate in dependency cases. 114 Federal law does require appointment of a guardian ad litem for children who are the subject of judicial proceedings involving abuse or neglect, though there is some debate as to whether this provision was intended to require appointment of attorneys for children. 115 There is no specific requirement that the state plan filed for Title IV-E funding eligibility provide, in any particular fashion or manner, for legal representation for children or the state in child welfare cases. Florida law simply does not

111. Wagner, supra note 1.
112. See Fla. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 14 (May 24, 2000); see also infra notes 302–07 and accompanying text.
113. Davidson, supra note 12, at 768.
114. Id. at 768–69.
guarantee that anyone in a dependency case will represent the child's legal interests.

F. Assumptions of the Dependency System

Emerging from the laws creating Florida's dependency system are some fundamental assumptions about the roles and expectations of the parties and their representatives. The core assumption is that the DCF will act in accord with the best interest of dependent children, even protect those interests, as it fulfills the extensive duties assigned to it. The Department is entrusted with the needs and care of dependent children, including safeguarding their interest in family reunification or preservation. The Department is to plan a course for those children and their families to achieve better health and functioning. The Department is expected to balance tensions between the needs of children and families with what services and resources may be available. In many cases, the Department is expected to reconcile its role of helping families reunite, while concurrently planning for and even pursuing the family's demise. The Department's attorneys are expected to file and prosecute civil dependency actions, literally acting in the name of the child and, presumably, in accord with the best interests of the child, though their client remains the Department itself.

It is likewise assumed that when volunteer guardians ad litem are appointed in dependency cases that they will advise the courts as neutral participants to safeguard the best interests of children in a timely manner. As the only party expressly charged with representing the best interests of children, it may also be assumed that the guardian can and will act to monitor the child's needs on a regular basis. It may also be assumed that the guardian will promptly seek to remedy any failings of the system which threaten to visit harm on the child. For children in out-of-home care, the guardian would also presumably be a check on abuses in foster care or other such placements.

There appears an expectation that the circuit court will oversee and ensure in a timely manner that the Department and other parties act expeditiously in the best interests of children and families. In an effort to ensure that the courts actually do this, an extensive hearing schedule is established by statute to review and approve everything that happens to a child and everything that is planned for the child. The detail of the statute and its demands for timely and extensive hearings suggest that none of the parties were actually trusted when the statutes were written. A similar sentiment of distrust can be construed from the painstaking detail of case plan requirements to guide the conduct of parties, discussed below. The courts check up on everyone and the courts are told how and when to do this.
It is presumed that the court can accomplish its oversight role based on most probably complete information received from the other system actors, including the DCF and its attorneys, the parents and their attorneys, and any guardian ad litem who may be assigned to a child. This point is particularly significant because the courts must necessarily rely upon information received from the parties and the lawyers. As the National Council of Juvenile and Family Court Judges (the "Council") recognizes, not only do attorneys largely control what information a judge sees, but also that "[e]ach party must be competently and diligently represented" for the system to function as it is intended. More significantly, the Council notes that the failure of attorneys to behave timely, both in correcting errors and advancing cases, adversely impacts "the quality and timeliness of the court's decision-making". Child welfare professionals in Florida recognize that this is a problem for Florida now, even as to statutorily required information at status hearings.

It is presumed that the courts can and will act as a check to ensure that all involved act at virtually every step and decision point in accord with the best interests of the children involved. This basic structure and its core assumptions, particularly as to the role of the court, exist nationally. The Council observes that "judges make critical legal decisions and oversee social services efforts to rehabilitate and maintain families, or to provide permanent alternative care for child victims." The current reliance on the courts as the key mechanism to ensure that children are not re-abused or neglected within or by the dependency or foster care system is one which has certainly not escaped the courts' attention. The Council notes the "more active" and "significant new role" the courts play in ensuring that "a safe, permanent and stable home is secured" and making decisions for each dependent child.

This present role of the courts, arising from changes in federal and state law, including the Adoption and Safe Families Act ("ASFA"), constitutes a significant expansion from their limited role in the 1970s to determine simply whether a child had suffered from abuse or neglect, and whether in-home services or out-of-home placement was the necessary response. The

117. Id. at 10, 22; see also DUQUETTE ET AL., supra note 5, at ch. VII.
118. Fourth Annual Dependency Court Improvement Summit, supra note 1.
120. Id.
121. Id.
122. Id.
expanded role necessitates handling more complex issues, more hearings, and more people. Dependency litigation places courts in a “managerial and directive” role, which is unsurpassed in the degree to which it intrudes into the actions of an executive branch agency. The Council finds that “many courts have neither the ability nor the resources to meet these new demands.” The demands on judges render the dependency division among the most stressful, if not the most stressful, in a courthouse. The Council finds that the present day structure of the dependency system effectively requires that “step-by-step the judge must determine how best to assure the safe upbringing of the child, and that the child is eventually placed in a safe and permanent home.”

If these statutory assumptions were seeing fruition when practically applied, dependency cases might be progressing well and timely. However, in practice, the assumptions of the dependency system are failing in many cases. Dependency system participants are aware of this and trying to compensate for the failures, and children and their families in the system are still being hurt.

VI. PART II—THE FINDINGS—HOW THE PRACTICAL APPLICATION OF DEPENDENCY LAW RESULTS IN SIGNIFICANT HARM TO CHILDREN

A. Dependency Litigation Delays Are Harming Children Significantly

A foster child described her nine years in foster care this way:

I’ve moved most of my life and, I tell you, it’s like a wave getting ready to come for you while you are on the sea. And in my life, I have experienced that, I am still experiencing it and I will experience it the rest of my life. It’s like a storm getting ready to wreck the ship and everything aboard, like my life, my soul, my heart, my future.

It is widely agreed that prolonged stays in foster care are detrimental in the precise manner indicated by this child, resulting in serious, life-long problems. As reported by the National Conference of State Legislatures:

125. For an excellent report of first-hand experiences and perspectives of foster children themselves, see Chaifetz, supra note 2.
Child welfare experts generally agree that prolonged stays in foster care and frequent moves from one foster home to another are not conducive to a child's healthy development. Children who grow up in foster care often exhibit emotional and behavioral problems that contribute to expensive social problems such as school failure, teen pregnancy, homelessness, unemployment, criminal activity, incarceration and welfare dependency. 126

Similarly, the National Council of Juvenile and Family Court Judges has cited the "widely accepted principle[]" that "stable and continuous care givers for children are very important to normal emotional growth ... [and that] children need secure and uninterrupted emotional relationships with adults who are responsible for their care." 127 Failing this, the Council acknowledges damage to "a child's ability to form close emotional relationships after reaching maturity." 128 Legal commentators have recognized for decades that even the best of foster care placements can be detrimental to children, simply because they have been separated from the families and lives that they know and to which they are bonded. As one commentator explains, foster children "suffer anxiety and depression from being separated from their parents, and they are forced to deal with new caretakers, playmates, school teachers, etc. As a result, they often suffer emotional damage and their development is delayed." 129

The American Bar Association likewise recognizes these circumstances in its model standards for lawyers who represent children:

In general, a child needs decisions about the custodial environment to be made quickly. ... [I]f the child must be removed from the home, it is generally in the child’s best interests to have rehabilitative or reunification services offered to the family quickly. ... [I]f it appears that reunification will be unlikely, it is generally in the child’s best interests to move quickly toward an alternative perma-

126. National Conference of State Legislatures, A Place to Call Home: Adoption and Guardianship for Children in Foster Care: Executive Summary, at http://www.ncsl.org/programs/pubs/BKFSTR2.HTM (last visited May 15, 2001); see also Duquette et al., supra note 5, at 130 (stating that "[l]ong delays in the courts and in matching children with nurturing families are extremely detrimental to healthy emotional development").


128. Id.

nen plan. Delay and indecision are rarely in a child's best interests.130

Unfortunately, Florida's foster children are subjected to delay and indecision on a regular basis. The statewide average length of stay in active cases for foster care children is almost three years, at 34.3 months (excluding relative care giver cases), with a range among the fifteen DCF districts of twenty-two months to fifty-six months.131 While the head of one DCF district reportedly counters these statistics by explaining that the average stay for children who have entered the system since 1997 is only two years,132 statewide data still shows an increase in these numbers over the previous year, when the average length of stay statewide was 32.4 months, with a district range of twenty-six months to 55.6 months.133 The target of eighteen months under the federal Adoption and Safe Families Act, which no district meets.134 Similarly, as of August 1999, the percentage of dependent children exiting foster care within fifteen months averaged only 26.4% statewide, with a district range of 14.3 to 44.7%.135

Undue delay exists regardless of the permanency goal in the case. In fiscal year 1995/1996, the statewide average length of stay in foster care with a reunification goal was approximately 20.5 months, which actually crept up to 23.3 months by 1999.136 In fiscal year 1995/1996, for termination cases with a goal of adoption, the statewide average length of stay was approximately forty-five months.137 These numbers are not far from the national average stay in foster care of three years.138 Not until parental rights are terminated do delays ease for Florida's children. The average length of time from termination of parental rights to finalization in fiscal year 1998/1999

131. FLA. DEP'T OF CHILDREN & FAMILIES, supra note 3, at FSP-027.
132. Carol Marbin-Miller, S. Fla. Kids 'Growing Up' in Foster Care, MIAMI HERALD, Sept. 20, 2000, at 1A.
133. See FLA. DEP'T OF CHILDREN & FAMILIES, supra note 3, at FSP-027.
135. Id.
137. Id.
138. Duquette et al., supra note 5, at ch. I.
was 12.52 months, compared with an ASFA goal of twelve months.\textsuperscript{139} This would seem to indicate that advancing cases to termination of parental rights or other such permanency determination is a more significant problem than the process of finalizing a permanent placement once a child is legally available for adoption or other permanency option.

Protracted dependency litigation and delayed permanency also impacts foster families as a unit. At least one court has recognized the severe strain on foster parents or prospective adoptive parents due to protracted litigation and delayed permanency, and how those factors may put children at further risk of unstable lives: "[a]t some point in time, custodial parents must earn the right to claim a child permanently, lest they discharge their duty with something less than completeness or worse yet, throw up their hands and abandon their efforts for the sake of their own emotional well-being."\textsuperscript{140}

As noted at the opening of this article, a glance into a typical day in Florida's dependency system revealed one foster family, likely destined to be an adoptive family, which simply crumbled under delay-induced stress. Not only did the potential adoptive family fail to solidify, but the siblings may now grow up without each other for support, a sense of stability, and the nurturing experience of a family. Still, other families which may have reunited never do simply because protracted litigation causes their bonds to dissolve, an example of which was also seen with a glance into a typical day in Florida's dependency system. Commentators have noted that a family's integrity is increasingly eroded in its own eyes, as well as the community at large, the longer children remain in foster care without final adjudication of their cases.\textsuperscript{141} Other families may simply have no chance when delays in planning for and providing rehabilitative services clash with legal requirements for expediency, discussed in greater detail below. Several examples of this were seen in the glance taken by this study into a typical day in Florida's dependency system.

Like Florida, Connecticut courts have also suffered from difficulty meeting basic statutory deadlines, with initial evidentiary hearings typically being delayed twice as many days as permitted by statute in the mid-1990s, though eventually recovering to an average much closer to statutory requirements.\textsuperscript{142} In the interim, the state was sued in \textit{Pamela B. v. Ment}\textsuperscript{143} for

\begin{itemize}
\item \textsuperscript{139} FLA. DEP'T OF CHILDREN & FAMILIES, supra note 134, at FSP-033.
\item \textsuperscript{140} In re Adoption of M.A.H., 411 So. 2d 1380, 1384 (Fla. 4th Dist. Ct. App. 1982).
\item \textsuperscript{141} Pamela McAvay, Note, Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law, 19 QUINNIPIAC L. REV. 125, 137 (2000) (stating that "[w]here investigation is improperly motivated, delay between removal and hearing simply allows more time during which the internal and external perception of the parents and the family may be denigrated")
\item \textsuperscript{142} See id. at 130.
\item \textsuperscript{143} 709 A.2d 1089 (Conn. 1998).
\end{itemize}
constitutional due process violations. The fundamental constitutional right to family integrity was at issue for taking several months to completely adjudicate removal hearings.\textsuperscript{144} The \textit{Pamela B.} court recognized that judicial delay can interfere with the constitutional right to family integrity to the degree that any delay is only constitutionally justified to the extent it is "unequivocally needed to safeguard and preserve the child’s best interests."\textsuperscript{145} The court spoke of a need for a "congruence of rights and remedies" in such cases, which require timely and enforced hearing schedules.\textsuperscript{146} Significantly, the court found that its responsibility in this regard was restricted to the proper allocation of its resources and that any remaining responsibility rested with the legislature.\textsuperscript{147} The court would not be responsible for delays, even if considered objectively undue, if those delays resulted from a lack of appropriated resources.\textsuperscript{148}

Similarly, in Florida, the Department’s predecessor, the Department of Health and Rehabilitative Services, was found in a class action lawsuit to have violated statutory rights to six-month foster care review hearings by failing to initiate such proceedings, “creat[ing] irreparable harm for which injunctive relief is particularly appropriate."\textsuperscript{149} The court highlighted that the statutory review hearings were intended to promote permanency and adoption of foster children in out-of-home care for more than a year.\textsuperscript{150}

\begin{enumerate}
\item[144.] McAvay, \textit{supra} note 141, at 131–32.
\item[145.] 709 A.2d at 1100.
\item[146.] \textit{id}.
\item[147.] \textit{See id.} at 1101.
\item[148.] A concurring opinion in that case disagreed, asserting that a constitutional due process violation occurred when the statutory time frame requiring a substantive hearing in ten days was not met, taking instead up to six months under colloquially accepted continuances, and that summary judgment on this point for the parents was warranted. \textit{id.} at 1110. (Berdon, A.J., concurring) The concurring Justice highlighted the fact that fundamental constitutional liberty interests were at issue, demanding that due process be afforded regardless of resource allocation issues. \textit{id.} at 1111. The criticism of the majority opinion was blunt and direct, stating:

\[T\]he majority would have us believe that the state could remove a child from a parent’s custody on the ground of neglect and then deny that parent a timely hearing if [the court administrator] could prove insufficient resources caused the delay. This reasoning is fundamentally flawed.

Any suggestion that this unusual theory of constitutional “hydraulics” can dissipate the fundamental federal constitutional rights of the plaintiff class—rights that do not depend upon the state’s resources, [the court administrator’s] discretion or any other such state consideration—is also unavailing.

\textit{Pamela B.}, 709 A.2d at 1113.
\item[150.] \textit{id}.
\end{enumerate}
The integrity of the family unit is constitutionally protected, and therefore, more than worthy of protection under the actual functioning of law, appropriately balanced with considerations of child safety. ¹⁵¹ The right to family integrity is one to which a child has an equal claim to that of a parent. ¹⁵² Federal courts have characterized this right for children in terms of their interest in regular, emotional contact with their parents, stating, “[the right to family integrity] is the interest of . . . the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent.”¹⁵³ As the foregoing demonstrates, expediency in dependency litigation is inextricably tied with the best possible balance between a child’s interest in family integrity and a child’s interest in stability and permanent family placement.

For the foregoing reasons, this study finds that children in foster care in Florida, likely thousands of them, are being significantly harmed by protracted delays in dependency litigation, before even addressing the day-to-day conditions in foster care and even if the children appear to be physically “safe.” It cannot be assumed that children will be any safer or better off in foster care than they were with their families of origin. While life for most does improve markedly, many others are placed in neglectful and overcrowded foster homes, many are subjected to serious physical violence and sexual abuse from foster parents or other foster children, possibly of a worse nature than they ever suffered with their birth parents, and some have even died.¹⁵⁴

These are not isolated risks. In one DCF district, at least sixty-five foster homes currently have more foster children than the home is licensed to have.¹⁵⁵ Last year, almost four hundred dependent children under protective supervision either ran away or simply “aged out” of the system without resolution of their cases.¹⁵⁶ Still others are believed to be subjected to worse abuse in the system than experienced with their parents. Consider reports of one child’s lawyer, that in Broward County alone, some fifty instances of child on child sexual abuse in foster care were brought to his attention in an eighteen-month period.¹⁵⁷ Based on all of these conditions and risks, ad-

¹⁵³ Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).
¹⁵⁴ Interview with Howard M. Talenfeld, children’s attorney/class action attorney, in Ft. Lauderdale, Fla. (July 28, 2000) (notes on file with author).
¹⁵⁷ National Coalition for Child Protection Reform, Foster Care vs. Family Preservation: The Track Record on Safety, text at note 5 (citing Aff. of David S. Bazerman, Esq., filed
dressing the factors which cause dependency litigation to be delayed is warranted.

B. Gobbledy Guck, Cookies and Other Debris Gunking up the System

A main statutory mechanism under state and federal law enacted to ensure timely permanency for children is the required court hearing to approve a permanency goal within twelve months of children entering the system. This is a key indicator of system efficacy. One of the main reasons that permanency is not being achieved timely is that often these hearings are simply not being held within twelve months.158 Some data and anecdotal experience gathered by others suggest why, as do matters observed in this study.

As noted, in a typical day in Florida’s dependency system observed in this study, cases simply were not advancing in accord with interim time deadlines leading up to the one-year permanency hearing. Adjudications were not occurring within twenty-eight days and the Department was seeking extensions of time to do so, and in one case seeking and obtaining from the court sixty additional days in a case already five months old. Case plans to map the progress of a case were being prepared as much as three months late, when the law provides for only sixty days to prepare the plan. Department investigations were not being completed timely and lengthy continuances of court proceedings were being granted. Department attorneys were simply not communicating with their client to verify and assess progress and compliance with the law.

Observations made on that typical day are confirmed by the Department itself and others to be, indeed, typical and widespread. In one judicial circuit, a committee of a dependency court improvement program concluded that the Department is simply not prepared to address permanency at one year due to a failure to staff cases for permanency far enough in advance.159 In accord with this conclusion, a preliminary investigation by federal officials, as to state response to ASFA, finds that Florida has not incorporated changes into its social work practice relating to ASFAs requirement that termination petitions be sought for any parent whose child is in foster care for fifteen of


159. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children's Services Comm., Notes on “Permanency Delays” (April 2000) (on file with author).

https://nsuworks.nova.edu/nlr/vol25/iss3/1
twenty-two consecutive months.\footnote{160} Federal officials also note the need for "establishing effective working relationships with agency attorneys" which could also impact on Departmental awareness and planning for statutory guidelines in individual cases.\footnote{161}

The Department itself has identified, in its handling of dependency litigation, extensive failures to use state and federally authorized mechanisms to advance cases promptly. When the Department audited cases in eight of its districts for pursuing expedited termination of parental rights in cases of the most egregious abuse or neglect, no district had qualified cases which were regularly supported by a court finding to expedite the case, and in only one district were petitions for expedited termination filed in all cases.\footnote{162} In the best of the remaining districts, petitions for expedited termination were filed in only forty-three percent of the audited cases. One district was found to file expedited petitions in as few as fourteen percent of qualified cases, while one district completely failed to file in any of its cases. These failures keep foster children from being available for adoption and compromise their ability to ever be adopted as they grow older and older in "temporary" care.\footnote{163}

The Department similarly identified a widespread failure to take advantage of concurrent case planning as a method of expediting cases. In applicable cases, the Department found that more often than not its districts fail to place children in a home that could serve as an adoptive placement or with a legal custodian while reasonable efforts for reunification were pursued concurrently. Concurrent case planning was not pursued in as much as ninety-three percent of qualifying cases in one DCF district. The average failure rate among districts was over sixty-eight percent.\footnote{164} Another study specific to dependency cases in Hillsborough County similarly found that a lack of concurrent case planning was a "barrier" to achieving permanence for children, calling it "one of the most frequently observed" problems.\footnote{165}

\footnote{160. U.S. GENERAL ACCOUNTING OFFICE, supra note 19, at 8–9.}
\footnote{161. Id. at 9.}
\footnote{162. See Address by Taylor, supra note 158. The Department used an auditing procedure identical to that which the federal government will use to determine Florida's compliance with the Adoption and Safe Families Act. Id. For a detailed description of audit procedures, see U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD AND FAMILY SERVICES REVIEWS, PROCEDURES MANUAL ch. 4 (Aug. 2000).}
\footnote{163. The courts were typically more responsive. In cases where the expedited petition was actually filed, termination hearings were conducted within 60 days in as high as 75 percent of the cases in one district, though none was held in District Fourteen. The remaining districts for which data was available had hearings held within 60 days 60, 50, 38, and 20 percent of the time. Letter from Taylor, supra note 28.}
\footnote{164. Id.}
\footnote{165. BARRETT, supra note 5, at 23.}
It is critical to recognize that simply conducting court hearings and issuing court orders is apparently not sufficient to ensure timely progress of cases. A Department audit of its files found cases where court orders were signed several months after a hearing because Department attorneys failed to provide drafts to judges as ordered. In one case, a draft order directing the Department to file a petition for termination of parental rights within ninety days of the hearing was sent to the judge 150 days after the hearing. The petition had not been filed, a fact not detected by the court and not remedied by any participant to the proceedings.\(^\text{166}\) A case worker supervisor reported regular delays of six to seven weeks in getting court orders signed because Department attorneys were not sending orders.\(^\text{167}\) Problems of this type prompted one judge interviewed for this study to request resources for a case coordinator to check on the status of compliance with court orders, recognizing that simply rendering an order is not enough to ensure that action ordered to ensure the best interests children is actually taken timely.\(^\text{168}\)

Lest all the blame be placed on the Department, it warrants note that the courts themselves acknowledge that their functioning is a significant problem. The National Council of Juvenile and Family Court Judges states:

> in many jurisdictions, the quality of the court process has gravely suffered. Hearings are often rushed in child abuse and neglect cases. There are also frequent and unfortunate delays in the timing of hearings and decisions, causing children to grow up without permanent homes. Many courts know little about relevant agency operations or services. All too often, child welfare agency employees spend unnecessary hours waiting for court hearings while they could be “out working in the field.”\(^\text{169}\)

Especially with heavy and increasing case loads, time to “work in the field” is critical, particularly as to case planning and execution. Numerous child welfare professionals interviewed in this study reported that the amount of time spent in statutorily mandated court hearings detracts from the ability of caseworkers to spend time with dependent children and assist parents.\(^\text{170}\) The impact on parents is also significant. As one judge interviewed for this study emphasized, parents are attending excessive court hearings rather than

\(^{166}\) Address by Taylor, supra note 158.

\(^{167}\) Confidential Interview in Broward County, Fla. (Sept. 29, 2000) (notes on file with author).

\(^{168}\) Interview with Judge Frusciante, supra note 123.

\(^{169}\) NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, supra note 116, at 10.

\(^{170}\) See Confidential Interviews, supra notes 1 & 4; Telephone Interview with Scherer, supra note 105.
being at work or attending rehabilitative services, giving rise to a plea that we "get these people out of this building" for their own good.\textsuperscript{171}

While court time is a factor, it must also be concluded that low quality in case planning is a significant problem. While case plans are intended by statute to be individualized to the needs of the families involved and a unique map of how many families can be restored, a Department audit of cases in eight of its districts found that only one district regularly maintained individualized case plans, with goals "behaviorally stated and measurable." On average, the remaining seven districts failed to do so in twenty-five percent of their cases.\textsuperscript{172} Case plans are routinely "cookie cutter" in nature, rather than being tailored to the specific needs of the children and families involved.\textsuperscript{173} In some cases, "cookie cut" case plans, which obtain court approval, fail to comply with logic and the facts of the case. A Department audit discovered at least one case plan which discussed the efforts of birth parents in a completely different case towards meeting reunification tasks. The case in which the plan was filed and approved was solely a termination case, in which reunification services were not being pursued at all.\textsuperscript{174}

The failure to include parents and guardians in case plan development was also independently observed in this investigation.\textsuperscript{175} In addition, Department officials acknowledge that, "routinely parents are not included in case planning, and reasons are not documented," and further that, "many [DCF] districts are not developing case plans within sixty days of removal," as is legally required.\textsuperscript{176} It appeared in this study that the practical impact of failing to include parents in case plans was to render the plans impractical. For example, it was regularly acknowledged by child welfare officials and even a judge that case plans are knowingly written to include rehabilitative services which parents cannot access for lack of transportation, a problem even in urbanized areas. The Department reports that standards of care

\begin{enumerate}
\item \textsuperscript{171} Interview with Dorian Damoorgian, Circuit Judge, Fla. 17th Judicial Circuit (Nov. 1, 2000) (notes on file with author).
\item \textsuperscript{172} Letter from Taylor (enclosures), supra note 28.
\item \textsuperscript{173} Fourth Annual Dependency Court Improvement Summit, supra note 1, with reports from at least four DCF districts.
\item \textsuperscript{174} Address by Taylor, supra note 158.
\item \textsuperscript{175} Visit to DCF Service Center, North Lauderdale (Sept. 29, 2000). During this visit, a case worker, who requested anonymity, acknowledged preparing a case plan unilaterally for a hearing the next business day. The case worker requested anonymity (notes on file with author).
\item \textsuperscript{176} Address by Taylor, supra note 158. One should not conclude that the DCF is the only party responsible for delays in case plan development. For example, one case was reported in this study in which a birth parent insisted on use of her psychologist, which caused delay, as the DCF needed to check the psychologist's credentials. Interview with Judge Frusciante, supra note 123.
\end{enumerate}
can vary significantly in different areas of the state. Parents, guardians, dependency system attorneys, and department officials all reported that case plans are regularly difficult to understand, particularly for parents of limited formal education. One Department official described case plans as "gobbledly guck." This consensus is all the more troubling considering that courts must review and approve all case plans.

Another study, which performed a case-by-case sampling and review of sixty dependency cases in Hillsborough County, similarly found case plans lacking in addressing the comprehensive needs of families to achieve reunification. That study found that most cases failed to address services needed to resolve such core “collateral” issues contributing to family dysfunction as, “substance abuse, domestic violence, or chaotic lifestyles.” Appropriate case plans “were the exception, rather than the rule.” Similarly, case plans often fail to include all tasks and services ordered by the court. Only in one of its districts did the DCF find that all case plans included all court ordered tasks and services. The remaining audited districts failed in at least five percent of the cases and in as much as forty-four percent of the cases, with an average failure rate among audited districts of twenty-three percent. Moreover, case plans effectively continue beyond their expiration without required court approval in “many areas” and case plans are extended because the Department has failed to provide reasonable efforts towards reunification.

The problems extend beyond simply writing a good case plan. The Department’s failure to provide timely services can directly hinder the ability of parents to comply with case plan requirements. Typical of the complaints that this study received from birth parent attorneys was that of a birth parent required to pass fifteen random drug screenings within the time frame of the case plan. As of the date the case plan expired, the Department had only subjected the parent to three screenings, causing the case to be delayed. Such

177. Telephone Interview with Vilchez, supra note 1; Confidential Interviews of May 23, 2000 and July 26, 2000, supra notes 1 & 4; Interview with Judge Frusciante, supra note 123; FLA. DEP’T OF CHILDREN & FAMILIES, COMPREHENSIVE PLAN TO REORGANIZE THE DEPARTMENT OF CHILDREN AND FAMILIES 6 (Jan. 1, 2000).

178. Fourth Annual Dependency Court Improvement Summit, Case Conferencing Workshop and Circuit Breakout, supra note 1; Interview with Wagner, supra note 1; Telephone Interview with Scherer, supra note 105; Confidential Interview, supra note 4; Confidential Telephone Interview with birth parent in Broward County (Oct. 2, 2000) (notes on file with author).

179. Interview with Allegetti & Sanford, supra note 7.

180. BARRETT, supra note 5, at 22.

181. Id.

182. Letter from Taylor (enclosures), supra note 28.

183. Address by Taylor, supra note 158.
failures can cause even further delay. For example, the delay may cause a need for an updated psychological evaluation.\textsuperscript{184} Another experienced dependency attorney interviewed for this study reported extended delays waiting for department action, such as waiting for approval of a psychological evaluation and another cited one case in which a DCF expert witness took nine months to complete a report.\textsuperscript{185} Similar problems were cited by a committee of one judicial circuit’s dependency court improvement project, described as a “waiting list for services,” and further that new tasks are added after completion of those in the written case plan.\textsuperscript{186} Reports of identical problems were cited by a Department caseworker supervisor.\textsuperscript{187}

An independent study of dependency cases in Hillsborough County finds conclusively that these conditions delay cases and, necessarily, permanency and stability that children need for their safety and health:

> delays [by the Department] in following up with parents led judges and parents’ attorneys to demand additional time for the parent to complete case plan tasks, and therefore extended children’s time in temporary out-of-home care. This, in addition to frequency of movement, led children to have increasing problems with attachment and behavioral development.\textsuperscript{188}

C. Social Conditions Joining Public Policy to Harm System Efficacy

The dependency system’s overall case load can impact the length of dependency litigation in each individual case. There has been a significant increase in the child welfare caseload in recent years, including a rapid escalation in the number of reports of suspected child abuse or neglect and responsive protective investigations. The number of calls to the child abuse hotline from August 1998 to August 1999 increased fifty-three percent.\textsuperscript{189} The past five years has seen a sixteen percent increase in the number of investigations, from 109,869 to 127,859.\textsuperscript{190} Caseload increases do not appear to be due merely to population increases, because the number of investiga-
tions per 1000 children in the past five years has risen from 32.3 to 37.2.\textsubscript{191} This has contributed to a significant increase in the number of cases of verified abuse or neglect. For example, in Hillsborough county, the number of verified reports of child maltreatment increased ten percent in just one year.\textsubscript{192} The Department identifies three social conditions as the main contributors to a rise in the incidence of abuse and neglect, including rising substance abuse among adults, lack of affordable child care, and increasing incidence of family violence.\textsubscript{193}

The societal dynamics contributing to high case loads may not yet have been met with sufficient resources, as the Department is calling for additional resources and alternative approaches to prevention, including greater funding of the primary prevention program sponsored by the Department, Healthy Families Florida.\textsubscript{194} Prevention efforts may need substantial reinforcement, as they appear inadequate now. At present, only forty-three of Florida’s sixty-seven counties even have the main child abuse prevention program provided through the Department, Healthy Families Florida, and a few more counties only have partial coverage. The fiscal year 2000–2001 budget allocation of the child abuse and prevention program is $24.5 million. By contrast, spending for intervention after child abuse or neglect that has already occurred is almost twenty times that amount, at $482.8 million.\textsubscript{195}

Failing to address this disparity will have long-term impact. The Department reports that because prevention services are currently insufficient, there is a risk of more serious problems for children, families, and the state at large to face later “many other critical services, particularly in the area of prevention and early intervention, remain limited or nonexistent. As a result, many individuals and families are unable to access services until they are in crisis when the costs in dollars and human terms are much higher.”\textsubscript{196}

A related issue is the impact on current resources from the growing number of children removed from their families. Removal of a child places particular stress on the child welfare system, because removal requires financial and other resources to address greater needs, perhaps most significantly, recruiting suitable foster homes. The number of children alleged to be victims of abuse or neglect who enter out-of-home care is increasing significantly. Hillsborough County, for example, saw a staggering eighty percent increase in the number of children entering out-of-home care from

\begin{thebibliography}{99}
\bibitem{191} Id.
\bibitem{193} \textit{FLA. DEP'T OF CHILDREN & FAMILIES, supra} note 9, at 2–3.
\bibitem{194} \textit{Id.} at 4.
\bibitem{195} \textit{Id.} at DCF/Family Safety charts 2–4.
\bibitem{196} \textit{FLA. DEP'T OF CHILDREN & FAMILIES, supra} note 177, at 6.
\end{thebibliography}
However, it does not appear that child removal cases are out pacing the increase in the total number of cases. Statewide, a recent measure showed an eighteen percent increase in child protective investigations, but only a thirteen percent increase in the number of children in foster care.

Notwithstanding data indicating a lack of proportional increases in dependent children being removed from their families, many child welfare professionals believe that removal often occurs when it is not needed. The primary reason cited is a lack of sufficient in-home services. A sampling and review of dependency cases in Hillsborough County by child welfare professionals concluded that the availability of in-home services would have prevented removal in five percent of the cases. In another DCF District, the District Administrator reportedly estimates that some thirty-five percent of her District's foster children could have been left with their families of origin if appropriate services had been available.

Aside from a lack of in-home services, many attribute unnecessary removal of children from their families to a perceived shift in Departmental philosophy, originating with the Department's Secretary. It is asserted that the Secretary has created an atmosphere of overreaction in the "emergency" removal of scores of children by caseworkers and investigators attempting to protect their jobs, while claiming "safety" for children. The criticism has been put this way:

[Secretary] Kearney’s policies set off a foster-care panic. Workers quickly got the message that they could be suspended, fired, maybe even prosecuted for wrongly leaving a child in his or her own home. But take away scores of children needlessly from loving homes and, while enormous harm would come to the child, the workers and their jobs were safe.
The perception is shared by others. One news account characterized the Department’s philosophy as, “remove [the] child at all costs,” while noting that a child’s death resulted in the suspension or firing of five workers and resignation of the two top district administrators.\(^ {203}\) One may also find historical support for this belief in an appellate case concerning a ruling by the DCF Secretary, while serving in her previous capacity as a circuit judge in the dependency division.\(^ {204}\) In that case, she was cited for “bureaucratic overkill” for erring too much on the side of caution in the interest of child safety.\(^ {205}\) A DCF official, speaking on the condition of anonymity, reported in this study that, “I don’t dare say ‘reunification’ in [the Secretary’s] presence.”\(^ {206}\) Another Department spokeswoman is reported to have described a “new philosophy” at the DCF under Secretary Kearney’s leadership this way: “If there’s even a shadow of doubt about safety, that child will be removed. . . . Our new philosophy is to remove the child at all costs.”\(^ {207}\)

However, the Secretary attributes current conditions not to any personal disposition, but rather a necessary reaction to the federal Adoption and Safe Families Act and to the state Kayla McKean Child Protection Act.\(^ {208}\) Others apparently agree with her. The National Center for Youth Law reports a “widespread impression among [Florida] caseworkers and administrators that ASFA ‘ended family preservation,’” as well as a general belief that this federal legislation is “widening the net” of children placed in out-of-home care.\(^ {209}\) A report prepared for the Department likewise concludes that the Kayla McKean Act causes “a built-in implication that . . . if one is to err in their professional judgment, the error must be on the side of safety for the child.”\(^ {210}\) At least one attorney who regularly represents birth parents reported to this study that if too many children are being removed, the Kayla McKean Act is the reason.\(^ {211}\) Other Department officials indicate that the Department’s philosophy actually has a greater emphasis on preserving families, reporting the Department’s efforts to fund and promote community

\(^{203}\) Sarah Eisenhauer, Foster Parent Shortage on Treasure Coast ‘A Crisis’ Officials Say, FORT PIERCE NEWS, July 9, 1999, at A4.

\(^{204}\) See In re C.G., 570 So. 2d 1136, 1137 (Fla. 4th Dist. Ct. App. 1990).

\(^{205}\) Id.

\(^{206}\) Confidential Interview with child welfare professional, public sector supervisory employee, in West Palm Beach, Fla. (June 13, 2000) (notes on file with author).

\(^{207}\) Eisenhauer, supra note 203, at A4.

\(^{208}\) Gwyneth K. Shaw, Parents Say State Overreacts, ORLANDO SENTINEL, June 11, 2000, at B1.

\(^{209}\) MARTHA MATTHEWS & MICHELLE CHENG, REPORT ON CHILD WELFARE ADVOCATES’ CONFERENCE, YOUTH LAW NEWS 3 (undated report of Nat’l Center for Youth Law conference held November 5–6, 1999).

\(^{210}\) MARKOWITZ, supra note 198, at 9.

\(^{211}\) Telephone Interview with Scherer, supra note 105.
involvement in prevention efforts, consistent with the agency's published strategic plan.\textsuperscript{212}

Given the noted statistical evidence that the proportion of abuse and neglect cases which result in removal of children has not increased under Secretary Kearney's stewardship, the claim that she has created an atmosphere of overreaction to almost arbitrarily remove children would be hard to endorse. Likewise, the percentage of confirmed cases of abuse and neglect where children are actually removed remains relatively low at approximately seven percent.\textsuperscript{213} Also noteworthy is the fact that over the past five years (the Secretary was appointed two and a half years ago) approximately the same percentage of all protective service cases, sixty percent, are closed with the children remaining with or being reunified with their parents.\textsuperscript{214}

The evidence indicates that any "unnecessary" removal of children is occurring due to a lack of in-home services, which accords with legal standards described above, not from any personal philosophy of Secretary Kearney. It would actually be more appropriate to recognize these cases as "avoidable" removals. As noted, federal and state law, which the Secretary is obligated to enforce, were amended at approximately the same time her tenure began to require removal of children when "available" services will not render the child safe in the home. At most, the anecdotal evidence would indicate that the Secretary requires personal accountability from child welfare professionals not to look past dangers to children based on consideration of scare resources, which is certainly a commendable policy in the best interests of children and in accord with the law. The issue raised by this debate is whether the child welfare system at large is equipped to redress timely, and on a case-by-case basis, the inappropriate removal of children from their homes which can happen in individual cases. It is submitted that it is not due to the lack of independent representation for children's legal interests and the lack of reasonable assurance that court proceedings will adhere to statutory deadlines necessary for the health and welfare of children, as more fully explored below.

\textsuperscript{212} Shaw, \textit{supra} note 208; Interview with Allegretti & Sanford, \textit{supra} note 7; FLA. DEP'T OF CHILDREN & FAMILIES \textit{supra} note 9.


\textsuperscript{214} \textit{See} Letter from Leon (enclosures), \textit{supra} note 156.
D. On Visitation Resources and Family Integrity

On that typical day in Florida’s dependency system, when a judge learned that a DCF case worker had blocked contact between a mother and her nine-year-old child for nine months without court approval and in contravention of state law, the judge queried as to how the case worker expected to achieve reunification for the family, which was the case plan goal, by keeping the family apart. The judge’s query recognized not only the child’s constitutionally protected interest in the integrity of her family unit, but also the practical and significant damage done to the parent-child bond when contact is deprived for a protracted period of time. Florida courts have also recognized expert testimony that a lack of sufficient visitation can deprive a parent of an opportunity to demonstrate the ability to safely parent a child and thereby achieve reunification.

Department officials expressed confusion over whose rights are at issue regarding visitation, specifically whether it is a right of the child or a right of the parent. In practice, visitation is so infrequent as to be almost meaningless in maintaining the child’s bond to a parent. There appears consensus in the child welfare community that foster children are developing attachment disorders due to the limited visitation they are afforded with their parents, a devastating condition that harms the child’s ability to form bonded relationships with anyone. Visitation occurs once a month at best in most cases. Visitation occurs frequently in locations which are impersonal and intimidating to parents and perhaps even the children, like a courthouse or at DCF offices. There are efforts to make visitation rooms appear like a “home” with noninstitutional furniture and décor, as were viewed in this study, but the parental awareness of the circumstances and surroundings calls into question the fairness of DCF workers subsequently critiquing parents in court for showing a lack of “intimacy” with their children during visitation.

215. Under Florida law, visitation is supposed to be granted absent clear and convincing evidence that such would not be in the child’s best interest. Fla. Stat. § 39.402(9) (2000). Visitation is to be ordered at the time of arraignment for any child in out-of-home placement, unless there is a “clear and convincing showing that visitation is not in the best interest of the child.” § 39.506(6).


217. Interview with Allegritti & Sanford, supra note 7.

218. Fourth Annual Dependency Court Improvement Summit, supra note 1.

219. Telephone Interview with Vilchez, supra note 1.

220. A visitation room was viewed during the course of this study in DCF District 10 on September 29, 2000. Additional testimony on this point was received from Vilchez, supra note 1.
It would stand to reason that it is hard for a parent and child to maintain or improve a close relationship with visitation only once a month. However, Florida law does not even guarantee that to a child and a parent, setting only nonbinding “goals” for children who are in shelter or foster care to visit with their parents “at least” once a month, and siblings once a week.\textsuperscript{221} Time and again in this study it was made clear that greater frequency of visitation would only be possible with greater resources, and that monthly visitation was often not achieved. Case workers already burdened with case loads above recommended levels and still spending too much time in court, away from the children who are their wards, lack the time to supervise visitation more frequently, not to mention scheduling problems with case plans that require parents to be at work during the same hours that supervised visitation is offered.\textsuperscript{222} It will be truly hard to ever forget the faces of the mom and the dad, holding hands and choking back tears on that typical day in Florida’s dependency system, as they tried to find words to explain how they could give up on reunifying their family after three years because their daughter simply did not know them any more.

E. The Significance of a National Problem

Florida is not alone in the nature or extent of dependency system problems, the tragedies it creates, and those it fails to stop. State child welfare systems nationally face questions about their efficacy.\textsuperscript{223} The federal government acknowledges that state programs are “plagued” by problems, including substantially increasing caseloads, persistent and growing social conditions contributing to the incidence of abuse and neglect, and weaknesses in state response systems, all of which are present in Florida. Workforce issues and poor agency relations with the courts are also specifically identified.\textsuperscript{224} Similarly, the efficacy of court involvement is

\textsuperscript{221.} FLA. STAT. § 39.4085(15), (16) (2000).

\textsuperscript{222.} Confidential Interview of May 23, 2000, \textit{supra} note 1; Confidential Interview of July 26, 2000, \textit{supra} note 4; Interview with Lisa Magrino, Program Operations Administrator (District 10), Fla. Dep’t of Children & Families (Sept. 29, 2000) (notes on file with author); Telephone Interview with Vilchez, \textit{supra} note 1.


cited, with causes for delays in permanency identified as high case volume, inefficient case scheduling, and unprepared and burdened attorneys, all factors identified in this study as problematic in Florida.\textsuperscript{225}

Along with growing public awareness and increased reporting of child abuse and neglect, the National Council of Juvenile and Family Court Judges cites poverty, drug use, and dissolved family units as social conditions contributing to increased case volume, similar to the problems identified by Florida’s DCF.\textsuperscript{226} A major critique of child welfare systems nationally is a belief that resources for investigation and prosecution of abuse and neglect are overemphasized, while insufficient resources are directed to families in need of services to address these problems, including preventative or remedial services.\textsuperscript{227} Again, like Florida.

Commentators in other states lament the same impact on foster children which concern Florida. These comments about Louisiana’s dependency system could just as soon have been made about Florida:

Un fortunately, in Louisiana and across our nation, too many children go to sleep at night not knowing where they will be tomorrow. These are our nation’s foster care children. . . . It is not enough that these children are abused and neglected but, once removed from their homes by the state in an effort to protect them, their fate often does not improve. Too many of these children end up in “foster care drift” and spend their childhood waiting either to be reunited with their families or to be placed in new homes. Far too many of them simply wait away their childhood.\textsuperscript{228}

The reasons identified for problems in dependency systems are also shared from state to state. Consider, for example, a recent task force report to the Georgia Department of Human Resources citing inadequate prevention resources and a lack of a comprehensive plan to address problems within its child welfare agency.\textsuperscript{229} Specifically cited are inexperienced and inadequately trained caseworkers, high caseloads, and, notably, systemic “mistrust” marked with private providers who “fear retribution and negative

\textsuperscript{225} \textit{Id.} at 12.

\textsuperscript{226} \textsc{National Council of Juvenile and Family Court Judges}, \textit{supra} note 116, at 10; \textit{see also}, National Conference of State Legislatures, \textit{supra} note 223.

\textsuperscript{227} State and federal expenditures for out-of-home care total approximately seven billion dollars annually, more than is spent on child abuse prevention, child protection, family support and adoption services combined. National Conference of State Legislatures, \textit{supra} note 126.

\textsuperscript{228} \textsc{Landrieu}, \textit{supra} note 124, at 469–70.

consequences” for raising complaints about the functioning of the state agency. Similar problems are reported in Pennsylvania, where at least one county-based child welfare agency is alleged to be interfering with the ability of birth parents to accomplish goals to achieve reunification. Of note, there is a specific allegation that supervised visitation with foster children is “routinely” scheduled when parents have to be at work, and that the parents are criticized regardless of their response. They are either criticized for missing visitation or for missing work, precisely the complaints received in this study.

The fact that Florida’s problems exist so prevalently elsewhere, and have done so for so long, suggest that the problems must continue. It does suggest that some reform is still necessary. Reform of a type which may not have been tried elsewhere. Perhaps fortunately for Florida’s children, the dependency system is about to be put to a substantial test by the federal government, with significant incentives for improvement. Or perhaps there is more reason than ever to worry.

F. A Looming Moral Crisis Created by the Law

With its extensive problems likely unresolved, in 2001 Florida’s dependency system will be audited by the federal government relative to its participation in Social Security Act funding of foster care. Approximately twenty-eight percent of the state’s child welfare budget will be at stake. Among other things, the audit will assess whether court reviews and permanency hearings are occurring timely, whether expedited termination of parental rights is pursued when warranted, and whether adoptions occur timely. Excepting the latter item, Florida’s performance appears below standards. If Florida fails to meet ASFA requirements in more than ten

230. Id. at 7–8.
232. Id.
233. Id.
234. Secretary Judge Kathleen A. Kearney, Address at the Fourth Annual Dependency Court Improvement Summit (Aug. 30, 2000).
235. Federal auditors are also expected to be assessing the quality of rehabilitation services provided to parents and the quality of reunification decisions, emphasizing results over methods. It is expected that auditors will be examining data on the re-entry into foster care by children who have been re-united with their parents to ensure that children are not returned too soon or inappropriately. Address by Taylor, supra note 158. By one measure, the percentage of children who exit foster care who do not re-enter foster care within twelve months after protective supervision is terminated, Florida is doing relatively well. The
percent of its cases, the Department will be placed under a two-year corrective action plan, after which significant sanctions will be levied against its Title IV-B grant for persisting failures.236 "Substantial conformity" must ultimately be achieved in ninety-five percent of cases.237

On a case-by-case basis, ASFA presents a significant moral crisis for state intervention in the lives of children and families. As discussed, state failures to advance the initial stages of proceedings significantly contributes to keeping many children in foster care for fifteen of twenty-two consecutive months, thus implicating federal funding.238 This includes delays in conducting arraignments, preparing case plans, and providing meaningful and timely rehabilitative services to birth parents. Where statutory deadlines are honored, a child’s parent should have no less than ten months to take advantage of rehabilitative services outlined in a case plan. State caused delays are contributing to parent-child relationships becoming subject to automatic termination, where the circumstances may not have otherwise warranted that in the first instance.

Federal law effectively decides that, regardless of whether delayed litigation is caused by the state or a birth parent, children will not suffer with delayed permanency. Even if the state fails to provide reunification services in the first fifteen months of the case, it is effectively relieved of providing such services because it must pursue termination of parental rights at that time.239 The plan to achieve permanent placement for the child is to prevail


236. Address by Taylor, supra note 158; U.S. DEP’T OF HEALTH AND HUMAN SERVS., supra note 162, at ch. 7 § B, F. As discussed above, individual cases can also lose Title IV-E funding eligibility.

237. Id. at ch. 6 § A-3, A-4.

238. As noted, Florida law actually imposes a more stringent requirement, that terminations be sought once a child has been in foster care for twelve months if parents have not substantially complied with case plan requirements. FLA. STAT. § 39.806(1)(e) (2000).

239. AACWA has also been criticized for promoting placement of children in out-of-home care by providing open-ended funding for foster care, while funding for rehabilitative and preventative services are limited. There is no indication that the scheme adopted by ASFA remedied this problem because the state is effectively relieved of its rehabilitative obligation once a child has been in foster care for fifteen of twenty-two consecutive months, even if delays are caused by the state. See Roger J.R. Levesque, The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 19 (1994–1995).
over continuation of "reasonable efforts" towards reunification.\textsuperscript{240} Federal law presumes that the state will responsibly pursue cases, with any delay caused by birth parents themselves, leaving them responsible for whether their families reunify or are destroyed. Given these standards, the arrival of federal auditors to Florida can create significant pressure to compromise familial and child interests in order to maintain federal funding.\textsuperscript{231} The pressure to make the wrong and arguably immoral choices has been suggested by other commentators:

Through [ASFA], Congress now wants federal and local officials responsible for oversight of the nation's foster care population to concentrate primarily on reducing the time children spend in foster care. This focus will divert attention from both the prevention of foster care and the devotion of money and services to reunification efforts. Instead, new federal policy will encourage adoptions once children have been in foster care for a certain length of time, even in cases where there was no compelling need for foster care placement or where no efforts were undertaken to reunify children with their birth families.\textsuperscript{242}

In order to prevail in the face of the moral dilemma created by ASFA, and embrace its invitation to honor family integrity without sacrificing child safety, efficacy at the case level must be addressed and assured, precisely because that is where success or failure for a child and a family is and must be made.


\textsuperscript{241} Federal authorities will assuredly be cognizant of ASFAs intent to reduce the number of children in foster care and the length of stay in foster care. See NATIONAL CONFERENCE OF STATE LEGISLATURES, 1998 STATE LEGISLATIVE RESPONSES TO THE ADOPTION AND SAFE FAMILIES ACT OF 1997, 24 STATE LEGISLATIVE REPORT 5 (Mar. 1999), available at http://www.ncsl.org/programs/cyf/asfslr.htm. For this reason, latitude given to states as to these ultimate performance measures will likely be limited. Federal auditors affirmatively indicate an intent "to use a new, results-oriented approach to monitor states' child welfare programs, including compliance with ASFA amendments." U.S. GENERAL ACCOUNTING OFFICE, supra note 19, at 16. Moreover, these auditors indicate an intent to depart from traditional evaluations of "the accuracy and completeness of case files," in favor of evaluating compliance with "required legal processes and protections" which impact on child permanency and safety. \textit{Id.}

\textsuperscript{242} Martin Guggenheim, \textit{The Foster Care Dilemma and What To Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?}, 2 U. PA. J. CONST. L. 141, 144 (1999). Mr. Guggenheim's discussion of the adverse impact that these circumstances will have on the poor and minorities, who are overrepresented in the foster care system, warrants serious consideration. \textit{Id.} at 145–46.
VII. PART III—TAMING THE HYDRA—HOW TO ENSURE CASE-BY-CASE EFFICACY

A. Two Heads Are Not Better Than One

"The Department is like a hydra, with many heads, each not knowing what the other is doing," commented a widely respected general master interviewed for this study.243 His remark aptly describes the multiplicity of roles that the Department is expected to fulfill in each dependency case and the difficulty attendant with that task. The inherent conflict between the missions of caring for families and of investigating and prosecuting parents is recognized by federal authorities, who state:

Caseworkers must balance the often conflicting roles of investigator and social worker. As investigators, [child protective services] caseworkers collect evidence and work with law enforcement officials; as social workers, they work with families to identify services needed to improve conditions in the home and provide a safe environment for the child.244

In a similar manner, the National Association of Child Advocates finds this to be the case in the "traditional" child protective services model.245 The Association describes the traditional role of child protective services to be "semi-prosecutorial," given the role of fact-finding to support legal findings of abuse and neglect.246 Assigning the task of providing or coordinating rehabilitative services with this prosecutorial role makes it "difficult to achieve the necessary trust between families and the [child protective services] agency worker" and interferes with open communication necessary for provision of successful services.247

Following the traditional child welfare model, Florida law provides for termination of parental rights if a parent fails to comply substantially with a case plan, while also providing that the Department is primarily responsible for preparing the case plan and assisting the parent in pursuing case plan

243. Interview with Nicholas Lopane, General Master, Fla. 17th Judicial Circuit, in Ft. Lauderdale, Fla. (Aug. 7, 2000) (notes on file with author). Several child welfare officials interviewed in the Circuit provided unsolicited and very high praise for General Master Lopane’s performance in the dependency division.
244. U.S. GENERAL ACCOUNTING OFFICE, supra note 224, at 3.
245. HEITZI EPSTEIN, NAT’L ASSOC. OF CHD ADVOCATES, A CHILD ADVOCATE’S GUIDE TO STATE CHILD PROTECTIVE SERVICES REFORM 1 (Winter 1999).
246. Id. at 3.
247. Id. at 6.
requirements. These are roles which, in order to succeed, require trust and cooperation between the Department and the parent. The ethics and wisdom are suspect of also requiring the Department in many cases to simultaneously develop evidence to prove that the parent has failed to pursue case plan requirements. It would seem that this arrangement would be analogous to, in criminal matters, asking the prosecutor to try to rehabilitate the accused while pursuing prosecution, and expecting trust to develop between the prosecutor and the accused. Clearly, the prosecutor could only pursue one of these roles in good faith at a time. The accused is only going to develop limited, if any, trust for the person who may ultimately seek to prosecute. Given that the Department’s participation in the case plan is at least intended to protect a child’s interests in family integrity, the arrangement also calls into question whether the child’s interests will be appropriately protected in every case.

These observations are not merely academic. One caseworker interviewed for this study reported that the impact of this dual role was for families in need of help to become simply “defensive,” a view shared by many child welfare professionals who note that parents often mistrust caseworkers for this reason. Anger regularly develops between parents and DCF caseworkers relative to testimony over case plan progress, rising to the level of shouting in courtrooms.

Concern exists that in cases where the Department believes that birth parents will ultimately fail to rehabilitate themselves and achieve reunification, lackluster assistance is provided to the birth parents in accomplishing the requirements of their case plan; in short, the Department displays limited interest in rehabilitation when its attention shifts to proving a case for termination of parental rights. Confirmation of this concern is found in reports of Department caseworkers in another recent study. These workers objected both to judges and parents’ attorneys who sought to maintain family reunification as a goal until the parent “proved” they were unable to achieve case goals, particularly where the caseworker’s assessment was that the parents were “unlikely” to rehabilitate themselves into safe parents for their children.

When the Department fails to provide appropriate support and services for a birth parent to achieve reunification, a birth parent can receive addi-

248. Confidential Interview with DCF case counselor in Broward County (Sept. 29, 2000) (notes on file with author); Fourth Annual Dependency Court Improvement Summit, Case Conferencing workshop, supra note 1; Confidential Interview, supra note 4.

249. Interview with Lopane, supra note 243; Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, supra note 1.

250. Interview with Vilchez, supra note 1; Confidential Interview of September 29, 2000, supra note 248.

251. Barrett, supra note 5, at 23.
tional time to pursue reunification services. This is consistent with state law and Florida's state plan for Title IV-E funding, which acknowledges that case-by-case eligibility is contingent on a judicial determination that reasonable efforts are made by the Department (as the agency responsible for implementing the plan) to, at the least, make it possible for a child to return home if not stay there in the first instance. Knowing that its failure to demonstrate this to the Court compromises funding provides a strong disincentive for the DCF to bring to the court's attention that it has failed to provide such services timely, despite the detriment to the child. Likewise, a particular case worker may risk employment-related sanctions. This study, in viewing a typical day in Florida's child welfare system, saw multiple cases with significant case plan delays and other actions contrary to a child's best interests, such as providing for parental visitation, none of which were reaching the court's attention on a timely basis. In many cases, the simple passing of time can be contrary to the child's best interest or, at the least, contrary to the child's interests in maintaining family integrity, particularly in light of federal law pressures.

Even in cases where services are provided timely under a case plan, undue litigation delay may very well result nonetheless from the melding of the caretaking role and the prosecutorial role within the Department. Confusion and lack of resolve would be expected. One child welfare professional interviewed for this study emphatically attributed delayed cases resulting from neither the courts nor the DCF having "the guts" to proceed to termination of parental rights. A similar perception is that case workers are slow to advance cases and make decisions due to a generalized fear of making wrong decisions. Likewise, many find "confusion" in the roles of Department attorneys given the fact that the Department is the client, but the real party in interest is a child. As one caseworker described it, "our interest is the child's." Despite the Department's mission to safeguard the child's interests in family integrity, the same caseworker described parents' attorneys as being "on the family's side."

The inherent conflict of missions between reunification and prosecution can be aggravated when case counselors and their supervisors disagree as to

254. Confidential Interview, supra note 4.
255. Id.; Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, supra note 1.
256. Confidential Interview, supra note 248.
257. Id.
whether termination of parental rights should be pursued. Department employees report cases where a case counselor and a supervisor disagree on what is best for the child, leaving the case counselor in conflict over court testimony on the best interests of a child.\textsuperscript{258} In these cases, while the caseworker would have an obligation to provide accurate testimony to the court as to observations and facts supporting one position, the caseworker would at the same time be acting contrary to the will and direction of a supervisor. The position of the caseworker would seem to be untenable, especially given personal concerns for performance evaluations, career references, and the like. The best interests of the child would seem to be left hanging in the balance.

The conflict of missions imposed by statute on the Department has not escaped the attention of Florida courts. The Third District Court of Appeal commented that, "there are instances in which the best interests of the child and the [Department] may differ."\textsuperscript{259} The First District Court of Appeal expounded further:

\begin{quote}
In keeping with the welfare and best interests of the child or children being the dominant or controlling consideration in all custody proceedings we may not overlook the probabilities that instances may occur wherein the best interests of the child and of the agency may be divergent. Indeed, in the case sub judice, one of the agents of the Division of Family Services testified that there were agency fears that their foster home or shelter would be lost if the agency insisted that the five children remain there together. We recognize the validity of the agency's concern for the loss of a facility but that fear, though a legitimate interest of the agency, may not be permitted to interfere with the best interests of the subject children.\textsuperscript{260}
\end{quote}

The court's observations underscore the fallibility of a system which requires the service provider role to be responsible for proving that service provision failed. The statutory assumption that the Department will always act in accord with the best interests of children is likewise invalidated. The National Court Appointed Special Advocations Association similarly acknowledges that the interests of children during dependency litigation may not only be adverse to their parents, but also adverse to the state, thus giving

\begin{itemize}
\item \textsuperscript{258} Fourth Annual Dependency Court Improvement Summit, Lawyers in the Courtroom workshop, \textit{supra} note 1.
\item \textsuperscript{259} Simms v. Dep't of Health & Rehab. Servs. 641 So. 2d 957, 962 (Fla. 3d Dist. Ct. App. 1994).
\item \textsuperscript{260} Div. of Family Servs. v. State, 319 So. 2d 72, 77 (Fla. 1st Dist. Ct. App. 1975).
\end{itemize}
rise to the need for independent representation. Notably, the primary advocate for including a guardian for a child as a federal law mandate has proposed a broad role for the guardian to include both legal and nonlegal matters.

Other comments note how a child’s best interests may be compromised by the conflict of interest that may arise when the governmental agency charged with providing reunification services is the same agency empowered to petition for termination of parental rights. One argues that use of private sector agency case petitioners would relieve the conflict:

The burden is on the public child welfare agency to provide services, but it is often the private agency that is actually delivering services and in frequent contact with the family. When the private agency is allowed to petition for termination, in effect it acts to release the public agency from the responsibility of providing further reunification services. Allowing the private provider, not just the public agency, to make this petition avoids resource conflicts for the public agency and helps to insure that the petition is in the individual child’s best interest.

Above all else, these perspectives underscore the untenable position that the Department is placed in by the multiplicity of missions and roles assigned to it by statute. It would stand to reason that by removing from the Department its “prosecutorial” role, the Department ought to be better positioned to stay focused on the mission of simply helping families achieve case plan goals and developing services for them, the mission it is uniquely equipped to fill. Likewise, by removing the Department’s prosecutorial mission, parents will more likely develop trusting relationships with the Department that are necessary for successfully rehabilitating parents in a timely manner, as well as helping children. This can only serve to improve the safety and stability of dependent children and provide for the best possible protection for their interest in family integrity as well as permanency. Concluding that the Department ought to be relieved of its prosecutorial role in dependency cases necessarily gives rise to the question of where else that role ought to be reposed. It is submitted that it can be reposed with counsel for children

262. Id. at 331.
263. Mangold, supra note 115, at 1447.
264. This report is not the first to recommend that a person other than a representative of the Department be the primary moving party in dependency litigation. See generally Albert E. Hartmann, Crafting an Advocate for a Child: In Support of Legislation Redefining the Role
who, in addition to helping resolve the problems of conflicting missions for the DCF, would provide other benefits to children in dependency litigation.

B. Counsel for Children

Child welfare professionals working in jurisdictions where children have attorneys report a positive impact on case progress. One highly placed child welfare professional reported in this study that counsel for children "yield a more vigorous case process" and help ensure that the parties are on equal footing.265 In accord, the American Bar Association ("ABA") took the opportunity when promulgating its proposed standards for lawyers representing children in dependency cases, to express a belief that "all children subject to court proceedings involving allegations of child abuse and neglect should have legal representation."266 Some forty states require that children who are the subject of dependency actions be represented by an attorney. Of those, approximately thirty provide for an attorney who attempts to jointly represent the best interests and the wishes or express interests of the child, while the remaining ten states keep these functions split between an attorney to represent the child's wishes and a guardian to represent the child's best interests.267

Where adequately funded and provided sufficient direction as to duties, counsel for children promotes the interests of children in prompt case progress. Efforts in Utah demonstrate this point. In a study of efforts to provide counsel for children in Utah (termed "attorney guardian ad litems") it was found that use of privately contracted attorneys, who split their professional energies with more lucrative private practices, "had strong incentives to do as little work as possible on their dependency cases, for which they were paid almost nothing."268 The pay was approximately $120 per case at best.269 The role of the attorney was also vaguely defined.270 Needed legislative reforms, which were implemented, included funding to train children's attorneys and

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265. Telephone Interview with Peter Digre, formerly Deputy Secretary of Operations for the Florida Department of Health and Rehabilitation Services, DCF's predecessor, Los Angeles County child welfare services agency (Aug. 25, 2000).

266. AMERICAN BAR ASS'N, supra note 130, at Preface.

267. DUQUETTE ET AL., supra note 5, at ch. 7, § 11.


269. Id. at 2.

270. Id.
increased funding to adequate levels for compensation and expenses of representation.

Clarification of the attorney's role was also critical. Among other things, Utah law directs the attorney to independently investigate and inform the court where services are not being provided to a child or the child's family, assess options of residential placement, when parents are not using court-ordered services or where services are not working as expected, and where the agency fails in its duties, including holding statutorily-required administrative reviews and hearings. Of particular interest, Utah law requires the child's attorney to notify the court of "any violation of orders, new developments, or changes . . . that justify a review of the case." With these reforms in place in 1998, Utah markedly achieved more timely permanency for foster children than Florida achieved. In reunification cases, the average length of stay in foster care was only 9.7 months. Adoption cases saw children in foster care an average of 27.8 months. The average length of stay in "permanent foster" homes, as a case goal, was thirty-four months. A permanency decision was achieved in twelve months in ninety-three percent of cases, forty-three percent were assigned a permanency goal and parental rights were terminated in fifty-one percent in twelve months. By January 1999, only twenty-six percent of Utah's foster children lacked a permanency goal after six months in care. Of foster children under the age of six, permanency goals were lacking after six months for only three of them—not three percent—three children. Moreover, the average time to close a case with a successful adoption after termination of parental rights was less than thirteen months in the fiscal year 1997 and less than ten months in the fiscal year 1998.

It would seem that counsel for children can help ensure that children's legal interests do not fall victim to the litigation interests of other parties, particularly as to delays in the progress of litigation which may only be in the interests of the child welfare agency or birth parents, several examples of which were seen during this study. However, it would seem that the child welfare agency must not be the one to represent the child's legal interests or even to execute the interests of the state in protecting the welfare of children.

272. § 78-3a-912(3)(x)(v).
273. See infra note 275.
274. See id.
276. Id. at 21.
277. Id.
278. Id. at 23.
279. Id. at 24.
The Supreme Court of Florida, for example, has recognized that any agency or person may do so, stating that "a petition for termination of parental rights is not a criminal prosecution which must be brought and prosecuted by the state. . . . It is a civil action initiated to protect the rights of abused, neglected or abandoned children."280

Observations and reports received in this study reveal that reliance on the Department and its attorneys to protect a child's legal interests is simply not working. Communication between Department caseworkers and their legal representatives is extremely poor in many areas of the state, causing information to simply not be available for the court.281 Regularly, caseworkers and Department attorneys communicate for the first time only shortly before a hearing or during the hearing itself. One caseworker reported that in four years with the DCF, the earliest consultation he had with a Department attorney was in the court hallway right before a hearing and that regularly "we go into hearings with no consultation with" Department attorneys. He also reported being threatened with a contempt of court charge because he failed to attend three hearings, each time because Department lawyers failed to provide advance notice of the hearing. Ironically, this caseworker reported that communication with parents' attorneys was reported to be "very good."282 Likewise, Department attorneys do not follow up with caseworkers or supervisors to ensure that court orders are followed, nor do caseworkers believe their written reports are read by the attorneys.283

Accepting that counsel for a child can be expected to provide better protection for the child's legal interests, and that a state's child welfare agency need not represent the legal interests of the state in dependency litigation, the issue of whether a child's attorney can act in a manner consistent with the child's legal interests while also ensuring that the state's interest in protecting the welfare of the child is not compromised ought to be addressed. This would seem possible for two reasons. Most importantly, the child's best interests ought not be different from the interests desired by the state in dependency litigation. Any information that the state acquires through its child welfare agency about the progress or condition of the parties can still be conveyed to the court for due consideration, guided by the agency's counsel, in a fact witness capacity. In addition, any changes made to the model of legal representation would not change the role of the court as

280. Simms v. Dep't of Health & Rehab. Servs., 641 So. 2d 957, 961 (1994) (stating that the guardian ad litem can "exercise[] concurrent power" with the state child welfare agency "to initiate and litigate" dependency proceedings).
281. Confidential Interviews, supra notes 187, 206, and 248; Interviews with Query, and Jones, supra note 1.
282. Confidential Interview, supra note 248.
283. Id.
the state's ultimate representative in adjudicating what is in the best interests of a child.

As noted, some states provide for counsel to represent a child's best interests as well as express interests, while others provide for an attorney simply to represent a child's legal and express interests. A review of the debate over which model is more appropriate will help reveal why the latter model is best suited for supplanting the role of the child welfare agency as the primary moving party in dependency litigation, while ensuring that a child's legal interests and best interests are duly protected. The debate necessarily begins with an assessment of whether a single attorney can represent both the child in the traditional sense of representing a client's wishes and representing the child's best interests.

Many opine that the roles are incompatible, giving rise to serious confusion and ethical dilemmas.\(^{284}\) The ABA likewise takes the position, in its standards for legal representation of dependent children, that the role of representing a child's best interests as a guardian ad litem and as a traditional attorney for a child will not be compatible in many cases. The ABA observes that:

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. . . . [I]n many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."\(^{285}\)

For these reasons, the ABA recommends appointment of a separate guardian when the child expresses a wish which is not simply contrary to the attorney's view of the child's best interest, but potentially "seriously injurious to the child."\(^{286}\)

While these concerns exist, note that the attorneys representing the Department have for years been effectively conducting litigation regarding children's best interests under the auspices of representing the Department, though at best representing the Department's point of view of the child's best interest. This is because the Department is the client. Where the Department's interests are contrary to the child's best interests, the responsibility to ensure the child's best interests are upheld has fallen to the courts. This reliance is misplaced. As specific cases revealed in this study demonstrate, much damage can be done to a child while information is either not brought

\(^{284}\) Hartmann, supra note 264, at 238.


\(^{286}\) Id. at B-4(3).
to the court’s attention or simply escapes its attention for a protracted period of time. This condition is aggravated by operation of certain child welfare laws, particularly laws mandating that time frames be met notwithstanding the state’s failures to perform reasonable efforts to protect a child’s interests in family integrity and rehabilitation.

Counsel for a child, assigned solely to protect their legal interests, can be an effective mechanism to ensure that matters are brought timely to the court’s attention. Under this model, litigation can be advanced without decisions being compromised by agency interests which are contrary to a child’s best interests. Unlike agency attorneys responsible for the agency as their client, a child’s attorney remains accountable to the child, ethically and otherwise, particularly where litigation must be advanced in accord with the child’s legal interests. Nonetheless, it is important that the Department maintain counsel to present to the court its professional recommendations and perspectives, and information held as a fact witness. A child’s legal interests are defined by the ABA as follows:

The determination of the child’s legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child’s specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

In practice, it would also seem possible for representation of dependent children to proceed in accord with the lawyer’s assessment of the child’s “best interests,” subject to objective presentation of all pertinent evidence for the court’s determination of the child’s best interests, an approach consistent with representing a child’s legal interests. For children old enough to have some appreciation of what their interests or wishes might be, an attorney representing the legal interests of a child can advocate for the wishes of the child, while also executing statutory responsibilities for ensuring that the legal rights of the child are met. As the ABA points out, where this role

287. Consistent with this point of view, see DUQUETTE ET AL., supra note 5, at ch. 7 § 8.
289. Mangold, supra note 115, at 1452.
290. One must be cautious to consider the motivations of the child and the capacity of the child to appreciate why they may choose a particular viewpoint, even as to wishing to remain silent. Commentators have observed:

From a developmental perspective, children’s cognitive perception of the world is quite egocentric until age eight or so. The child sees self as the cen-
may become problematic, a guardian ad litem can be effective in achieving resolution.

At present, Florida law relies upon volunteer guardians ad litem to represent the best interests of children in essentially all dependency litigation. Representing a child in this manner satisfies federal law, which requires only that a nonlawyer guardian ad litem or court appointed special advocate be appointed to represent the child in every abuse or neglect case. The guardian is supposed to obtain first hand knowledge of the pertinent facts to assess and advise the court of a child’s best interests, but need not address a child’s legal interests and may very well not be legally competent to do so.291 In practice, the guardian program is often assigned to cases for which it lacks an actual embodied guardian. In addition to first hand reports received in this study, the Florida House of Representatives Committee on Children and Families cites to “unofficial reports” that as many as fifty percent of foster children do not have guardians ad litem appointed to represent their interests.292 In the limited instances where attorneys ad litem are appointed, the statutes lack even a definition of “attorney ad litem,” and lack any further direction on the role or expectations of the attorney.293 In many cases, an appointed volunteer guardian ad litem will only visit a child a few times, perhaps even just once, during the course of a case.294

The guardian ad litem program itself recognizes that its role is not primarily to safeguard the legal interests of a child. As indicated in a memorandum of law filed by the guardian ad litem program in one dependency case, the program only sends one of its attorneys to dependency hearings with the volunteer lay guardian if it anticipates that legal arguments will have to be advanced or the program is affirmatively seeking relief through a motion to execute its role in the case.295 The guardian program observed that “the legislature has entrusted the Court with ensuring that the legal rights of

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ter and cause of all that happens, which—when traumatic events such as severe sexual and physical abuse are occurring, being removed from one’s home, etc.—is terrifying. Telling the child to take on even more responsibility and “direct” his or her adult attorney may be overwhelming and traumatic for the child and exacerbate feelings of blame.

DUQUETTE ET AL., supra note 5, at ch. 7, § 14.
292. FLA. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 13 (May 24, 2000).
293. Id. at 14.
294. Interview with Judge Frusciante, supra note 123.
295. See Amended Memorandum of Law in Support of Shelter Review Hearings, § V, In re Minor Children (17th Cir. Filed April 5, 2000) (No. 99-770-DP) (on file with author) The memorandum was supplied by the guardian program with the childrens’ identifying information redacted due to confidentiality in the case.

https://nsuworks.nova.edu/nlr/vol25/iss3/1
children are protected . . ." 296 While one may suggest that the legislature has otherwise assigned this task to the Department, one must recognize that in the conduct of litigation the Department may and does have instances when its interests, or at least its actions, depart from the child’s best interests. Expecting the Department’s attorneys to seek out court assistance or even inform the court of these instances is wholly contrary to the professional responsibilities of these attorneys to their client, the Department. 297

For these reasons, it is clear that counsel for children would not only serve different purposes than a guardian ad litem, but may also provide a basis for more selective appointment of volunteer guardians, particularly to cases where the child is old enough to express wishes which may be contrary to the attorney’s assessment of the child’s best interests. 298 This would allow for a more readily directed guardian program as a specialized and limited resource, rather than its widespread assignment in what appears to be a vain attempt to provide all children with some degree of independent representation through the guardian ad litem program.

For an additional reason, the guardian ad litem function would still be necessary in some cases. Having an attorney represent the legal interests of children cannot be assured to provide for the best interests of the children, for example, where an abuse victim wishes to return to an abusive home. The express wish to return would still have to be represented by a child’s attorney while representing the child’s legal interests and would call into question the efficacy of best interests advocacy. The converse is true of a guardian ad litem representing the best interests of children. 299

The ABA recommends appointment of counsel for children at the earliest point, including upon removal from their home and when the court obtains jurisdiction. 300 To best ensure that the goals of this proposal are achieved, it is recommended that counsel for children be appointed at the time of shelter review hearings, at which time the prosecutorial function would be assumed from the Department. Following this appointment, counsel for children should operate under statutory standards for representation and duties. The failure to provide specificity has decreased efficacy in other

296. Id. § VII.

297. There should be no doubt that the Department itself, not a dependent child, is the client recognized by Department attorneys, even when the attorney is employed and housed outside of the Department itself. See Letter from Patrice Paldino, Assistant Attorney General (Apr. 25, 2000) (on file with author).

298. See also AMERICAN BAR ASS’N, supra note 130, at pt. I, § B-4(1) (wherein the A.B.A. recommended that attorneys for children seek a separate guardian ad litem where a child is unable to express a position or appreciate the proceedings, such as with younger and preverbal children).

299. See generally McElroy, supra note 268.

300. AMERICAN BAR ASS’N, supra note 130, at pt. II, § H-1, commentary.
jurisdictions, such as Utah prior to recent statutory changes, as discussed above.

State laws typically do not, but perhaps should, adopt standards for lawyers who represent children in dependency cases.\(^{301}\) The ABA developed nonbinding model standards.\(^{302}\) It is reported that these standards “have become de facto standards of practice” for lawyers representing children.\(^{303}\) A similar need for clear standards for attorneys representing child welfare agencies is expressed as follows:

Ambiguity of role and lack of clear practice standards is not only a problem for lawyers representing children, it is also a challenge for attorneys who represent parents or the child welfare agency. National standards for legal representation of the child welfare agency and of parents accused of child maltreatment are not currently available, but their development may be very important to improve professional practices.\(^{304}\)

Notwithstanding these cautions, in 2000, the Florida Legislature created an attorney ad litem pilot program (hereinafter “the Program”) to provide attorneys for some children in out-of-home care without articulating such standards. The Program is established by the Office of State Courts Administrator either a private or public entity, independent of any other agency responsible for the care of the dependent children.\(^{305}\) In part, the program aspires to reduce the length of time children spend in foster care.\(^{306}\) In cases where the court determines that attorney ad litem representation is necessary, the Program is appointed at the shelter hearing, though the court may appoint the Program later if the need arises.\(^{307}\) Once appointed, the attorney ad litem represents “the child’s wishes... as long as the child’s wishes are consistent with the safety and well being of the child.”\(^{308}\) The role of the attorney in representing the child is consistent with those representing an adult client.\(^{309}\)

Beyond this statutory direction, the “duties, responsibilities, and conduct” of attorneys in the Program are left to the courts to establish by rule.\(^{310}\)

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\(^{301}\) Duquette et al., supra note 5, at 122–23.

\(^{302}\) Id. at 123.

\(^{303}\) See Fla. H.R. COMM. ON CHILDREN AND FAMILIES, HB 2125, 15 n.1 (May 24, 2000).

\(^{304}\) Duquette et al., supra note 5, at 123.


\(^{306}\) See id.

\(^{307}\) § 39.4086(2)(f).

\(^{308}\) § 39.4086(2)(g).

\(^{309}\) Id.

\(^{310}\) § 39.4086(3).
While perhaps practical for attorneys simply representing the child's express wishes, such an approach would be ill-advised for the proposal for counsel for children made in this report, particularly due to the proposed responsibility for progress of the litigation. Statutory standards ought to specify what legal interests of children ought to be protected, as suggested by the ABA. For example, it would seem that representing the child's legal interests ought to include many of the matters set forth in the Utah model, particularly as to timely progress of litigation, receipt of appropriate foster care services for children in out-of-home care, parental access to rehabilitative services, and regular visitation if reunification is a case plan goal. The ABA identifies several other litigation-related duties, including conducting independent investigation and discovery, maintaining contact with other litigants and representatives, requesting services for the child and parents, and negotiating settlements.  

Given the need for independence, as well as the value of specialized representation, it is recommended that counsel for children be primarily provided through a discreet independent office, similar to the Program already established by the Florida Legislature. Another model of publicly-sponsored representation established in Florida presents a similar and successful approach, that being providing appellate legal representation of criminally convicted persons sentenced to capital punishment. This model, termed "capital collateral regional counsels," provides for fiscal control in the public's interest, as well as quality control to ensure efficient and timely representation, and independence of the office.  

A significant advantage of this proposed model of representation is the ability of dependency proceedings to be "self-executing," that is requiring less frequent judicial intervention. Existing law calls for such a multitude of regular hearings to utilize the court to ensure timely case progress. With counsel for children monitoring a child's circumstances, case plan progress, compliance with court orders and the like, the need for such regular hearings should be diminished. Matters requiring court attention would be brought to its attention by the parties, rather than presuming that the parties must all be brought to court regularly for inspection.  

C. Enough Already—Reducing the Number of Dependency Hearings  

A committee of one circuit's dependency court improvement project attributed to the courts four main reasons contributing to delays in permanency for dependent children. Two reasons pertain to caseload and hearing
volume, specifically an "inability to get timely trials [sic] dates" and "piece meal trial dates." 314 The remaining two reasons cited reveal an attitude or belief that dependency judges should be, or at least have been directed to be, responsible for monitoring cases. The cited reasons were, "the Courts are not always assertive in directing that cases are staffed for permanency when appropriate (in a timely manner)" and "the Courts are not always assertive in holding the parents and parties to target dates and time frames to accomplish tasks." 315 These viewpoints suggest that the parties themselves ought not be responsible for their failure to meet time standards, but rather that the judge is at fault for not checking to make sure deadlines of which all parties are aware are actually met.

While it is easy to criticize the parties for not accepting responsibility, the attitudes expressed arguably match those of the statutes. The statutes set forth a rigorous hearing schedule, including conducting hearings in every case on average every two weeks for the first three months of the case, and every fifteen days until an arraignment occurs, all to require the court to monitor what the parties are doing. As discussed above, the efficacy of this approach is questionable for a number of reasons. At the least, it seems clear that the aggressive hearing schedule is certainly not working to reduce litigation delays, evidenced by the longstanding problem of protracted litigation delays that dependent children experience despite all the court hearings. Moreover, it appears that statutory mandates of court hearings may actually be impeding effective court monitoring of cases. At least one judge and one DCF supervisory official commented in this study that some cases warrant more frequent review hearings, while others could go with less frequent hearings. 316 However, the demands of conducting all statutorily-required hearings consumes all available court time, preventing courts from exercising discretion to monitor cases as it sees appropriate. 317

Federal law requirements for in-court reviews, as a condition of receipt of federal funding, are relatively modest, numbering no more than three a year and tied to necessary substantive steps. Case plans must be prepared within sixty days of a child’s removal from the home to detail the efforts and services which will be expended to attempt to achieve safe conditions for reunification, unless reunification is not appropriate, in which case permanent homes must be sought within thirty days of the determination that reunification will not be pursued. Within twelve months of removal, and

314. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children's Services Comm., supra note 159.
315. Id.
316. Interview with Judge Frusciante, supra note 123; Interview with Lori I. Day, Service Center Director, District 10, Fla. Dep't of Children & Families (Sept. 29, 2000).
317. Interview with Judge Frusciante, supra note 123.
every twelve months thereafter if necessary, a permanency hearing must be held to assess efforts towards permanency and make decisions for permanency, with interim six month reviews to assess the safety and appropriateness of the child's placement. Florida directs all of these hearings and then adds fifteen day shelter reviews up to the time of case adjudication, almost tripling federal requirements even in cases where all other deadlines are achieved. It is submitted that these excess reviews could be safely eliminated in favor of additional court hearings only as needed in the judgment of the court and on petition of a party, provided counsel for children is provided to ensure that the measures can become "self-executing," as discussed above.

D. Shortened Permanency Deadlines for Younger Children

Recognizing the damage that results to children from delayed permanency has contributed significantly to the philosophy of child welfare laws. For this basic reason, time limits are placed on reunification of families, failing which, other permanency options must be pursued. While recognizing that, especially for younger children, delays in legal status are less important than the actual commitment of their caretakers, older children likely confer greater significance to their legal status. It appears that foster care nonetheless carries significant pain for children, including the shame and stigma of being foster children and the pain of family separation. However, damage to children and their parental bonds is exacerbated with younger children:

Emotionally, and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents.... [H]er emotional and intellectual memory has not matured sufficiently to enable her to hold on to the parent she has "lost." During such an absence, the child under two years of age "quickly" latches on to the new adult who cares for the child's needs.

318. See Marsha Garrison, Parents' Rights vs. Children's Interests: The Case of the Foster Child, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 377 (1996) (stating that "it is the child's need for an undisrupted parental relationship in a permanent home that provides the basis for proposals to sever the parent-child bond at the end of a time-limited period in foster care")

319. Id. at 388–89.

320. Chaifetz, supra note 2, at 21; Confidential Interview of May 23, 2000, supra note 1; Confidential Interview, supra note 4.

Not until adolescence does a child’s sense of time resemble that of an adult.\textsuperscript{322} As to all children, the Department seems to recognize that delays in permanency do result in “detachment from the parents.”\textsuperscript{323} One attorney for children reported that long delays in permanency cause children to “lose hope and become angry.”\textsuperscript{324} The National Council of Juvenile and Family Court Judges provides this succinct statement of the prejudicial passage of time on children subjected to dependency proceedings:

The passage of time is magnified for children in both anxiety levels and direct effect. Three years is not a terribly long period of time for an adult. For a six-year-old, it is half a lifetime, for a three-year-old, it is the formative state for trust and security, and for a nine-year-old, it can mean the difference between finding an adoptive family and failing to gain permanence because of age. If too much time is spent in foster care during these formative years, lifetime problems can be created.\textsuperscript{325}

Approximately two-thirds of Florida’s dependent children are within these critical, formative years. Twenty-one percent are under the age of two, nineteen percent are between three and five, and twenty-six percent are between six and nine years of age.\textsuperscript{326} The average dependent child in Florida is just over eight-years-old.\textsuperscript{327}

Three states attempt to address the particular need for permanency for younger children. Minnesota requires permanency hearings for children under the age of eight to be held no later than six months after out-of-home placement, while permitting twelve months for cases involving children over the age of eight.\textsuperscript{328} Similarly, Oklahoma requires a permanency hearing for a child under three within six months, instead of the usual twelve months.\textsuperscript{329}

\begin{itemize}
  \item 322. Id. at 138–39.
  \item 323. Interview with Allegretti & Sanford, supra note 7.
  \item 324. Confidential Interview, supra note 4.
  \item 325. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, supra note 116, at 14.
  \item 329. OKLA. STAT ANN. tit. 10 § 7003-5.6g (West Supp. 2001).
\end{itemize}
Vermont law provides for permanency hearings every six months for children between the ages of three and six, and every three months for children under three. Florida joins most other states in making no adjustments to dependency systems of procedures for these younger children.

Given the foregoing, it is recommended that Florida consider shortening permanency deadlines in cases involving younger children who are in foster care. However, implementation of such efforts should likely be delayed until such time as case planning more regularly accords with statutory deadlines and assurances can be made that rehabilitative services can be promptly provided. These measures would seem to be necessary to provide due respect for a young child's interest in family integrity while balancing the uniquely pronounced need for permanency experienced by younger children.

E. Time Out on Continuances

In football games they are called "time outs"—two-minute pauses in the action so a team can regroup before getting back into the fray. The other side waits. Under the strict rules, teams get only three for each thirty minute half of the game. For this reason, time outs are used sparingly and only when really needed. In child welfare litigation they are called "continuances." Unlike football, they can be days or weeks or even months long as a party catches up on delinquent tasks. The other parties wait, including the child. Unlike football, each party gets as many time outs as the judge is willing to issue. Use them too early or too often and, well, nothing really happens. You can always get another, with no accounting required for previous delay.

Significantly, the legislature has specified only the following four circumstances when continuances may be granted in dependency litigation: 1) Continuances at the request of, or with the consent of, a child’s counsel or guardian ad litem; 2) Continuances at the request of the Department's attorney, but only if material evidence is unavailable, due diligence has been exercised to obtain the evidence timely, and it is believed that the evidence will be available within thirty days, or otherwise under exceptional circumstances; 3) Continuances for "[r]easonable... delay necessary to accomplish notice of the hearing to the child’s parents[,]" though the Department must "continue regular efforts to provide notice" during such

330. VT. STAT. ANN. tit. 33 § 5531(a)(2) (Lexis Supp. 1999). These provisions are not self-executing; they require an order on a party’s motion or a sua sponte order.
332. § 39.013(10)(b). If the Department will not be prepared in 30 days, the statute empowers the parent to move for an order to show cause for sanctions, including dismissal of the case. § 39.013(10)(b)(1).
delay; and 4) Continuances for reasonable delay at the request of the birth parent.

Under court rules governing dependency cases, continuances may be granted simply on a showing of good cause. In cases witnessed in this study, continuances were granted and waiver of time standards were made typically without the parties addressing the statutory criteria. This included waiver of statutory time standards in advance of an express or demonstrated need. It appeared in some instances that judges really had no choice but to grant continuances grudgingly because certain tasks must be completed for cases to progress. By placing the interests of parents and the Department above children's interests in permanency in this manner, the intent of the law to provide deadlines to ensure that children achieve permanency in their lives is being frustrated.

The observations made in this study were confirmed by others in reports. For example, a Department employee complained that significant litigation delays are resulting from multiple rescheduling of the same hearings due to continuance requests and scheduling conflicts. A committee of the dependency court improvement program in one judicial circuit similarly concluded that attorneys for parents are “getting excessive continuances for trials, months of delays.” Football teams are limited in their time outs so that the players can go home at a reasonable hour. It would stand to reason that dependency litigants, especially children, should be assured that they get a permanent home in a reasonable amount of time.

The foregoing suggests two legislative changes. One is to add a statutory provision that any continuance or waiver of time standards must be considered individually and not be waived in advance of the particular circumstances arising which may warrant a continuance. Another is to limit the parties to a total number of days of continuances which can be sought during the pendency of litigation, in order to provide an incentive for parties to limit the number of times delays in litigation are sought. This is intended to balance the litigation interests of the various parties with the interests of children in expediency. It is recommended that continuance requests be limited to sixty days annually.

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333. § 39.013(10)(c).
336. Interview with Day, supra note 316; Confidential Interview, supra note 4.
337. Fla. 17th Judicial Circuit Dependency Court Improvement Program, Children’s Services Comm., supra note 159.
F. Simplified Case Planning

As discussed above, case planning is supposed to provide direction on all key matters in a dependency case, including what services will be provided to the children and parents, and what expectations are made for efforts to reunify families or to keep children safely in their homes.\(^{338}\) Case plan requirements under federal law are rather straightforward and to be applied for all foster children.\(^{339}\) To qualify for federal funding under the Social Security Act, states are to require that case plans address the following four basic matters: 1) A description of services offered and provided to prevent removal of the child or to reunify the family, as applicable;\(^{340}\) 2) A description of the type of home or institution where the child will be placed, with a discussion of safety and appropriateness of the placement;\(^{341}\) 3) A plan for assuring safe and proper care is provided to the child and services provided to parents for reunification or other permanent placement, and description of those that have been provided;\(^{342}\) and 4) A plan for necessary services for the child and foster parents.\(^{343}\)

The case plan should also have attached documentation of efforts to achieve adoption or other permanency and the child's health and education records.\(^{344}\) Under special circumstances, the case plan must include: 1) If pertaining to foster children over sixteen-years of age, a transition plan, including provisions as to independent living;\(^{345}\) and 2) If a child is to be placed in a foster family home or institutional placement far from the home of origin, or is to be placed in an out-of-state foster placement, a statement of how a child's best interest will be served by that placement and plans for an annual visit by a caseworker in that state, with a report to the state of origin.\(^{346}\)

As with required court reviews, Florida law substantially exceeds federal case plan requirements for cases involving children in out-of-home care by including at least the following eleven matters: 1) A description of the problem being addressed, including that which precipitated the dependency case;\(^{347}\) 2) The tasks required of the parent, and the services and treatments to be provided, including the type, frequency, location and accountable

\(^{338}\) § 39.601.
\(^{340}\) 45 C.F.R. § 1356.21(g)(4) (2000).
\(^{342}\) § 675(1)(B).
\(^{343}\) Id.
\(^{345}\) § 675(1)(D).
Department staff person or service provider; 348 3) Performance measures, including time frame, relative to the services and treatment; 349 4) The child’s permanency goal and type of placement; 350 5) The reasonable efforts to be made to place the child in an adoptive home or legal custodial relationship if reunification efforts fail, and any concurrent plan to prepare for termination and reunification; 351 6) The type of home or institution where the child is placed, as well as a description of its safety and appropriateness, including as to how it is the least restrictive and most family-like option, and in close proximity to the child’s home; 352 7) Ongoing financial obligations, including health insurance, to be maintained by the parents; 353 8) A description of the foster parents’ or legal guardians’ role in providing or developing services for themselves or the child; 354 9) A description of the child’s need for services and how they will be implemented; 355 10) How the child’s educational placement will remain stable; 356 and 11) Written notice to the parent that failure to comply substantially with the case plan may result in termination of parental rights and, somewhat ironically, that a petition to terminate rights may actually be filed sooner than required by statute based on such failures. 357

As if the foregoing is not enough, there is an entirely separate requirement that the Department describe how it will actually assure that the services set forth in the case plan will actually be provided, and how they will improve the home and facilitate reunification or other permanent placement with those services. 358 Moreover, a separate description is required of how the Department will assure that the services described in the case plan will be provided and will address the child’s needs and why all of this is appropriate in the first place. 359 In addition, one case plan requirement suggests the need for a crystal ball or other such fortune telling device. In the first sixty days of the case before the court has made any truly final decisions about a child or a family, the Department is supposed to explain how it “plans to carry out the judicial determination made by the court, with respect to the child, in accor-

349. § 39.601(2)(c).
351. Id.
352. § 39.601(3)(b), (e).
353. § 39.601(3)(c).
355. Id.
357. § 39.601(3)(k).
358. § 39.601(3)(h).
dance with this chapter and applicable federal regulations." By law, the case plan needs to be created before any substantial judicial determinations are actually made at the time of adjudication.

The meticulous case plan requirements under state law give rise to arguably onerous and confusing case plans. The Department has attempted to develop a streamlined, standardized form to be used to report all of the foregoing in a case plan. When completely blank, the form is twenty-eight pages long. As set forth above, the result of the state case plan requirements are widely cited among child welfare professionals as promoting confusing case plans. Moreover, it would seem that the painstaking statutory detail promotes "cookie cutting" of case plans. The extensive statutory directives leave little room for case by case determinations of the individualized needs of the parties, detracting from the overriding directive and intent that case plans be specially tailored and remain flexible to the needs of the children and families involved.

Case plan requirements in some other states are much simpler than in Florida. Ohio, for example, simply directs that case plans be standardized under rules developed by the child welfare agency which comply with content requirements of Title IV-E of the Social Security Act and the stated goals under federal laws for funding eligibility. Given the foregoing considerations, it is proposed that Florida replace its detailed case plan requirements with an approach similar to that taken in Ohio.

VIII. PART IV—WHAT WORKS—GUIDANCE FOR FLORIDA FROM OTHERS’ SUCCESS

A. Quit Weighing Pigs and Other Lessons from Alabama

In 1991, the State of Alabama settled a class action lawsuit brought on behalf of foster children for the impact of similar systemic problems to those currently experienced in Florida. The consent decree embodying the settlement is credited as being "the first, state-wide, bottom-up reform of a child welfare system in the United States." It is founded on "reform... driven not by procedural requirements but by the principles of good practice."

360. § 39.601(3)(g).
364 Id. at 6.
Results are measured simply by whether the system “is meeting the child’s needs for stability and family integrity, by whatever means it takes.” 365

“Bottom-up reform” refers to reform which begins with principles on how agency social workers are to work with children and families, and what supports they will need for that interaction, rather than starting with agency structure from the “top down.” 366 For example, promoting visitation between dependent children and their parents is recognized in the Alabama consent decree as being one of guiding principles for an appropriate “system of care.” Visitation is “viewed as an essential ingredient of family reunification services . . . [to] be actively encouraged” and any necessary transportation assistance is to be provided. 367 Resources needed to support this principle are then to be put in place.

Alabama’s focus on principles and resources, directed essentially from the child’s view, have allowed Alabama, unlike Florida, to enjoy a decrease in the number of child abuse and neglect reports received each year since 1997 which result in a finding of abuse or neglect or reason to suspect such maltreatment. 368 Similar success is found when measuring the number of children in out-of-home care, which has fluctuated over the past several years, but in raw numbers never reaches the levels experienced prior to 1992. 369 Given that the Alabama model has been phased in over time among the counties, as a so-called “conversion” process, Alabama has been able to measure contemporaneous success of its reform efforts among its counties. Of particular note is the fact that the rate of children in foster care (cases per 1000 children) in “converted” counties versus “non-converted” counties has been lower every year since 1992. 370 Moreover, the rate difference between converted and non-converted counties has steadily widened virtually every year since 1992. 371 Alabama’s success has come without any significant change in the permanency goal for children over the past five years, with statewide trends remaining relatively constant for all permanency options. 372

From Alabama’s experience, the federal court monitor, Dr. Ivor Groves, concludes that “child safety does not correlate strongly with the number of children taken into custody . . . and, in fact, exposes children to other poten-

365. Id.; see app. 1.
366. Id. at 26–27.
367. Id. at 89.
369. Id. at 38.
370. Id. at 40.
371. Id.
372. Id. at 46.
Dr. Groves attributes Alabama’s success in foster care primarily to the strengthening service provision on initial contact. Suggesting support for reducing reliance on court hearings to ensure compliance and actions in the best interests of children, as this article urges, Dr. Groves opines that you “cannot monitor into compliance.” In a similar, though more colorful manner, Dr. Groves comments, “you can weigh the pig, but that can’t make it fatter.”

Resource development is critical to success and much of Alabama’s efforts in this regard have been geared towards home-based services.

In part for this reason, this article proposes allowing the DCF to focus on providing social services without contending with potential conflicts in its missions, especially for generating a trusting relationship with birth parents and providing services to protect the interest of children in family integrity. Moreover, providing counsel for children can allow for reduced litigation, allowing all of the parties to focus on services.

Consistent with the successes in Alabama, the need for “front-end” services is routinely recognized. Compliance with federal ASFA requirements is also recognized by the National Conference of State Legislatures to place urgency on the need to ensure that social services are available:

Even after ASFA, the permanency goal for most children in state care will be to return home as quickly as possible. States will find it hard to achieve that goal if appropriate and effective services are not provided to families in a timely manner. When services are delayed, agencies and courts are unable to make informed decisions about parents’ ability to protect and care for their children, and such children will continue to languish in foster care.

Dr. Groves opines that Florida is weak in its provision of services immediately following the child protective investigation, causing more children to be removed from their families. At the least, the finding of this
study that case plan development is seriously delayed in many cases in itself prevents Florida's dependency system from providing early services in a case, as has been successful in Alabama. Likewise, Alabama's model prioritizes flexibility in service provision and, therefore, case planning. For this reason, this article urges simplifying Florida's statutes on case planning.

B. The Partial Promise of Community-Based Care

Efforts are underway in Florida to improve the provision of services. With the reorganization of the Department by the legislature in the 2000 legislative session, steps are to be taken to privatize the delivery of direct child welfare services, with the Department remaining primarily responsible for "contract management, monitoring compliance with contract requirements, and assuring fiscal integrity and quality in the service provided by private entities." 379 This direction follows legislative mandates for the privatization of the delivery of foster care and related services, commonly referred to as "community based care," beginning in 1996 with model programs and then in 1998 with a directive that privatization be implemented state-wide. 380 Florida's efforts in this regard accord with methods being tried nationally to improve overall system performance. 381

The promise of community-based care is to improve service delivery and availability, which, as seen in Alabama, is the proven method to solving many of the problems experienced by children and families in the dependency system. Reliance on the implementation of community-based care initiatives as the sole means to ensure timely permanency and appropriate care of all foster children and families would be suspect for two reasons. One, community-based care systems do not have a direct impact on the role or expectations of the judiciary. Two, the model community-based care systems implemented over the past four years in Florida have faltered. A report prepared for the Department reviewed model community-based care projects that have been implemented in five of the Department's fifteen districts at various points over the past three years. 382 The deficiencies in one project go to the core of the dependency system mission, the report noting that the "Department of Children and Families does not have confidence that the coalition staff can achieve the required levels of safety and permanence for the children and families being served . . . ." 383 The oldest program was found to suffer from at least one significant problem historically experienced.

381. Markowitz, supra note 198, at 13–14.
382. See generally id.
383. Id. at 19.
by the DCF itself, high staff turnover, as well as "little confidence [among Department staff] that the [private] provider line staff knew what they were doing."\textsuperscript{384}

The transition to privatization, though not necessarily privatization itself, presents an interim (though potentially lasting for a number of years) risk to the provision of needed services for family reunification, children's needs in foster care, and other such services. A principal source of the problem lies with compensation methods under the private sector contracts. The Department has observed that an unresolved "risk factor" exists with some private service contracts, particularly from "unanticipated caseload increases or an unusual incidence of families with catastrophic service needs."\textsuperscript{385} The Department projects that these risk problems can ultimately be addressed "by moving toward a case-rate funding approach," but that will take "experience data" which is not available at this time.\textsuperscript{386}

C. What We Teach Our Children

Public policy and government action are teaching tools for society, particularly for children, whose appreciation and understanding of the values and expectations conveyed through laws and governmental acts grow as they do. Jurisprudential philosopher H.L.A. Hart wrote, "[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals."\textsuperscript{387} In the spirit of Professor Hart's observations, we know that when the State exercises its \textit{parens patriae} role and acts through its dependency system to raise a foster child, its daily impact inevitably teaches that child. Two years after I adopted my son at age four from an overseas orphanage, he asked, "why are you my dad?" The silence of my long pause to grasp for the right answer caused him to ask further, "because you teach me things?" To this day, I can find no better answer, but I do find myself awed by the responsibility that his questions remind me I have. I must be ever vigilant in my actions, because he will be looking to me to learn, even when I am not trying to teach, and I will make mistakes.

When our public policy fails to achieve for a foster child a permanent, stable family over the course of many years, the child may learn that family is not important to us whether we intend that or not. No child will be reading legislative intent language to discover otherwise. When we move a child from one crowded foster home to another every few weeks or months, we

\textsuperscript{384} Id. at 29.
\textsuperscript{385} FLA. DEP'T OF CHILDREN & FAMILIES, supra note 177, at 23.
\textsuperscript{386} Id.
teach that child to have a life of temporary, poorly-developed relationships. When we fail to keep our promises to a child, such as by failing simply to show up to supervise anxiously awaited visitation with a parent, the child learns that we, the State, cannot be trusted. Public policy must be prepared to act timely and responsibly in dependency cases when things go wrong, because they will. Accomplishing this goal will help ensure that a child does not learn the wrong things, because on the typical day that we create for Florida’s dependent children, they will learn from their parents, even the lessons that we do not want to impart.
Child Welfare Managed Care in Florida: Will It Be Innovation or Abdication?
Christina A. Zawisza

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I. INTRODUCTION

Election ballots and international custody battles aside, all eyes are on Florida for yet another reason: Florida's steady push to privatize the operation of its social services programs. Part of Governor Jeb Bush's plan to trim the government payroll by transferring state functions to private community groups, including faith-based organizations, privatization in Florida has hit industries ranging from nursing homes for veterans to the child welfare system.¹

Privatization is also known as "managed care" and resembles managed care in the health care setting.² Both terms refer to the use of a variety of approaches intended to balance the cost of services with quality and customer access by reconciling the provision of care to each individual with the resources available to serve an entire pool of customers. "Cost effectiveness is achieved by efficiently delivering the most appropriate services to

¹ J.D., University of Virginia School of Law (1977); M.A. in Public Policy and Administration, University of Wisconsin (1971). Director of the Children First Project at Nova Southeastern University Shepard Broad Law Center.
² See Steve Bousquet, Veterans Blast Bush Plan to Privatize, MIAMI HERALD (Broward), Jan. 29, 2001, at 1A; Steve Bousquet, Faith-Based Initiative Familiar to Florida, MIAMI HERALD (Broward), Jan. 30, 2001, at 1A.
The following strategies are typically used by managed care systems to balance cost, quality, and access: pre-authorized care; gatekeeping and utilization review; use of standardized practice guidelines; management of data through information technology; built-in financial risks and incentives; and outcome-based contracting.

While Florida is unique in the breadth and scope of its privatization movement, many other states are experimenting with the transfer of pieces of state government functions to private organizations, particularly in the area of child welfare services. By 1999, twenty-nine states had one or more initiatives to change their management, financing, or child welfare service delivery practices by adopting one or more principles of managed care.

There are two basic elements to managed care arrangements in child welfare: fixed or capitated prospective payments to at least one service provider, rather than traditional fee-for-service reimbursement payments; a single private entity responsible for providing appropriate and quality services.

The majority of the twenty-nine states that operate child welfare “managed care” initiatives are experimenting with the delivery of services to emotionally disturbed children, only one segment of the child welfare population. In some states, certain counties, most notably Jefferson and Mesa Counties in Colorado, serve all children in foster care in privatized systems. Kansas was the first state to develop a statewide system of managed care for all of its child welfare services. Now Florida has joined Kansas in this endeavor.


4. Id.

5. Cynthia M. Fagnoni, Child Welfare: New Financing and Service Strategies Hold Promise, but Effects Unknown, Statement Before the Subcommittee on Human Resources, Comm. on Ways and Means, House of Representatives (July 20, 2000), in U.S. GEN. ACCT. OFFICE (GAO), GAO/T-HEHS-00-158 (2000) [hereinafter GAO Statement]. For purposes of this article, “child welfare” or “child welfare system” will refer to the full range of functions and services operated to protect Florida’s abused, neglected or dependent children, including protective investigations, early intervention services, family preservation and support services, shelter care, foster care, therapeutic foster care, group care, residential care, independent living, postadjudication case management, postplacement supervision, permanent foster care, and adoption.

6. Id. at 3.

7. Id.


9. GAO Statement, supra note 5, app., at 16.
This article will first describe the statutory characteristics of the child welfare community-based care movement in Florida, as well as the shift in statutory philosophy regarding the roles and responsibilities of Florida's state child welfare agency, the Department of Children and Families. Next, the national and state contextual drivers serving as the impetus for Florida's child welfare community-based care and the attributes of successful community-based care will be described. This will serve as background for a discussion of the following three challenges facing Florida's implementation process: adequate state funding; limitation of legal liability; and preservation of appropriate state *parens patriae* roles.

The article will conclude with recommendations designed to assure that Florida's process is effective in protecting children, rather than abdicating state responsibility and devolving state obligations upon local communities and private providers without adequate resources.

I. CHILD WELFARE COMMUNITY-BASED CARE IN FLORIDA

The Department of Children and Family Services ("DCF"), Florida's child welfare agency, began privatizing child welfare services in several Florida communities in the early 1990s by purchasing an extensive array of services from private sector providers such as the Florida Sheriff's Youth Association and the Children's Home Society. "Of Florida's $373 million child protection budget [in 1999], $240 million or [sixty-three] percent [was] spent on services provided by the private sector."¹⁰ Some seventy licensed child-placing agencies offered foster, group, and shelter placements, and some 104 offered only adoption services.¹¹

But in 1996, the sea change in the delivery of child welfare services in Florida began in earnest. The Florida Legislature authorized DCF to contract with competent community-based agencies for the provision of foster care and related services,¹² and to establish five model community-based pilot programs, one of which had to be operated by a for-profit corporation.¹³

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12. These services are to include: "family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, . . . postadjudication case management, postplacement supervision, permanent foster care, family reunification, the filing of a petition for the termination of parental rights, and adoption." FLA. STAT. § 409.1671(1) (Supp. 1996).

13. § 409.1671(1), (5). The 1996 Personal Responsibility and Work Opportunity Act amended the Social Security Act shortly after the 1996 session of the Florida Legislature adjourned to allow federal reimbursement of costs by Title IV-E for foster care provided by
The expressed intent of the Florida Legislature in creating this community-based care model was to strengthen the support and commitment of communities for the reunification of families and to promote efficiency and increased accountability in the care of children and families.14

In 1998 the Florida Legislature expanded the concept of community-based care and directed DCF to privatize all foster care and related services statewide, phased in over a three-year period beginning on January 1, 2000.15 The legislature required DCF to prepare a plan to transfer all available funds, including federal funds, to such community-based agencies.16

The concept of an "eligible lead community-based provider," a single agency that contracts with DCF for the provision of child protective services in a community no smaller than a county, was established with the following parameters:

[the ability to coordinate, integrate, and manage all child protective services in the...community in cooperation with child protective investigations; the ability to ensure continuity of care from entry to exit for all children referred[by]...protective investigation and court[s]...; the ability to provide directly, or contract for through a local network of providers, all necessary...services; the willingness to accept accountability for meeting the outcomes and performance standards...established by the Legislature and the Federal Government; the capability and the willingness to serve all children referred to it from the protective investigation and court systems, regardless of the level of funding allocated to the community by the state, provided all related funding is transferred; the willingness to ensure that each individual who provides child protective services completes the training required...17]

DCF, the contracting agency, retained responsibility for the quality of contracted services and programs, for ensuring services were delivered in accordance with applicable federal and state statutes and regulations, and for private for-profit companies. See 42 U.S.C. § 672(c) (Supp. III 1997). Some argue that "[t]he entrance of profit making into the system raises issues of accountability and oversight unique to the profit making structure of the corporations." Mangold, supra note 11, at 1295.

15. Id.
16. Id. The services to be privatized include the list of services authorized in 1996 minus the filing of petitions for the termination of parental rights. Id.
17. § 409.1671(1)(b).
establishing a quality assurance program and an annual evaluation of community-based agencies. ¹⁸

Emboldened by its 1996 and 1998 legislative successes, DCF sought and obtained permission from the legislature in 1999 to suspend its statutory duties and responsibilities and to submit a comprehensive reorganization plan to achieve more effective and efficient service delivery and improve accountability.¹⁹ The Department's comprehensive plan articulated an eye-catching vision for community-based care that created local community alliances to draw together lead agencies, networks of service providers, and the department in implementing the reorganization.²⁰ The effort would begin with community-based care for child welfare services, but would incrementally expand to include all other services.²¹

According to DCF, such a bold step was necessitated by the following factors: a statutory mission too enormous to fulfill, with a span of control too broad and communications between central offices and districts often problematic; "[l]ack of true partnership with local communities; [a]bsence of local systems of care . . . characterized by a single point of intake for assessment, service planning, and care management with necessary specialized services carefully coordinated and integrated to meet the needs of . . . client[s]; [lack of uniformity in] contract management [of] over 1700 individual contracts; . . . [lack of resource coordination between the state and localities]."²²

DCF's proposed solution would be to create a responsive system of care in local communities which would produce an integrated service plan for each family and which would be accessible, individualized, family-centered, respectful, integrated, effective, efficient, normalized, and community focused.²³ Community-based care would be composed of the community, a Community Alliance serving as the focal point of community ownership and oversight of the system of care, a lead agency providing core services, and a network of local service providers.²⁴

While DCF would "continue to be responsible for the overall provision of state and federally mandated and funded services,"²⁵ the most controversial portion of the plan would require local communities to share both the

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18. § 409.1671(2), (3)(a).
21. Id. at 7.
22. Id. at 5–6.
23. Id. at 9–10.
24. Id. at 11–12.
25. COMPREHENSIVE PLAN, supra note 20, at 19.
costs and the risks of operating the system and delivering services.\textsuperscript{26} Local communities would be expected to commit increased funds and might be expected to develop local match funds in order to obtain an increment of state funding.\textsuperscript{27} Risk would be shared through a case rate funding approach with a state set-aside of a risk pool.\textsuperscript{28}

The Florida Legislature balked at the notion of requiring local governments to share greater costs, and specifically provided in year 2000 that “the Legislature does not intend by its privatization of foster care and related services that any county, municipality, or special district be required to assist in funding programs that have previously been funded by the state.”\textsuperscript{29} The legislature was silent, however, with regard to expectations of private providers, although it authorized the creation of a risk pool to reduce the financial risk to eligible lead agencies resulting from unanticipated caseload growth\textsuperscript{30} and agreed to establish community alliances to oversee the devolution to local communities.\textsuperscript{31} The legislature further put some skids on DCF’s adventurous plan, limiting application of the larger plan to one prototype region and requiring demonstrated improvement in management and oversight of services or cost savings from more efficient administration before the Secretary of DCF could expand the plan to other districts.\textsuperscript{32}

Perhaps the greatest change in Florida law regarding the administration of its child welfare system is the reduced mission of the state child welfare agency and its Secretary. In 1995, the mission of the then Department of Health and Rehabilitative Services, was “to deliver, or provide for the delivery of, all health, social, and rehabilitative services offered by the state through the department to its citizens,”\textsuperscript{33} and the duties of the department were statutorily prescribed. Most notably, they included providing assistance to individuals, preventing and remedying neglect, abuse, exploitation of children, and aiding in the preservation, rehabilitation, and reuniting of families.\textsuperscript{34}

\textsuperscript{26} Id. at 23.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} FLA. STAT. § 409.1671(1)(a) (2000).
\textsuperscript{30} § 409.1671(7). The legislature appropriated $4.5 million for the risk pool in 2000. REPORT, supra note 2, at 18.
\textsuperscript{31} § 20.19(6). The initial membership of each community alliance is a representative of county government, school district, county United Way, sheriff’s office, circuit court, and children’s board. Id. § 20.19(6)(d)(1)–(7).
\textsuperscript{32} § 20.19(7). The prototype region is the geographical area including counties in the 6th, 12th, and 13th judicial circuits. Id. § 20.19(5)(a)(7), (16), (17).
\textsuperscript{33} FLA. STAT. § 20.19(1)(a) (1995).
\textsuperscript{34} Id. Other responsibilities included but were not limited to: cooperating with other state and local agencies in integrating the delivery of all health, social, and rehabilitative
In 1996, this mission was changed, along with the name of the department. DCF was “to work in partnership with local communities to help people be self-sufficient and live in stable families and communities.” The 1996 statute, however, retained the prescribed duties of DCF. By 2000, these defined purposes had disappeared. The mission of DCF now is “to work in partnership with local communities” to help people be self-sufficient and live in stable families and communities. The duties of the Secretary are, simply, to assure “that the mission of the department is fulfilled in accordance with state and federal laws, rules, and regulations.” Gone are the obligations to provide assistance to individuals and to prevent or remedy neglect, abuse, and exploitation and to aid in the preservation, rehabilitation and reunification of families.

The community-based care revolution in Florida is now complete. No longer is the focus of ownership, responsibility, and service delivery. The state child welfare agency, according to state law, at best, holds shared responsibility for the protection of children with local communities and enjoys a vast diminution of duties.

II. IMPETUS FOR CHILD WELFARE COMMUNITY-BASED CARE

The motivation for community-based care comes from different sources. One driving force, certainly one prevalent in Florida, is the desire to shrink the size of state government and eliminate the need for civil service protections that make it difficult or impossible to discipline or fire incompetent employees. Community-based agencies can terminate ineffective employees at the will of the supervisor.

A stronger motivating force, however, is the desire to fix what most commentators describe as a broken child welfare system: one beset with escalating costs and a poorly integrated patchwork of services. Nationally, state child welfare systems are currently responsible for more than one
million children needing protection or care. "Foster care is intended to provide a temporary, safe haven for children whose parents are unable to care for them," according to Michael Mushlin. Yet more than half a million children currently languish in government foster care at a cost of $12 billion. In the current child welfare delivery system, there are many problems. Among these problems is the lack of permanence; "children remain in foster care too long without being reunited with their parents or adopted into a permanent home." Compromised safety is another issue; "children are sent back to abusive homes or placed with abusive foster parents or in overcrowded conditions." There are a high number of placements; "children move from foster home to foster home within short time periods, jeopardizing their safety and stability." Heavy caseloads is yet another problem; "social workers are responsible for far too many children to supervise all cases thoroughly." Finally, caseworker turnover is among the problems; "foster children face many changes and have to adjust to many caseworkers."

In the latter half of the 1990s, the march toward foster care drift for abused and neglected children seemed almost inexorable. While

[i]n 1996, approximately 520,000 children were in foster care; by March 1999, 547,000 children were in foster care. In 1996, 11 percent had been in foster care for three to four years, and 10 percent had been there for five years or longer. By March 1999, 15 percent had been in foster care three to four years and 18 percent had been in foster care 5 years or longer. In 1996, 54,000 children were legally available for adoption; by March 1999, 117,000 were legally available for adoption.

The average length of stay of a child in foster care in Florida in November, 2000 was 35.6 months.

41. Id. at 5.
44. Id.
45. Id.
46. Id.
47. Id.
48. Snell, supra note 43.
49. Id.
50. REPORT, supra note 2, at 30.
Jill Chaifetz observes the incalculable human loss behind these statistics, the enormous personal pain and hurt, and the tangible, detrimental societal costs. “Children who have grown up or left foster care fill the nation’s jails, mental hospitals and welfare rolls,” according to documented studies.\(^5\)

These results have occurred despite the passage of good laws. The federal Adoption Assistance and Child Welfare Act of 1980 (AACWA) was designed to address the decades old problem of foster care drift: the phenomenon of a child literally growing up in foster care.\(^5\) The AACWA provided fiscal incentives to states to prevent the removal of children from their homes unless necessary and to reunify them with parents or relatives as soon as possible. Adoption or other permanent living arrangements were to be found if prevention or reunification was lacking.\(^5\) The AACWA required states to make “reasonable efforts” to prevent removal or to reunify through services;\(^5\) to develop written case plans to direct the provision of services for each child;\(^5\) to judicially or administratively review the status of each child at least every six months;\(^5\) and to hold a permanency hearing within eighteen months of placement.\(^5\)

The promise of the AACWA was never fulfilled. The federal law’s financing scheme incentivized keeping children in foster care. Lack of state funds for services, insufficient foster homes, and lax federal monitoring of state programs contributed to the problem.\(^5\)

The Adoption and Safe Families Act of 1997 (ASFA) sought to cure some of the defects of the AACWA. It makes federal reimbursement contingent on speeding up the process of cases heading towards termination of parental rights, by removing the mandate for reasonable efforts to reunify children under certain circumstances,\(^5\) requiring permanency hearings within twelve months instead of eighteen,\(^6\) and providing fiscal incentives to states to foster more adoptions.\(^5\) As another impetus, President Clinton issued a challenge to states to double the number of children moved from

\(^5\) § 671(a)(16).
\(^5\) § 675(6).
\(^5\) § 675(5)(c).
\(^5\) Chaifetz, supra note 51, at 9.
\(^6\) § 675(5)(c).
\(^6\) § 673(b) (West Supp. 2000).
foster care to adoption by 2002. The ASFA changes have placed enormous pressure upon child welfare agencies to improve service delivery.

Another force behind community-based care has been the influence of class action lawsuits and high profile media stories about the "failure" of the system to protect and serve children. Class action lawsuits against public child welfare agencies on behalf of children have driven more than twenty states to operate under court consent decrees.

Florida is currently plagued with three such class action lawsuits. M.E. v. Bush, filed in 1990, challenges the failure of the state to provide mental health services to children in state custody. Ward v. Kearney, filed in 1998, challenges unconstitutional conditions in the child welfare system in Broward County, while Foster Children v. Bush, filed in 2000, challenges such failures on a statewide basis. Another systemic child welfare lawsuit, Children v. Chiles, was settled in 1995. In addition, a celebrated circuit court damage action, Two Forgotten Children v. Department of Health & Rehabilitative Services, resulted in a jury award of some $4.4 million.

Hardly a day goes by without media attention to the inability of Florida's child welfare system to protect children. The most famous case of

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63. See Gordon, supra note 52, at 639; Mangold, supra note 11, at 1312.
64. CHILD WELFARE LEAGUE OF AM., supra note 3.
65. Id.
67. Id. at 2.
69. Id. at 2.
70. No. 00-2116-Civ-Moreno (S.D. Fla. 2000).
71. Id. at 3.
74. Final Judgment at 2, Two Forgotten Children v. Dep't of Health & Rehab Serv., No. 95-19835 CA2 & No. 96-5980 CA27 (Fla. 11th Cir. Ct. Oct. 22, 1999).
75. Id.
late has been that of Kayla McKean, whose death in 1998, after repeated reports of abuse to the state child abuse hotline, failed to prompt her removal from her parents’ home, resulted in the Kayla McKean Child Protection Act of 1999. Against this backdrop of documented failures, federal pressure, lawsuits, and media attention, a methodology that saves costs and improves outcomes, tested in the public health care delivery system, looks very attractive to Florida policy makers.

III. ATTRIBUTES OF SUCCESSFUL COMMUNITY-BASED CARE

Community-based care is not a new phenomenon in child welfare. For much of this country’s history prior to the middle of the twentieth century, private agencies “championed interventions on behalf of abused and neglected children,” while governments made “fledgling efforts.”

The federal government “became financially involved through [passage of] the Social Security Act of 1935” and the creation of the Aid to Families with Dependent Children program. Only with the passage of the AACWA, ASFA, and the Child Abuse Prevention and Treatment Act of 1974 did the federal government assume a major role in the funding of child welfare.
services through incentive payments to states. 82 Even with increased federal funding, however, states still retain a great deal of discretion in the operation of their child welfare systems. 83

The lessons of the past have led to increased motivation for systemic reform. Thanks to research, it is now possible to identify attributes of successful community-based care. One of these attributes includes design and pricing; good systems ensure access to the full range of services needed and adequate funding to support service delivery and ensure quality. 84 Another attribute is quality; good systems have quality as the centerpiece and use best practices and procedural protocols that are followed. 85 Role clarity is yet another attribute; “public and private sector responsibilities must be clearly defined and delineated.” 86 Outcomes are another factor to consider; good systems have “meaningful, measurable, and attainable outcome measures and performance benchmarks.” 87 Management information systems should also be considered; such systems “must be capable of monitoring and evaluating critical information on an ongoing basis.” 88 Finally, an inclusive planning process is important; all stakeholders must be included in the design and evaluation process. 89

The General Accounting Office (GAO), in its study of child welfare managed care initiatives around the country, reports that states and localities are meeting some of these attributes better than they did under public delivery, to the encouragement of state and local officials. 90 Child welfare systems are becoming more results oriented and performance based through outcome measures for child safety, child permanency, child and family well-being, stability, and client satisfaction for which providers are accountable. 91

Initial evaluation of Florida’s community-based care pilot projects established by the 1996 Legislature also demonstrated mixed results. Some improvements over the DCF run system were noted. These included: weekly in-person contact with the child in 65% of the cases, reduction of number of children per foster home to 1.6, average caseload of 18.9, average number of placements per child in the community-based system was 2.79, length of stay

82. Id.; Mangold, supra note 11, at 1308–10, 1312.
83. Gordon, supra note 52, at 643.
84. CHILD WELFARE LEAGUE OF AM., supra note 3, Overview.
85. Id.
86. Id.
87. Id.
88. Id.
89. CHILD WELFARE LEAGUE OF AM., supra note 3, at 2.
90. GAO Statement, supra note 5, at 1–2.
91. Id.
in foster care shortened 66%, counselor turnover three or more times in only 12.8% of cases, and foster parent satisfaction in 78.9% of cases.\textsuperscript{92}

On the other hand, for the three pilot projects for which data is available, two of the three were not successful in meeting the following performance goals: children not re-abused during service provision, children not re-abused one year after service closure, average length of stay for children whose goal was family reunification, and reentry into foster care within one year after reunification.\textsuperscript{93} Even the most successful project, the Sarasota County Coalition, failed to meet its performance goal regarding prevention of re-abuse during one year after service closure.\textsuperscript{94} Evaluations of the Kansas privatization effort also showed mixed results on key performance measures.\textsuperscript{95} Performance regarding lack of re-abuse improved in care and stabilization of placements, while performance on timely achievement of permanency and remaining home after reunification worsened.\textsuperscript{96}

The GAO, therefore, sounds a cautionary note. In some states, overall costs have increased.\textsuperscript{97} Kansas, for example, experienced cost overruns of 45.2 million dollars.\textsuperscript{98} Many state and local agencies do not have appropriate data systems in place.\textsuperscript{99} In Florida, for example, the legislature’s Office of Program Policy Analysis and Government Accountability (OPPAGA) found that monitoring focused on contract compliance instead of on the quality of services provided.\textsuperscript{100} The GAO calls for increased rigorous evaluation of these managed care initiatives so that we have a true picture of their outcomes.\textsuperscript{101}

\textsuperscript{92} Snell, \textit{supra} note 43, at 10.
\textsuperscript{93} See generally OPPAGA Draft, \textit{infra} note 94.
\textsuperscript{94} The Florida Legislature, Office of Program Policy Analysis and Government Accountability (OPPAGA), \textit{Justification Review, Child Protection Program, Florida Department of Children & Families}, Report No. 01-Draft, 45–46 (Feb. 2001) [hereinafter OPPAGA Draft]; See generally OPPAGA, \textit{Justification Review, Child Protection Program, Florida Department of Children and Families}, Report No. 01-14 (Mar. 2001). The Sarasota Coalition has since become a lead agency. OPPAGA Draft, \textit{supra}, at 48. Among the factors in the success of this agency are the agency’s already established infrastructure and experience, a “well developed and active community stakeholder group,” executive leadership, the county’s wealth of local resources, and a small child population. \textit{Id}.
\textsuperscript{95} OPPAGA Draft, \textit{supra} note 94, at 55–56.
\textsuperscript{96} \textit{Id.} at 56.
\textsuperscript{97} GAO Statement, \textit{supra} note 5, at 12.
\textsuperscript{98} OPPAGA Draft, \textit{supra} note 94, at 55.
\textsuperscript{99} GAO Statement, \textit{supra} note 5, at 2.
\textsuperscript{100} OPPAGA Draft, \textit{supra} note 94, at 58.
\textsuperscript{101} See GAO Statement, \textit{supra} note 5, at 2.
IV. LIMITATIONS OF COMMUNITY-BASED CARE IN FLORIDA

Florida faces considerable challenges in implementing community-based care in a way that will produce consistently positive outcomes for children and families. OPPAGA reports that DCF is experiencing difficulties in establishing lead agencies and will not meet its statutory deadline of January 2003 for statewide child welfare privatization.102 Among the barriers cited by OPPAGA are lack of capacity and experience of community-based providers to assume additional management responsibilities; reluctance to assume financial risk; and sentiment that child protection should remain a state function.103

This section will discuss three hot spots: 1) adequate funding; 2) limitation of legal liability; and 3) preservation of appropriate state parens patriae roles.

A. Adequate Funding

As discussed previously, Florida’s community-based care vision requires shared costs and risks with local communities.104 But community-based care often costs more than traditional child welfare service delivery.105 One of the attributes of successful programs is adequate funding to support service delivery and ensure quality.106

While Governor Bush has committed record levels of funding for child welfare programs and the total funding for child welfare in the Executive Budget for Fiscal Year 2001–2002 is $761 million, an eighty-seven percent increase since Governor Bush took office,107 this budget must be viewed against a backdrop of years of under funding and a currently soaring child welfare population in Florida. By June 2001, the number of children in out-of-home care in Florida is expected to rise to over 18,000 children.108 Cur-

102. OPPAGA Draft, supra note 94, at 41.
103. Id.
104. See COMPREHENSIVE PLAN, supra note 20, at 23.
105. OPPAGA Draft, supra note 94, at 55; GAO Statement, supra note 5, at 11; Carol Marbin Miller, Private Services “Better” for Kids, But State Strategy Could Get Costly, Early Figures Show, MIAMI HERALD (Broward), Mar. 1, 2001, at 1A. DCF expects Community Alliances to share ownership and responsibility for resource development. REPORT, supra note 2, at 25.
106. See REPORT, supra note 2, at 16.
rently there are approximately 12,164 children in out-of-home care;109 in mid 1997, there were 9045.110 The DCF admits that this huge growth has resulted in insufficient foster homes to meet the demand, resulting in overcrowded conditions with children and staff staying in motels, children placed at serious risk of harm, unrealistic expectations for care and supervision by foster parents, rapid turnover, and failure in meeting statutory expectations for permanency within twelve months.111

OPPAGA lists financial risk as one of the obstacles to successful implementation of community-based care in Florida,112 a finding that is not surprising. Providers worry that the state will not give them the resources to do the job right and that community-based care is just another under funded state mandate.113

One measure of anxiety centers around the availability of a “Risk Pool” to protect lead agencies from the risks of uncompensated growth due to unexpected caseload increases, legislative and policy changes, and media awareness. Under a state-run child welfare system, the DCF had the ability to transfer funds from other programs or districts to address costs associated with these risks, a remedy no longer available under community based care. The Florida Legislature set aside $4.5 million in budget authority for a “Risk Pool” in the fiscal year 2000–2001,114 a minuscule amount compared to DCF’s projected 2002 child welfare budget of $761 million and the projected growth of numbers of children in out-of-home care.115 No administrative rules have been promulgated to allow providers to access even these limited “Risk Pool” funds.

Adding to the apprehension is the language of the Statement of Assurances contained in the proposed DCF contracts with lead agencies. Applicants must agree to “ensure continuity of care from entry to exit for all

110. FLA. DEP’T OF CHILDREN & FAMILIES, FAMILY SAFETY AND PRESERVATION, MANAGEMENT PLAN SUMMARY (July 1997).
111. See generally REPORT, supra note 2.
112. See OPPAGA Draft, supra note 94, at 41. This consternation might be expressed by existing agencies not showing interest in serving as a lead agency; lack of capacity to serve as lead agency; or demands for more resources. REPORT, supra note 2, at 17–18.
113. Shana Gruskin, Two Agencies Team Up To Bolster Foster Care in Palm Beach County, SUN-SENTINEL, web-posted Dec. 11, 2000, http://www.sun-sentinel.com. One fiscal advantage of community-based care is that private agencies can earn Medicaid dollars at a higher rate than can the state. The Sarasota Coalition, for example, earns $1 million in Medicaid billings to supplement its $14 million in DCF funding. Miller, supra note 105, at 2A.
114. REPORT, supra note 2, at 18.
115. See generally OPPAGA Draft, supra note 94.
children referred” and “serve all children referred, regardless of the level of funding allocated by the State of Florida.”

The Statement of Assurances omits the clear language of statutory law containing the clarifier, “provided all related funding is transferred.”

Community-based agencies understandably see this contract clause as an administrative abdication.

Illustrative of the depth of community misgivings about the ultimate success of community-based care, is the analysis of a prospective lead agency in Miami-Dade County, which claims that DCF’s new direction has thrown the foster care system into crisis. It says:

The cost of recruiting, training services, and supporting foster homes, while creating an infrastructure to provide services properly without adequate financial support, has threatened the viability of the privatization movement in Miami-Dade County. In turn, this has placed a great strain and created apprehension among the corporations, foundations, and community partners that have already joined the effort.

This agency’s Supported Foster Care Program costs $28 a day per child. Although the initial reimbursement rate provided by the state for two years was $20 a day, DCF now provides $15.66 per day, leaving the agency to make up $12.32 a day through private funds. This is in contrast to the $36 that Florida spends on receiving, screening, and referring just one call to the Child Abuse Hotline.

Cost issues have already spawned litigation in Florida. The Lake County Boys Ranch, a privatized lead agency, has sued DCF for injunctive relief and damages after DCF notified the Ranch that the state agency would

116. CHILDM'S HOMESOCY, APPENDIX XII, STATEMENT OF ASSURANCES, 86–87.
119. CHARLEE HOMES FOR CHILDREN, FOSTER CARE CRISIS 1.
120. Jacqueline Charles, Funding Puts Pressure on Foster-Care Agencies, MIAMI HERALD, Jan. 2, 2001 at 1B.
121. Id. The Children’s Home Society receives $15.00 per day. Charles, supra note 120, at 1B, citing DCF’s need to divert the money to create new programs and increase the number of children in others. In contrast, Florida provides $23.83 for care of an adult in an assisted living facility, a rate also deemed woefully inadequate. Carol Marbin Miller, Crisis of Care for Florida’s Mentally Ill, MIAMI HERALD (Broward), Feb. 11, 2001, 1A.
122. OPPAGA Draft, supra note 94, at 9.
take over all child welfare functions by December 31, 1999. The suit alleges, inter alia, failure of the state to protect children, failure to allocate sufficient funds, failure to follow the statute, contract breaches, negligence, fraudulent misrepresentation, fraudulent concealment, and defamation. The agency had originally contracted to care for all new children entering state care each month, a number that averaged twelve children per month. After the death of Kayla McKean, the number of new cases each month exceeded 100, with sometimes as many as 170. When the Ranch first signed its contract, there were 200 children in care in Lake County; when the lawsuit was filed, there were 1500. The Ranch was providing care for fifty percent of DCF’s children, while receiving only thirty percent of funds allocated. The lawsuit is now on appeal.

Resource issues need to be squarely resolved by DCF. Without resolution, communities will either decline to step up to the plate, will be unable to meet quality performance measures, or will embroil the state in mounds of litigation.

B. Limitation of Legal Liability

Closely linked to the above discussion is the question of legal liability. While the state retains legal responsibility for children in its care, and sovereign immunity is waived for negligence in the performance of operational level activities of DCF caseworkers, a statutory cap limits the state’s

123. Petition, Lake County Boys Ranch v. Kearney, No. 00-3055, (Fla. 5th Jud. Cir., Lake County, FL) (Sept. 20, 1999), appeal pending, No. 99-2413 CA, (Fla. 5th Dist. Ct. App.).
124. Id.
126. Lake County Boys Ranch, No. 00-3055, at 12.
127. Id. In addition, officials of the Ranch were indicted in April 2000 for Medicaid fraud and grand theft for over-billing, double billing, and fraud in their billing practices. OPPAGA Draft, supra note 94, at 48.
128. See Dep’t of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258 (Fla. 1988) (calling actions of caseworkers investigating and responding to reports of child abuse operational level activities and legally actionable); Dep’t of Health and Rehab. Servs. v. Whaley, 574 So. 2d 100 (Fla. 1991) (calling the care of youth in detention an operational level activity and legally actionable). But see Dep’t of Health and Rehab. Servs. v. B.J.M., 627 So. 2d 512 (Fla. 1993) (holding that decisions about where to place a child and the kind of services to give them are planning level activities and not actionable); Lee v. Dep’t of Health & Rehab. Servs., 698 So. 2d 1194 (Fla. 1997) (holding that decisions about staffing and staffing levels are planning activities and not actionable).
financial risk. 129 Private providers, on the other hand, do not have sovereign immunity and can be held legally responsible for negligence in the delivery of their services.130

In the 1999 Florida Legislature, private providers attempted to secure passage of a law to make any community agency that delivers foster care and related services under contract with DCF an instrumentality of the state and, thus, subject to the same statutory damage cap as the Department.131 They feared that one or two major jury verdicts for children would drive them out of business. But some legislators were leery of opening the door to nonchild welfare corporations doing business with the state and worried that such a provision might reduce accountability among private providers and encourage the same indifferent services that led to child welfare tragedies.132

The 1999 Legislature required lead agencies and subcontractors to acquire a liability insurance policy of at least $1 million dollars per claim and $3 million per incident. The outcome was that the legislature also limited economic damages (past and future medical expenses, wage loss, and loss of earning capacity) to $1 million and noneconomic damages (pain and suffering) to $200,000 per claim.133 Community-based care providers secured some degree of lessened liability, but certainly liability remains of great concern in the decision to enter into contracts with the state.134

C. Preservation of Appropriate State Parens Patriae Role

Another attribute of successful community-based care is role clarity. Not only does Florida law and practice fail to clearly delineate the role of the state versus the role of communities in its "partnership," the very nature of the "partnership" described in Florida law135 may run afoul of state parens patriae and police powers to protect children. Implicit in the state's desire to "share costs and risks" is the desire to diminish the state's liability. This, however, may not be legally possible.

129. The cap is $100,000 per incident of negligence and $200,000 total per victim. FLA. STAT. § 768.28(5) (1999). A successful litigant would have to seek a special claims bill from the legislature to exceed the statutory cap. Id.

130. The United States Supreme Court, in Richardson v. McKnight, 521 U.S. 399 (1997), held that private persons performing governmental functions are not entitled to qualified immunity. Id. at 402.

131. THE FLORIDA LEGISLATURE, supra note 10, at 2.

133. FLA. STAT. § 409.1671(1)(f) (2000).

134. Interview with Kathryn O'Day, supra note 118.

135. See generally COMPREHENSIVE PLAN, supra note 20, at 5.
The state may constitutionally delegate "functions" that are traditionally performed by the government to a private entity, but it may not delegate governmental "power." A private entity exercises governmental power whenever it deprives a person of life, liberty, or property under government directive, giving rise to a claim of "state action." Under the "state action" theory, the state retains responsibility to protect the constitutional rights of the children and families over whom community-based care providers exercise control because the responsibility is nondelegable.

The nondelegation doctrine is particularly applicable to the child welfare system for reasons other than the "state action" theory. The state is prohibited from interfering in family life except to protect children because of: the state's constitutional police powers; and the state's common law parens patriae responsibilities.

Historically the care and protection of children was the prerogative of the crown, a prerogative which devolved upon the state, as sovereign, for example, the parens patriae. Parens patriae responsibilities are vested only in the state and are the basis for state laws which protect children. These powers cannot be surrendered, bargained, or contracted away.

In the community-based care context, the state can lawfully delegate the performance of state "functions," such as the delivery of shelter care, foster care, adoption, and other services to private providers, but it must retain the


137. Robbins, supra note 136, at 931.


141. 3 WILLIAM BLACKSTONE, COMMENTARIES 426–27.


143. See In re Beverly, 342 So. 2d 481, 485 (Fla. 1977). The Third District Court of Appeal in Simms v. Dep't of Health & Rehab. Servs., 641 So. 2d 957, 960–61 (Fla. 3d Dist. Ct. App. 1994) recognized that two branches of government, the courts and the executive branch, can simultaneously exercise protective powers over children but did not reach the question of sharing power with private entities.

"power" and duty to protect children assigned to these services. The state cannot delegate the removal of children from their homes to a non-governmental actor. Nor can the state delegate its ultimate responsibility for children once they are in state custody and deprived of their liberty. The logical implication of this analysis is that the state cannot require private providers to assume the costs and risks of fulfilling governmental obligations. The state can ask the community for assistance, but ultimately the state remains responsible for the adequacy of resources, caseload sizes, and the quality of services provided.

Practically speaking, then, the state is responsible for the costs of delivery of services in a community-based care environment, costs which are inevitably greater than in a completely state-run system. The state must maintain oversight and monitoring responsibilities over the child welfare system, including the obligation to represent the agency in juvenile dependency proceedings. On top of that fiscal obligation, the state must pay for a child's daily care and associated services delivered by community providers.

V. RECOMMENDATIONS AND CONCLUSION

Some say that privatization represents an abdication of the state's responsibility to promote the general welfare of its citizenry. On the other hand, because of its unique ability to foster meaningful, measurable and attainable outcome measures and performance standards, child welfare privatization represents one of the best strategies to date to cure the historic and current ills of the child welfare system.

Will Florida innovate or abdicate? In order to innovate, Florida must be true to the attributes of successful community-based care. This article has revealed that Florida is struggling to achieve at least two of those attributes: appropriate pricing and role clarity.


146. Some argue that the non-delegation doctrine has been for all practical purposes discredited, but it still holds firm in instances where the power delegated was never lawfully delegable. See A.A. v. State, 605 So. 2d 106, 108 (Fla. 1st Dist. Ct. App. 1992) (Ervin, J., concurring) (citing Chiles v. Children A–F, 589 So. 2d 260, 265–66 (Fla. 1991) for an excellent summary of these points).

147. For example, sheriffs' offices now conducting child protective investigations spend $654 per investigation, which is $183 more than DCF's average cost per investigation of $471. Miller, supra note 105, at 2A.

148. See OPPAGA Draft, supra note 94; Chiles v. Children A–F, 589 So. 2d 260, 267 (Fla. 1991) (agreeing that exercising powers that are not capable of delegation is an exercise in abdication of responsibility); see also Field, supra note 136, at 668–69.
If Florida will successfully innovate, it must accomplish the following reforms: clearly establish in law that, while community partnerships are beneficial, the ultimate responsibility for the welfare of dependent children lies with the state, i.e. the state is the lead or primary partner in community-based care; reinstate the prescribed duties of DCF and those its Secretary recently abolished, i.e. the duty to actually provide services, the duty to prevent or remedy the neglect, abuse, or exploitation of children, and the duty to aid in the preservation, rehabilitation, and reuniting of families; clearly establish in law that the ultimate fiscal responsibility for dependent children lies with the state, by enacting similar language to that which the legislature used in 2000 absolved local governments of responsibility, for example, the legislature does not intend by its privatization of foster care and related services that any private provider of child welfare services be required to assist in funding programs previously funded by the state; fund an adequate financial "Risk Pool" for community-based care; remove language from community-based agency contracts that negate the clear language of Florida law that requires the transfer of all appropriate state funds; appropriate sufficient funds to allow DCF to exercise its oversight and monitoring obligations while enabling community-based providers to succeed in daily care responsibilities; reduce the statutorily prescribed legal liability of private providers to an acceptable level.

The future of Florida’s children is in the hands of Florida’s elected officials. Rafts of litigation and media attention are poor substitutes for informed public policy and skilled public policy implementation. The path to innovation is clear, but unfortunately the spectrum of government abdication also lurks ominously on Florida’s horizon.

149. FLA. STAT. § 409.1671(1)(a) (2000).
Florida’s Foster Care System Fails Its Children

Timothy Arcaro*

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I. INTRODUCTION

Florida’s child welfare system fails to protect children placed in the state’s foster care system from neglect, physical abuse, sexual abuse, emotional abuse, and psychological harm.1 Florida’s systemic failure incorporates many

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elements concomitant to what is described as "a national collapse in child welfare services." A particularly disturbing aspect of Florida’s dereliction of duty is illustrated by the state’s handling of child sexual abuse complaints involving foster children, and the lack of appropriate attention given to foster children with sexual behavioral problems. The breakdown of systemic protections within the foster care setting creates an environment that has enabled further victimization. Failing to properly identify children with sexual behavior problems and placing those children with appropriate foster care placements and services has led to an implosion of incidents involving inappropriate sexual conduct between foster children. Legislative, administrative, and social indifference to the plight of Florida’s foster children has contributed to the catastrophic damage they have suffered under the auspices of "state care."

This article will attempt to draw attention to the pervasive problem of child sexual abuse in foster care by identifying circumstances that contribute to sexual victimization. Hopefully the discussion will illuminate the plight of child victims of sexual abuse and generate discourse on a new paradigm of protection initiatives for foster children. Part I of the article will explain child protection proceedings and how children enter the foster care system. Part II will describe common characteristics of state foster care systems. Part III will discuss traditional notions of child sexual abuse and their illusory application in the context of sexual behaviors that occur solely between minor children. Part IV will discuss the prevalence of child sexual abuse in the foster care system and the factors that increase the likelihood of such incidents. Part V

2. Roger J.R. Levesque, The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1994/1995) (attributing the overall failure of the American foster care system to three determinative factors: an upsurge in the number of children in need of care; an overburdened system and agencies; an inadequate number of foster parents).


4. Id. Accounting for the marked increase in child sexual abuse incidents the Report included the following: the failure to carefully plan foster care placements for children known to have sexual behavioral problems; the exposure of children to victimization through inappropriate placements; the failure to provide foster parents with necessary background information on children placed in their care which interferes with the parent’s ability to make informed decisions on supervision and care.

5. Id.

6. Id.
Arcaro will examine Florida's acquiescence in the systemic abuse of foster children, the state's failure to take corrective action on the issue of child sexual abuse, and the resultant impact on foster children placed in its care. Part VI will examine judicial intervention and the right of foster children to be protected from harm while in foster care. Finally, Part VII will conclude the article by addressing the need for increased attention to the problem of child sexual abuse in the foster care system.

II. CHILD PROTECTION PROCEEDINGS

It is well established that parents have a fundamental liberty interest in the care, custody, and raising of their children. Although those rights are "essential, they are not absolute." The government may invade the sanctity of family when a compelling governmental interest can be demonstrated to justify intrusion. The governmental interest must be especially pronounced where it is necessary to protect children from parents themselves. Under the doctrine of parens patriae, the state clearly has the authority to pursue the overwhelming societal interest in protecting children from abuse. This premise has lead to an ever-increasing intervention of state action, which has displaced the role of private actors in providing children with basic necessities, such as teaching and nurturing. Once the state removes a child from his

11. Natalie Loder Clark, Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare, 6 MICH. J. GENDER & L. 381 (2000) (parens patriae, literally "parent of the county," is defined as the government's power and responsibility, beyond state police power, to protect, care for, and control citizens who cannot take care of themselves—traditionally infants, idiots, lunatics, and others who have no other protector).
12. See Prince, 321 U.S. at 165–67; Myers, 810 F.2d at 1437 (holding that qualified immunity may apply where state officials take proper action to investigate abuse complaints when founded upon reasonable suspicion); see also Marsha Garrison, Child Welfare Decisionmaking: In Search of the Least Drastic Alternative, 75 GEO. L.J. 1745 (1987) (noting that deference should be given to the social consensus that the family should raise the child rather than the state, and that traditional family law clearly points to harm of the child as a requisite for state action).
parent, the state assumes the role of primary caregiver and the fundamental obligation of safekeeping.\textsuperscript{14}

In Florida, the competing interests of protecting children from abuse and neglect while respecting a parent’s fundamental right of family integrity often collide in state dependency proceedings. Child protection proceedings, known as dependency proceedings in Florida,\textsuperscript{15} authorize state intervention in suspected cases of child abandonment,\textsuperscript{16} abuse,\textsuperscript{17} or neglect.\textsuperscript{18} The legislative intent behind Florida’s child protection laws is: “[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state’s care.”\textsuperscript{19} Florida’s child protection laws closely resemble those enacted in numerous

\begin{itemize}
\item \textsuperscript{14} Hutchinson \textit{ex rel.} Baker v. Spink, 126 F.3d 895, 900 (7th Cir. 1997) (finding liability under 42 U.S.C. Section 1983 where a child was killed after county officials placed the child in a foster home and negligently supervised that home); see also LaShawn v. Dixon, 762 F. Supp. 959 (D.D.C. Cir. 1991) (holding that a section 1983 claim provided a federal remedy for violations of the federal Adoption Assistance Act; by virtue of official policy or custom, deprived children of rights conferred by the Act; and district officials deprived children in district’s foster care of their constitutionally protected liberty interests); Norfleet v. Dep’t of Human Servs., 989 F.2d 289 (8th Cir. 1993) (holding that children in foster care have constitutionally protected due process rights).
\item \textsuperscript{15} See generally FLA. STAT. § 39.01(14)(a) (2000) (defining a dependent as “a child who . . . is found by [the court] to have been abandoned, abused, or neglected by the child’s parent[s] or legal custodian . . . .”).
\item \textsuperscript{16} § 39.01(1) of the \textit{Florida Statutes} defines abandonment as:
A situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver responsible for the child’s welfare, while being able, makes no provision for the child’s support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations.
\textit{Id.}
\item \textsuperscript{17} § 39.01(2) (defining abuse as “any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child’s physical, mental or emotional health to be significantly impaired”); see also § 827.03(1)(b) (defining the crimes of child abuse as “an intentional act that could reasonably be expected to result in physical or mental injury to a child”).
\item \textsuperscript{18} § 39.01(45) (defining neglect as “when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment, or a child is permitted to live in an environment when such deprivation or environment causes the child’s physical, mental [condition] . . . to be significantly impaired”).
\item \textsuperscript{19} § 39.001(1)(a).
\end{itemize}
jurisdictions in what some suggest is the “federalization of child protection legislation.”

A child protective investigation is often initiated after child maltreatment allegations are reported to the Florida State Department of Children and Family Services (“DCF”). Allocations are then investigated by DCF or its agent to determine their merit. If a child’s safety with the custodial parent cannot reasonably be assured, the child may be physically removed and placed temporarily in shelter status. Due process entitles the parent to notice, a hearing, and proof of unfitness when the state endeavors to remove the child from the parent. In Florida, a hearing is scheduled within twenty-four hours of the child’s removal, as state law requires a detention or shelter hearing to determine probable cause of dependency and assess the need for continued shelter placement. In general, only a small portion of all substantiated cases are ultimately brought before the court for judicial intervention. These cases commonly require court intervention to involuntarily remove children from the care of their parents.

When DCF believes the conditions of maltreatment cannot be remedied by a voluntary agreement with the parents, a petition for dependency may be filed. If the parent consents or admits to the allegations to the dependency petition, or if the allegations in the petition are established by a preponderance

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20. Levesque, supra note 2 (describing the influence of CAPTA, AACWA, and ASFA in shaping state law to comport with federal requirements in order to obtain much needed federal reimbursement for child protection and child welfare proceedings); see also Stephanie Jill Gendell, In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation, 39 FAM. & CONCILIATION CTS. REV. 25 (2001). By July 1999, every state passed the requisite enabling legislation which mirrored the federal language.

21. §§ 39.201–.206 (reporting child abuse); see also Caroline T. Trost, Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments, 51 VAND. L. REV. 183, 188 (1998) (summarizing various state reporting obligations concomitant with federal regulations and implications and the implications of potential claims to immunity for reporting).

22. §§ 39.201–.206.

23. § 39.402. It should be noted that at the shelter hearing and anytime thereafter, the court does have the authority to place the child with a related adult or any other person as a temporary physical placement. Such decisions usually vest legal custody with the state agency and temporary physical custody with a temporary custodian. Additionally, under Florida law, any person has the right to file a petition for dependency—also known as a private petition.


25. § 39.402; see also FLA. R. JUV. P. 8.305.


27. Id.

of the evidence, an order of adjudication of dependency is entered. The case is then set for a disposition hearing where the court addresses placement issues and parenting defects through a case plan. When the child cannot be returned to the parent and no other adult is available to care for the child, the child is placed in the temporary legal custody of DCF and placed in foster care.

III. FOSTER CARE

Established as early as 1832, foster care in America was rooted in social concerns for orphaned, poor, and needy children. Until the end of the nineteenth century, this system of care was based on “child rescue philosophy.” In theory, modern foster care systems envision a temporary home like setting for the protection and nurturing of children unable to live in a parental home due to abuse, neglect, or abandonment. In reality, many states have failed to provide even the most rudimentary protections to foster children. For too many children, foster care is a dangerous place. Research

29. § 39.507.
30. Garrison, supra note 12 (specifying that judicial supervision of the case plan determining where the child will be placed, the steps that will be undertaken to return the child home, and the actions that will be undertaken to maintain parent-child ties is warranted in light of consistent reports of agency failure to plan and implement treatment programs carefully).
31. § 39.623. Foster care is but one placement alternative, for purposes of this article only foster care placements are considered as dispositional alternatives.
32. See Gendell, supra note 20.
33. Karoline S. Homer, Program Abuse in Foster Care: A Search for Solutions, 1 VA. J. SOC. POL’Y & L. 177, 182-83 (1993) (explaining the historical overview of foster care and the philosophical development of rehabilitating parents as being superior to removal and permanent placement of children outside the home).
35. See generally Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 HARV. C.R.-C.L. L. REV. 199 (1988); see also Sally Kestin, Failures of Foster Care; Saving Money Comes First, SUN-SENTINEL (Pittsburgh), Nov. 23, 1998, at 1A (detailing how children were consistently left in dangerous foster homes by child welfare officials because it takes time and money to move them; caseworkers were admonished for seeking to protect too many children); Shana Gruskin, DCF Slapped with Federal Suit, SUN-SENTINEL (Pittsburgh), June 15, 2000, at 1B (state class action filed on behalf of over 14,000 children in the Florida child welfare system alleging sexual abuse, beatings, malnutrition, torture, and neglect).
36. Emily Buss, Parent's Rights and Parents Wronged, 57 OHIO ST. L.J. 431, 439 (1996) (stating that the child welfare system plays out abysmally for children often exposing them to neglect, physical, and or sexual abuse); see also Mandelbaum, supra note 26 (citing to
suggests that once a child is removed from abusive parents, and placed in foster care, the child may not be safer from harm, which "undermines the belief that foster care placements are less dangerous and detrimental to children than remaining with their biological parents who have abused or neglected them." In fact, evidence to the contrary suggests that rates of abuse and neglect of children in foster care may be greater than those in the general population. The failure of foster care systems to follow minimum standards of care that may otherwise ensure care and protection of children, has led to increased rates of foster care abuse and neglect. The latest national data on child abuse fatalities suggest that a child is nearly three times more likely to die of abuse in foster care than in the general population. Children may also be at greater risk of abuse in nontraditional family structures, although few studies have actually tested the premise. With the national foster care population around 500,000 children, there is tremendous exposure to harm.

Foster care placements, although intended as a temporary respite on the service continuum, often become a final stopping ground for too many children. The average stay in foster care has risen over the past fifteen years with many children spending more than two years in care on a national level and over three years in Florida. The term "foster care drift" was adopted to describe the experience for too many foster children-protracted

S. Rep. No. 104-117, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492 testimony of Professor Richard Wexler at Senate Committee hearing, "foster care is not a haven. Often it is not even safe. Most people assume that removing children from their parents means removing them from danger and placing them in safety. Often it is the other way around.").

38. Levesque, supra note 2; Skoler, supra note 34.
43. Gordon, supra note 42, at 643.
44. Id. at 648.
stays in foster care which frequently involve numerous placements. The phenomenon is not new and has attenuated modern foster care systems since the late 1970s. Multiple placements have become a reality for most children in foster care. Research has firmly established that these placements have "a variety of negative consequences for children and adolescents."

IV. FEDERAL INFLUENCE ON STATE FOSTER CARE SYSTEMS

Systemic deficiencies associated with the child welfare system have evaded governmental eradication efforts over past thirty years. The federal government entered the child protection movement with the promulgation of the Child Abuse Prevention Treatment Act of 1974 ("CAPTA"). CAPTA was the first in a series of comprehensive federal legislation designed to combat child maltreatment and neglect. Primarily a funding act, CAPTA was designed to provide support for and improve operating standards of local and state child protective services. Of major significance, the act required states to pass reporting laws for known cases of child abuse, provide for prompt investigation of child abuse complaints, and also provide for the appointment


46. Gordon, supra note 42, at 643; see also LELA B. SOSTIN ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA, 82, 97–99 (1996) (citing studies from the late 70s and early 80s showing that seventy percent of children in foster care had been there for longer than one year, that thirty-four percent had been there for longer than four years or more, and that fifty-three percent experienced multiple placements).

47. Gordon, supra note 42, at 643.

48. Id. at 655 (quoting Robert George et al., A Foster Care Research Agenda for the 90s, 73 CHILD WELFARE 525, 537 (1994)).


50. Id.


53. § 5106a(b)(2)(A)(ii).
of a guardian ad litem to represent the best interest of child victims of abuse and neglect.\textsuperscript{54}

Based on child development theory, many policy makers of the 1970s became convinced that lengthy foster care placements resulted in significant harm to children.\textsuperscript{55} Foster children were being harmed in many other ways. Foster care placements were often utilized as a substitute for providing much needed reunification services to families.\textsuperscript{56} Children were not only remaining in foster care for extended periods of time, they were often experiencing multiple placements.\textsuperscript{57} Financial incentives were wrongly placed on keeping children with special needs in foster care instead of promoting their placement in pre-adoptive homes\textsuperscript{58} and reliable data was not being adequately collected on the number of children actually using foster care services\textsuperscript{59}—making it difficult, if not impossible, to evaluate program services.

The high cost of foster care maintenance and the increasing evidence that foster care was being misused\textsuperscript{60} prompted the federal government to revisit child welfare through the passage of the Adoption Assistance and Child Welfare Act ("AACWA") of 1980.\textsuperscript{61} The AACWA had three major goals: 1) to provide families with sufficient pre-placement, remedial, and support services to keep families together and prevent removal of the child; 2) to provide appropriate care and services to children in foster care; and 3) to reunify families where possible or expedite permanency by locating permanent adoptive homes for children that could not be reunited with their parents.\textsuperscript{62}

\textsuperscript{54} § 5106a(b)(2)(A)(ix).


\textsuperscript{56} Levesque, \textit{supra} note 2, at 14.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES} 290 (1991). The Commission found that children are removed from their families prematurely or unnecessarily because federal reimbursement provides a strong financial incentive to do so.

\textsuperscript{60} Levesque, \textit{supra} note 2, at 14.


\textsuperscript{62} Gordon, \textit{supra} note 42, at 638; Levesque, \textit{supra} note 2, at 14–15.
Although the AACWA did not expressly address child safety, it made considerable progress to ensure that states would move forward with a comprehensive approach to meet basic human needs of children placed in foster care and required that states do a better job documenting their efforts.

States were able to demonstrate a procedural conformity with the AACWA but this superficial compliance subverted the substantive value of the act. AACWA anticipated that states would report to Congress on compliance, but it was the duty of the states to police themselves. This "called for [state] officials to make major, painful changes, and if they did not effect these changes, to report themselves so that the federal government could cut off their funding." As states came to rely on federal funds, they reported compliance with the AACWA and funding for a failing system continued to flow. Despite the high hopes of foster care reform, the AACWA failed to realize its objectives.

Due to the system of federal reimbursement for foster care services, the AACWA had the "unfortunate effect of contributing to the unprecedented rise in the number of children placed in foster care." The AACWA's financial incentive scheme provided for "partial reimbursement to state and local agencies for the cost of keeping children in foster homes." Conversely, it failed to provide reimbursement for other social services designed to rehabilitate the child/parent relationship within the home setting. Other than the threat of lost funding, the AACWA did not allow for appropriate remedies

63. Herring, supra note 55, at 33 (describing how noncompliance with the dictates and intent of ASFA will minimize the overall impact of the act).
64. Levesque, supra note 2, at 14.
66. Pursuant to the AACWA, case planning, review hearings, and judicial scrutiny were all designed to give the Act meaning. The result was different. Child welfare agencies developed cookie-cutter forms for case plans, review hearings were cursory at best with the court spending less than ten minutes to review cases, and judicial scrutiny gave way to system pressures. Herring, supra note 55, at 335.
67. Id.
68. Id. at 336.
69. Id.
70. Id. (explaining the realities behind a flawed funding system for AACWA).
71. Levesque, supra note 2, at 19.
72. Stacy Robinson, Comment, Remedi...
for enforcement.\textsuperscript{74} Although the legislature’s efforts to incorporate child development theories and permanency planning concepts into the AACWA were laudable, they simply had no chance for success of survival in the resource poor trenches of the child public welfare system.\textsuperscript{75}

In an effort to address many of the identified deficiencies in the nation’s foster care system, former President Clinton signed the Adoption and Safe Families Act ("ASFA") into law on November 19, 1997.\textsuperscript{76} The ASFA has two primary objectives: “to prevent children from being returned to unsafe homes and [to] diminish the “foster care drift” by finding safe, loving, and permanent homes for children who cannot be reunited with their families.”\textsuperscript{77} Again, foster care legislation clashes with systemic realities as the ASFA failed to address the most frequently identified problems which plague every foster care system: insufficient funding for services;\textsuperscript{78} lack of training for social workers, supervisors, attorneys, and judges; overwhelming caseloads; foster and adoptive parent recruitment;\textsuperscript{79} and funding for post-adoption services.\textsuperscript{80} The ASFA’s nonsensical financial system of reimbursement between federal and state government continues to reward states for leaving children in foster care, thus undermining state incentives.\textsuperscript{81} In the end, the legislative scheme of the ASFA is essentially the same as the AACWA—state court enforcement through the review of individual cases, combined with rather lax periodic file audits conducted by the federal Department of Health and Human Services.\textsuperscript{82} Historically, the system of enforcement has produced unimpressive results.

\textsuperscript{75} Herring, supra note 55, at 333.
\textsuperscript{76} Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in various sections of Title 42 of the United States Code).
\textsuperscript{77} 126 CONG. REC. H2012, at 2017.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Gendell, supra note 20, at 31.
\textsuperscript{82} Gordon, supra note 42, at 639 (detailing the inconsistent logic behind the ASFA that would jeopardize state funding for services if in fact states were more effective in reducing foster care populations).
\textsuperscript{83} Herring, supra note 55, at 340.
V. DEFINING CHILD SEXUAL ABUSE

The term "child sexual abuse" can be employed to conceptualize a variety of sexually oriented behaviors involving a minor child. Stereotypical notions of child sexual abuse portray children being victimized exclusively at the hands of adult perpetrators. Stereotypical notions of child sexual abuse portray children being victimized exclusively at the hands of adult perpetrators. A growing body of literature pertaining to child sexual abuse indicates that principal actors in many abusive incidents are sexually aggressive minor children with sexual behavior problems. It is important to note that research of this subject is still in its infancy stages and must be considered preliminary. However, the fact remains that we have only recently begun to conceptualize child sexual abuse as a phenomenon occurring within the context of child sexual behavioral problems.

Given this relatively new perspective, existing definitions of child sexual abuse need to be examined and retooled to fit our expanding knowledge and comprehension of the subject. The American Academy of Child and Adolescent Psychiatry defines child sexual abuse as "sexual behavior between a child and an adult or between two children when one of them is significantly older or uses coercion ...." CAPTA defines sexual abuse as "the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in or assist any other person to engage in, any sexually explicit conduct for the purpose of producing a visual depiction of such conduct ...." Another authority defines sexual abuse in terms of

84. Id.
86. Sue Righthard & Carlann Welch, U.S. Dep't of Justice, Juveniles Who Have Sexually Offended 19–21 (2001) (explaining that many of the conclusions reached are based upon clinical observations and empirical data, and that longitudinal studies must be conducted to confirm the findings).
87. See generally id. (detailing an up-to-date review of the literature and discussing the pragmatics of professional work with juveniles who have committed sex offenses).
88. See American Academy of Pediatrics, Committee on Child Abuse and Neglect, Guidelines for Evaluation of Sexual Abuse of Children, 87 PEDIATRICS 254 (1991). The perpetrator and the victim may be of the same sex or the opposite sex. Id. The sexual behaviors include touching breasts, buttocks, and genitals, whether the victim is dressed or undressed; exhibitionism; fellatio; cunnilingus; and penetration of the vagina or anus with sexual organs or with objects. Id. It is important to consider developmental factors in assessing whether sexual behaviors between two children are abusive or normative.
89. CAPTA, supra note 49. The Act defines child maltreatment as "[t]he physical and mental injury, sexual abuse, neglected treatment or maltreatment of a child under age 18 by a person who is responsible for the child's welfare ... ." Under this limited definition,
Physical contact and noncontact. Criminal statutes often characterize sexual abuse in terms of acts that are *per se* sexual abuse and others that qualify as abuse based on the actor's intent. Florida law has endeavored to define juvenile sexual abuse as "any sexual behavior which occurs without consent, without equality or as a result of coercion." Only a parent, legal guardian or caregiver could be a perpetrator of child abuse or neglect. See also Diana J. English, *The Extent and Consequences of Child Maltreatment*, in 8 *The Future of Children* 1, *Protecting Children from Abuse and Neglect*, 39 (Richard E. Berkman, M.D. ed., 1998).


Acts that are per se or presumed to be sexual include the (1) insertion of a penis into another's vagina, mouth or anus, or (2) the insertion of some other object (including oral contact) into a vagina or anus, other than a privileged insertion for medical or child care purposes (such as an enema) . . . Other acts that are sexual, by virtue of the actor's intent to satisfy his desires or arouse desire in another, include: fondling of private areas (through touching of skin or through clothing), including the genital or anal region, thighs, or breasts of the desired person (or inducing the desired person to do the same to the actor or another); other sexualized touching including frottage (rubbing of actor's genitals, often through clothing, against another); kissing or french kissing; nontouching acts such as voyeurism and exhibitionism (including masturbation in the presence of a child); explicitly sexualized speech.

Id.

92. Section 39.07(7) of the *Florida Statues* provides:

Alleged juvenile sexual offender means (a) a child 12 years of age or younger who is alleged to have committed a violation of chapter 794, chapter 796, chapter 800, s. 827.071 or s. 847.0133; (b) [a] child who is alleged to have committed any violation of law or delinquent act involving juvenile sexual abuse. 'Juvenile sexual abuse' means any sexual behavior which occurs without consent, without equality, or as a result of coercion. For purposes of this paragraph, the following definitions apply: 1) 'Coercion' means the exploitation of authority or the use of bribes, threats of force, or intimidation to gain cooperation or compliance; 2) 'Equality' means two participants operating with the same level of power in a relationship, neither being controlled nor coerced by the other; 3) 'Consent' means an agreement, including all of the following: a. [u]nderstanding what is proposed based on age, maturity, developmental level, functioning, and experience; b. [k]nowledge of societal standards for what is being proposed; c. [a]wareness of potential consequences and alternatives; d. [a]ssumption that agreement or disagreement will be accepted equally; e. [v]oluntary decision; f. [m]ental competence.
As indicated, these definitions are clearly relevant in the context of adult sexual abuse of minor children. They incorporate concepts, such as knowledge, informed consent, intent, capacity, and purpose. However, they are less helpful in assisting with the identification, classification, and characterization of sexual conduct occurring between developmentally young children with limited cognitive abilities. Whether conduct involving a young sexually aggressive child with sexual behavioral problems may be equated to child sexual abuse is a difficult question of law and one not easily answerable by behavioral scientists.  

Such incidents of sexual conduct involving similarly situated minor children blur the parameters of normative or acceptable behaviors on the continuum of child sexual development. Therapists often differentiate deviant child sexual behaviors from exploratory child sexual play based on the dimension of power. The disparity of power, control, and authority are often identified as factors consistent with child sexual abuse and not exploratory behavior.

Imprecise and inconsistent definitions of child sexual abuse make uniform reporting of these incidents difficult. It is suggested that a highly normed measure, such as the CSBI-3, be employed to distinguish the extent to which children engage in developmentally expected and unexpected sexual behaviors. A standardized inventory may be more accurate and consistent in detecting incidents of child sexual abuse. The magnitude of child sexual abuse incidents must be recognized in order to fashion appropriate preventive measures.

93. Martin, supra note 85, at 292 (explaining the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") indicates clinical judgment must be used to take into account both the maturity of the victim and the age difference between the parties when assessing the appropriateness of sexualized contact between one adolescent and the other).
94. Id. at 290 (explaining that a concise and yet inclusive behavioral science definition of juvenile sex offending has proven to be elusive).
96. Martin, supra note 85, at 291 n.104.
97. Friedrich, Child Sexual Behavior Inventory, The Clinical Use of the Child Sexual Behavior Inventory: Frequently Asked Questions. [hereinafter CSBI]. The APSAC Advisor, 8. 1–20, measures frequency that children six to twelve years of age have engaged in a variety of sexual behaviors over six month period as indicated by their parents.
99. CSBI, supra note 97.
If prosecutors, mental health professionals, and society in general portray adults accused of child sexual abuse as abnormal and perverse monsters, what label(s) shall we adopt for children whose sexual behavioral problems stem from their own past sexual victimization? Some suggest that criminalization of childhood sexual behavior promulgates terms such as “child perpetrator” and “very young sexual offender.” No one disputes that when a child has been sexually abused by the intentional act of a parent or through negligent supervision of the parent, the child has truly been victimized. But what happens if that child victim then sexually assaults another child? Does the original label of victim now change to that of perpetrator? If so, does this represent a fundamental shift in the paradigm of child sexual victimization?

VI. CHILD SEXUAL VICTIMIZATION IN FOSTER CARE SYSTEM

The highly publicized “Battered Child Syndrome” drew significant attention to the issue of child maltreatment in the late 60s and early 70s. In addition to comprehensive child protection initiatives launched by the federal government, significant state resources have been devoted to the detection and prosecution of child abuse offences. Incident rates of child sexual abuse appear to have increased over time although it is unclear if this increase is attributable to more stringent reporting requirements, data collection, or simply an increase in the actual number of incidents. There has also been a significant increase in the number of prosecution-friendly statutes that have appeared on the child maltreatment landscape during the

100. Underwager, supra note 95. The authors take the position that our current sexual abuse system promotes an antisexual view of human sexuality. This view is seen in the negative depiction of sex in sexual prevention programs and the criminalization of child sexual behavior.

101. See Goldstein, supra note 91, at 196.
103. Tomison, supra note 41.
104. Roger J.R. Levesque, Prosecuting Sex Crimes Against Children: Time for “Outrageous” Proposals?, 19 L. & PSYCH. REV. 59, 60 (1995). There has been an explosive growth in the research and commentary on the plight of sexually abused children, which has resulted in vast legal reforms providing them with needed protection and treatment. These reforms have manifested through legislative and evidentiary considerations designed to enhance prosecution efforts. Id. at 60–79.
105. Sana Loue, Legal and Epidemiological Aspects of Child Maltreatment, 19 J. LEGAL MED. 471, 475 (1998) (citing to results from studies which reflect a significant statistical increase in reports of child sexual abuse; it should also be noted that a system-wide failure to collect reliable data regarding incidents of child sexual abuse in foster care interfere with efforts to assess the scope of this problem).
past two decades. In contrast, very little consideration has been given to the post-litigation life of child maltreatment victims in general, and specifically, child sexual abuse victims, placed in foster care systems ill-equipped to respond to their particularized needs.

Until recently, society has paid little attention to the issue of child sexual abuse as it pertains to incidents occurring exclusively between minor children. It was not until the late 1980s that children with sexual behavior problems were even recognized as a clinical population having unique needs. The fact that children and adolescents commit acts of sexual abuse is a relatively recent discovery. It is now estimated that nearly 40% of all child sexual abuse is performed by youth less than twenty years old, with six to twelve-year-old children being the source of thirteen to 18% of all substantiated incidents of child sexual maltreatment.

One study found the rate of “substantiated” cases of sexual abuse in foster care to be more than four times higher than the rate in the general population. In group homes, the rate jumped to twenty-eight times higher than in the general population. In a study of 127 children with sexual behavior problems, 84% had been sexually abused, 48% had been physically abused, 33% had been emotionally abused, 18% had been neglected, and more than 56% of the children had experienced multiple forms of maltreatment.

106. See generally John E. B. Myers, Evidence in Child Abuse and Neglect Cases, Vol. 1, (2d ed. 1992) (containing a comprehensive treatise on significant cases and decisional law generated from criminal and civil litigation of child and abuse neglect).

107. Id.; see generally Levesque, supra note 104, at 61 (detailing the trend of criminalization and prosecution for sex crimes against children and the concomitant effect of diverting focus, attention, and financial resources). This fundamental shift in priorities has adversely affected the search for other models of child sexual maltreatment, prevention, and control. There have been few general and genuine policy reforms aimed at helping children deal with victimization. Id. at 60–79.

108. Sander N. Rothchild, Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths a Second Chance, 4 J.L. & POL’Y 719, 720 n.7; see also Kathryn Casey, When Children Rape, LADIES HOME J., June 1995, at 112.

109. Pithers, supra note 98.
110. Tomison, supra note 41.
111. Pithers, supra note 98, at 200.
112. NCCPR supra note 40 (citing Mary I. Benedict & Susan Zuravin, Factors Associated With Child Maltreatment by Family Foster Care Providers, John Hopkins University School of Hygiene and Public Health, 28, 30 (1992)).

113. Id.
114. Pithers, supra note 98, at 208.
115. Id.
Sexual acting out by foster children poses serious problems for the foster care administrators, caseworkers, placement custodians, and other children in the home. Not only do children with sexual behavior problems present a threat of harm to themselves, they also present a threat of harm to others. The following factors may substantially impact the likelihood of child sexual victimization in foster care setting.

A. Investigating Complaints of Child Sexual Abuse in the Foster Care System

CAPTA required states to develop child protection policies and procedures to receive and investigate reports of child maltreatment and neglect. Although states have adopted investigative priorities, many jurisdictions failed to adopt any meaningful investigative response to allegations of child sexual abuse emanating from children placed in the state's own foster care system. Nationwide, the overall number of reports for child maltreatment has increased by 41% since 1988. The actual amount of abuse in foster care is likely to be far higher than reported figures indicate, as agencies have an inherent incentive not to investigate such reports. For child welfare agencies to investigate their licensed foster care agents means they would be, in effect, investigating themselves. Given the agencies' lawful discretion to physically move children placed in their temporary legal and physical custody from one placement to another, many complaints of foster children

117. Pithers, supra note 98.
118. Grand Jury Report, supra note 3; Mushlin, supra note 35.
119. Id.
120. Mushlin, supra note 35 at 206 (indicating that rates of child abuse in foster care may be higher than anyone imagines). One study found that one foster care agency neglected to report 63% of suspected child maltreatment, although state law required such reports. Id. at 207 (citing D. Caplovitz & L. Genevie, Foster Children in Jackson County, Missouri: A Statistical Analysis of Files Maintained by the Division Of Family Services, 83–84 (1982) (unpublished report)). Another study indicated that although seventy-five cases of abuse, neglect, or sexual abuse were reported from one area, “virtually no reports had been documented” by the official child abuse reporting system. Id. at 206–07 (citing Gil, Institutional Abuse of Children in Out-of-Home Care, 3 CHILD & YOUTH SERVS. 7, 8 (1981)).

121. Grand Jury Report, supra note 3 (stating that DCF officials would not report allegations to the abuse agency registry for investigation by the department and often failed to inform the court of allegations of abuse in foster care placements).
have escaped judicial scrutiny. In Florida this meant that DCF agents could change a child's placement when allegations of abuse arose instead of investigating the allegations or bringing the matter to the court's attention.

Child welfare officials appear to have been tacitly involved in what amounts to a "conspiracy of silence" similar to that of public school officials who have failed or refused to address child sexual abuse in their districts. This institutional failure encompasses mistakes made as result of negligent supervision, while others are attributed to an intentional course of conduct to conceal the true dimensions of the problem. On both accounts, DCF has demonstrated a tremendous capacity to tolerate child sexual abuse incidents in the state foster care population.

Agency discretion to selectively accept and investigate allegations of abuse has particularly harmed children in foster care. Investigative policies that do not incorporate appropriate responses to allegations of child sexual abuse in foster care are irresponsible and perpetuate the problem. Equally unacceptable are administrative policies that refer sexual abuse allegations of foster children to law enforcement officials as a singular response to the allegations. This is especially true when vulnerable children remain in harmful placement regardless of prosecutorial merits of their allegations.

The investigative techniques employed by the agency can also compromise the integrity of sexual abuse allegations. Child sexual abuse encompasses complex familial and psychological dynamics that often require training and development.

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122. See, e.g., FLA. STAT. § 39 (2000) (indicating that children placed in legal care and custody of the department are wards of the state, but DCF has an obligation to place those children). However, no state ordinance requires DCF to report to the court when foster care placements are made or changed, which seems to indicate that DCF has the authority to place children in care and monitor placements without court intervention.

123. The task of licensing is delegated to DCF, the child placing agency; licensing of DCF agents is under the exclusive control of DCF.


125. Id.


127. See id. at 15 (indicating that DCF may have intentionally concealed information from the court); see also Kestin, infra note 136.

128. Grand Jury Report, supra note 3, at 51. The report noted that the district needs to follow its legislative mandate—safety of the child is its overriding concern.

129. Id. at 16.

130. Id. at 11.
expertise to recognize.\textsuperscript{131} Although many jurisdictions rely on evaluations from a sexual abuse assessment center or a multidisciplinary team\textsuperscript{132} in cases of suspected sexual abuse, the child protective investigator must have the requisite skill to recognize the warning signs due to the secretive nature of the abuse. Investigating reports of abuse which occur in an institutional setting also require specialized training, as these allegations frequently involve children having multiple behavior problems that may interfere with their ability to communicate accurate information in a reliable fashion.\textsuperscript{133} Foster parents, as well as other service contractors, may have financial, and potentially, penal interests that influence their decision to report incidents of abuse or otherwise cooperate with investigative efforts.\textsuperscript{134}

B. Incomplete and Inappropriate Records

Children in foster care present a challenging array of behavioral, psychological, educational, medical, and psychiatric problems.\textsuperscript{135} The range of mental health needs for foster children is so varied, that multiple children placed in a single home can frustrate and exasperate even the best foster parents.\textsuperscript{136} Although foster children suffer disproportionately from serious emotional, medical, and psychological disabilities, they generally receive woefully inadequate care and often no therapeutic intervention at all.\textsuperscript{137} Accurate mental health records identifying children known to present a risk of

\textsuperscript{131} \textbf{ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES} 47 (ABA 1999).

\textsuperscript{132} \textbf{DONALD C. BROSS ET AL., FOUNDATIONS OF CHILD ADVOCACY} (1997). Multidisciplinary teams are designed to bring together experts from various disciplines to diagnose and treat child abuse out of recognition that abuse itself is a complex social problem that may have many underlying causation factors. \textit{Id.}

\textsuperscript{133} Sally Kestin, \textit{Volatile Environment Sometimes Leads to Abuse Investigations Lack Depth, Children's Input: Throwaway Kids}, SUN-SENTINEL (Broward), Nov. 11, 1999, at 6A.

\textsuperscript{134} Grand Jury Report, \textit{supra} note 3. Civil Liability, criminal liability, licensing, and foster care placements are affected by the treatment the child receives. \textit{Id.;} Mandelbaum, \textit{supra} note 26, at 15.

\textsuperscript{135} Mandelbaum, \textit{supra} note 26, at 17 (citing Robert Pear, \textit{Many States Fail to Meet Mandates on Child Welfare}, N.Y. TIMES, Mar. 17, 1996, at A1 ("91.5% of children were found to have at least one abnormality in at least one body system and more than half of the children's health problems warranted the need for referrals for medical services").

\textsuperscript{136} Sally Kestin, \textit{System Pulls Kids From Bad to Worse: Abuse Neglect, Apathy—The Failure of Foster Care}, SUN-SENTINEL (Ft. Lauderdale), Oct. 29, 1998, at 1A.

harm to themselves or others, especially from their own sexual behavioral problems, could serve as a catalyst for protecting the entire foster care population.\textsuperscript{138} Formulating placement decisions with inaccurate information can be as disastrous as failing to communicate this critical background information to the foster parent.\textsuperscript{139} With inadequate background information, recognizing foster children with sexual behavioral problems may be difficult as they engage in developmentally expected sexual exploration in addition to more unexpected and intrusive acts.\textsuperscript{140}

Detailed information on every child in the foster care system was a prerequisite for comprehensive case planning which was to serve as the cornerstone of AACWS.\textsuperscript{141} In support of this goal, state foster care agencies were required to develop comprehensive record keeping systems to track children entering foster care.\textsuperscript{142} Agencies were obliged to review the academic and health records of the child and to keep those records current to enhance the foster parent’s ability to meet the child’s needs.\textsuperscript{143} Agencies found themselves overwhelmed with paperwork requirements.\textsuperscript{144} Caseworkers, already overworked and underpaid, had to prioritize immediate case demands over book-keeping responsibilities.\textsuperscript{145}

These missing records would also enlighten and assist the court at judicial review hearings,\textsuperscript{146} which are designed to ensure agency accountability and reunification efforts.\textsuperscript{147} For many states, literal compliance with AACWS unfortunately denigrated into the perfunctory task of filling out cookie-cutter forms while paying only lip service to the spirit and intent of the act.\textsuperscript{148} These

\begin{itemize}
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Kestin, \textit{supra} note 139.
\item \textsuperscript{140} Pithers, \textit{supra} note 98, at 204.
\item \textsuperscript{141} Atwell, \textit{supra} note 74, at 620 (stating that the case plan must provide specific information and provide for ensuring every child in foster care receives “proper care” which is defined to include both the physical and emotional well-being of the child); \textit{see also} Garrison, \textit{supra} note 12.
\item \textsuperscript{142} Guggenheim, \textit{supra} note 45. A federal law requiring better statewide record keeping for children in foster care makes it easier than ever before to learn a great deal about children that enter foster care. \textit{Id.}
\item \textsuperscript{143} Atwell, \textit{supra} note 74.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Gordon, \textit{supra} note 42. The AACWS tripled the number of issues lawyers and judges must deal with in juvenile proceedings. For example, the expansion of these hearings requires social workers to document far more about children thereby devoting less time to other priorities. \textit{Id.}
\item \textsuperscript{146} \textit{See generally} 42 U.S.C. \textsection 675(1)(B) (1992).
\item \textsuperscript{147} Id.
\item \textsuperscript{148} CAPTA, \textit{supra} note 49; \textit{see also} Herring, \textit{supra} note 55, at 335.
\end{itemize}
standard forms and procedures did little to facilitate the conveyance of information to the court. Agencies come to enjoy what is essentially an exclusive license to control information disseminated to the court. This means critical information regarding foster care developments may bypass judicial scrutiny when the agency intentionally or negligently, failed to communicate that information to the court.149

C. Caseload Responsibilities

Child protection workers carry caseloads often much higher than recommended, making the expectation of quality performance often unrealistic.150 Caseloads have grown beyond the worker’s ability to provide minimal care to their constituents.151 Although the National Child Welfare League recommends only fifteen cases per foster care worker,152 many systems are so overburdened that caseworkers are required to handle caseloads of forty or more cases.153 The Supreme Court of Florida has consistently stated, “reasonable workloads are essential to the proper functioning of dependency courts in performing multiple important reviews and hearings required of them by law and necessary for the best interests of children.”154 However, caseworkers must often prepare time consuming reports documenting six months worth of case developments for each review hearing even though these proceedings are apportioned fifteen minutes or less.155

Caseworkers have become easy targets for venting system frustrations and often recognize the indefensible position in which their agency has placed

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151. Levesque, supra note 2, at 10.
152. NCCPR, supra note 40; Mandelbaum, supra note 26.
153. Gordon, supra note 42, at 679 (“[s]ocial workers and their supervisors regularly handle more cases than recommended by licensing organizations: in some jurisdictions, more than four times more”); see also Gendell, supra note 20, at 34.
154. M.W. v. Davis, 756 So. 2d 90, 108 (Fla. 2000) (holding no due process violation existed where a child adjudicated dependent and placed in the legal custody of the state protection agency, was involuntarily hospitalized in a locked mental health facility for six weeks, without prior evidentiary hearing on placement). Id. at 109.
155. Gendell, supra note 20, at 34 (citing Melissa D. Protzek, A Voice for the Children: Court Appointed Special Advocates are Trying to Make a Difference One Case at a Time in the Lives of Children in the Juvenile Justice System, 22 PA. LAWYER 26, 26 (2000). Juvenile court judges in urban areas have about fifteen minutes to decide the fate of abused and neglected children and often do so without being informed of all the facts. Id.
They do not have sufficient time to work closely with individual families even though their cases obviously present difficult and complex issues that are not quickly ameliorated. Agencies that do not or cannot attract qualified employees may simply shift the burden onto the current caseworkers. The resulting lack of staff and time causes some caseworkers to simply fabricate case details they have not otherwise been able to confirm.

Clearly, some problems facing the child welfare system are budgetary and financial in nature, while others stem from a lack of "credibility and accountability." No child welfare agency should tolerate policies for caseworkers that intentionally provide erroneous information to the court, fabricate reasons for shoddy work, or create false documents instead of completing assignments.

D. Therapeutic Indications

By definition, children placed in foster care have already experienced some type of maltreatment or neglect by those charged with their care. These children enter the system psychologically and emotionally vulnerable. It is estimated that approximately 30% of all children in foster care have severe emotional, behavioral, or developmental problems—physical health problems are also common. The prevalence of such disorders in this population complicates the task of identifying children that have undiagnosed sexual behavioral problems. Child victims of sexual abuse commonly experience a variety of negative impacts from the victimization, such as "delayed recall, negative self-image and body image, eating disorders, running away and delinquency, anxiety and depressive disorders, participation in high risk sexual behaviors, feelings of helplessness and self-blame, difficulty with relationship and with sexuality, and underdeveloped spirituality." One authority on child sexual abuse suggests that only two symptoms are consistently found more frequently in sexually abused children than non-abused children: post-

157. Mushlin, supra note 35.
159. Id. at 50 (holding "[t]he Department must emphasize to its employees that classification of records or false reports to the courts is not only intolerable but illegal").
160. Id.
161. Green, supra note 137, at 5; see also Mushlin, supra note 35, at 204.
162. Green, supra note 137, at 5.
163. Loue, supra note 105, at 480–81.
traumatic stress disorder and developmentally unexpected sexual behaviors.\textsuperscript{164} It is also suggested that the etiologically significant factor in the emergence of abusive sexuality is exposure to trauma, not a unique associate of sexual victimization.\textsuperscript{165} This factor expands the potential threat of sexual abuse far beyond those children that may presumptively be suspected as having sexual behavioral problems due to a history of prior sexual victimization. Research data also convincingly establishes that deviant sexual interests can have an onset early in development, underscoring the need for early intervention.\textsuperscript{166} Once children that have sexually offend, or are at risk of being sexually offending, have been identified, comprehensive assessment is required to facilitate treatment and intervention strategies.\textsuperscript{167}

Placement of children with extended family members often fails to provide the child with emotional and psychological support necessary to foster therapeutic intervention.\textsuperscript{168} Research has demonstrated that support for the child is especially critical in facilitating symptomatic improvement in very young children, who are particularly dependent on parents for physical and emotional needs.\textsuperscript{169} Not surprisingly, kinship placements often form the most reliable form of placement alternatives.\textsuperscript{170} Although many mental health experts believe that removal of a sexually abused child from a nonoffending

\textsuperscript{164} Pithers, \textit{supra} note 98, at 206.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 201. The study showed that more than half of adult offenders (53.6\%) report becoming interested in at least one deviant sexual interest before age eighteen. \textit{Id.}
\textsuperscript{167} Righthard, \textit{supra} note 86, at 27. Due to the heterogeneous nature of juveniles that have offended, comprehensive assessment should include assessment of each juvenile’s needs, such as psychological, social, cognitive, and medical, family relationships, risk factors, and risk management possibilities. \textit{Id.}
\textsuperscript{168} Levesque, \textit{supra} note 2, at 26.
\textsuperscript{169} Judith A. Cohen & Anthony P. Mannarino, \textit{Factors that Mediate Treatment Outcome of Sexually Abused Preschool Children: Six- and 12-month Follow-up}, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 44 (1998). Children living in short-term foster home placements were not included in this study which hypothesized that two particular factors: "parental emotional distress regarding the abuse and lack of parental support of the child, would predict poorer child outcomes at both follow-up points." \textit{Id.} The findings demonstrate the importance of appropriate parental support on the short-term function of sexually abused children. \textit{Id.} The study highlights the importance of parental reaction to the abuse and including parents in the treatment of young sexually abused children. In particular, the study reveals the importance of focusing on these issues during parental therapy. \textit{Id.; see also E. Deblinger et al., Sexually Abused Children Suffering Posttraumatic Stress Symptoms: Initial Treatment Outcome Findings; Child Maltreatment 1:310–321 (1996).}
parent may be counter productive to the therapeutic interests of the child, safety concerns will prevail.\textsuperscript{171}

E. \textit{Inappropriate Placements}

Foster care placement decisions should be given the highest degree of care—since the state is substituting its decision for that of the parent.\textsuperscript{172} There is strong evidence to suggest that inappropriate foster care placements, which mimic the child’s abusive home environment, only serve to further damage the child and increase the likelihood of serious emotional and psychological harm.\textsuperscript{173} Children suffer additional victimization and often irreparable harm when child welfare agencies have failed to establish appropriate pre-placement criterion for foster care placements or otherwise fail to accurately evaluate the individual dynamics of each child’s placement.\textsuperscript{174} Placements in overcrowded and inadequate foster homes fail to provide for children’s basic needs.\textsuperscript{175} Beyond this, some governmental officials have consciously abdicated their obligation to provide remedial protection for foster children even where they have specific knowledge of threatened or actual harm to such children.\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{171} Cohen, \textit{supra} note 169.
\item \textsuperscript{172} T.M. v. Carson, 93 F. Supp. 2d 1179, 1187 (D.C. Wyo. 2000). The professional judgement standard was appropriate to determine liability for placement decision of child welfare workers who placed children with sexually abusive foster parent. \textit{Id.} at 1195.
\item \textsuperscript{173} Pithers, \textit{supra} note 98, at 209.
\item \textsuperscript{174} Carson, 93 F. Supp. 2d at 1194.
\item \textsuperscript{175} Mandelbaum, \textit{supra} note 26, at 175 (explaining that children in foster care fail to have their mental, emotional, and physical health needs met).
\item \textsuperscript{176} See, \textit{e.g.}, LaShawn, 762 F. Supp. 959, 996–97 (D.D.C. 1991). In a class action brought by children in foster care, the court held:
\begin{itemize}
\item The facts in this case established beyond any doubt that defendants have failed to protect these plaintiffs from harm—whether physical, psychological, or emotional—by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things . . . [K]nowledge of these problems and refusal to take action confirm that the problems are not isolated, but amount to “a persistent pervasive practice . . . decisions made by officials within the DHS have not been the result of the exercise of professional judgement . . . . These failures are not the result of choosing among several professionally acceptable alternatives. The failures are the result of making no choices at all. \textit{Id.} at 995.
\end{itemize}
\end{itemize}
Foster children desperately need stability, security, and consistent nurturing.\textsuperscript{177} Multiple placements cause emotional bonds to break as children learn to develop shallow roots in relationships with others, which may interfere with normal and healthy attachments.\textsuperscript{178} "Imagine as an adult, you go through a courtship, a marriage and a divorce—now imagine you do that thirteen times in a year—that's what is happening to these [foster] children."\textsuperscript{179} Placement options may be so limited for teenage children that foster care workers permit them to sleep in their own work offices or even motel rooms.\textsuperscript{180} Overcrowded placement and the concomitant lack of privacy may lead to fewer inhibitions and increase the likelihood of sexual assault among the foster children.\textsuperscript{181} Placing vulnerable young children with older children that may have sexual behavioral problems while failing to provide necessary support and supervision can be a terribly unwise decision.\textsuperscript{182} There are countless examples where foster children have been abused by the very person sanctioned to

\begin{quote}
 Overcrowding was but one risk factor that may increase the risk of sexual offending based on Finkelhor's four part model for on child victimization by an adult, not victimization by a child. Finkelhor suggest four essential factors must exist for CSA to occur: (1) A potential offender must have some motivation to sexually abuse a child. The potential offender must feel some form of emotional congruence with the child, sexual arousal with the child must be a potential source of gratification, and alternative sources of gratification must be unavailable or less satisfying; (2) Any internal inhibitions against acting on the motivation to engage in sexual assault must be overcome.; (3) Any external impediments to acting on the impulse to abuse must be overcome. This may involve enticing an emotionally deprived child into accepting inappropriate attention, or over coercion to achieve domination of the relatively powerless child. \textit{Id.}

182. Grand Jury Report, supra note 3; Kestin, supra note 136 (detailing how DCF placed an eight year old child in a foster home with eight or nine older children that had mental handicaps. The child was sexually assaulted as often as twice a day by teenagers in the home). The Court had previously found the placement inappropriate for this child and unsafe.

https://nsuworks.nova.edu/nlr/vol25/iss3/1
provide foster care placement. Some suggest that privatized services or even institutional care would be a better solution. No substantial body of research supports the conclusion that privatization of child welfare services will dramatically improve the delivery or quality of those services. It has been suggested that private agencies, which work directly with families, are in a better position to inform courts of the needs and welfare of children. However, there is no data to suggest that they have been any more or less effective than the state agencies in protecting children in foster care.

Constitutional limitations imposed by the separation of powers doctrine prohibit courts from micromanaging child welfare agency affairs. Courts may establish placement criterion for a specific child being placed in foster care but they are generally prohibited from selecting the actual placement, which may effectively tie the court's hands in regards to its important placement decisions. The child welfare agency is charged with monitoring and supervising their licensed agents; others have little ability to police agency

183. See generally Taylor v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987); K.H. v. Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (girl sexually abused while in foster placement).

184. The Florida Legislature currently requires DCF to contract out all placement services to private providers. FLA. STAT. § 39.01 (2000).


188. Id.

189. K.A.B. v. Hyson, 483 So. 2d 898, 899 (Fla. 5th Dist. Ct. App. 1986). A court which adjudicates a child to be dependent and places the child with Department of HRS (now known as DCF) does not have authority to direct precisely where child is to be placed. Id. "It is crystal clear that it is within the discretion of the agency to decide where to keep a child who is in its custody." Id. It is not within the province of the court to manage the affairs of another branch of government. Id.; see also FLA. STAT. § 39.521(1)(b)(3) (2000), (providing that "[the court shall] [r]equire placement of the child either under the protective supervision of an authorized agent of the department in the home of a relative of the child or another adult approved by the court, or in the custody of the department").
practices.\textsuperscript{190} Even when there is an objection to an agency placement decision, there may be little recourse until the child is harmed.\textsuperscript{191}

F. \textit{Delinquency}

Foster care youth are at greater risk than non-foster care youth for involvement in the juvenile justice system.\textsuperscript{192} One study of foster children placed in a group home found that twenty-seven of twenty-eight teenagers had been arrested at least once, and that almost half had been arrested as a result of an incident in placement.\textsuperscript{193} When foster care children are charged with violations of a criminal statute, they tend to be incarcerated for longer periods of time and tend to receive stiffer punishments than their non-foster care counterparts.\textsuperscript{194} Expenditures for treatment of children with sexual behavioral problems remain minuscule compared with funds dedicated to investigating, prosecuting, and incarcerating adult sex offenders.\textsuperscript{195} Almost half of all child sexual abuse is committed by youth less than eighteen years old, yet our social, political, and legal focus remains incarceration.\textsuperscript{196} Failure to promptly and effectively respond to children with sexual behavior problems only results in far greater costs of criminal prosecution and subsequent incarceration in either juvenile or adult facilities.\textsuperscript{197}

There are rising concerns that the affect of portraying adult sexual offenders as abnormal and perverse monsters\textsuperscript{198} will adversely impact therapeutic interventions for children with sexual behavioral problems—many of whom were also previous sexual assault victims. Criminal justice

\textsuperscript{190} Lupu, \textit{supra} note 187, at 1371 (explaining the paradox of power separation models in child protection legislation that adversely impact the protection goals).

\textsuperscript{191} Kestin, \textit{supra} note 133 (reporting that an eight year old child was sexually molested in foster care over the judge’s objection to DCF’s placement decision).

\textsuperscript{192} Molly Armstrong, \textit{The Importance of Bridging the Gap Between Child Welfare and Juvenile Justice for Arrested Foster Youth}, at 55 (PLI Crim. Order No.: 00-0016 (2000) (explaining the relationship between child maltreatment and disposition to the juvenile justice system)).

\textsuperscript{193} \textit{Id.} (citing results of a study on foster children and the juvenile justice system conducted by the Vera Institute of Justice).

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} Pithers, \textit{supra} note 98, at 201. \textit{But see} Rothchild, \textit{supra} note 108, at 736 (citing WILLIAM L. MARSHALL ET AL., \textit{HANDBOOK OF SEXUAL ASSAULT} 6 (1990) (noting that some behavioral scientists consider juvenile sex offenders to be untreatable because extensive studies on adult sex offenders indicate a high rate of recidivism)).

\textsuperscript{196} Pithers, \textit{supra} note 98, at 203.

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} Underwager, \textit{supra} note 95.
intervention does not offer promising solutions to children with sexual behavior problems.

G. *The Child's Voice*

The child's voice frequently disappears into the abyss of the child welfare system once the child is placed in foster care. Pursuant to CAPTA, children are entitled to representation by a guardian ad litem ("GAL") when they are subject to child protection proceedings. 199 Congress subsequently amended the statute to expand child representation by permitting the court-appointed advocate to be an attorney. 200 The child's advocate is charged with the responsibility, "to obtain first hand, a clear understanding of the situation and needs of the child and to make recommendation to the court concerning the best interests of the child." 201 It has long been recognized that independent representation for dependent children is necessary to protect their interests and rights. Every state has enacted legislation providing for child representation in protection proceedings, yet many states fail to meet this obligation. 202

In practice, the child welfare agenda is often inconsistent with the child's best interest; this creates a conflict between agency responsibility and the child's rights. 203 A primary manifestation of this conflict occurs when foster children are harmed in care, leaving the agency to defend failed placement and or case decisions for political, administrative, and economic reasons. Because children enjoy no federal constitutional rights to programs for protection from abuse and exploitation, and no rights to basic nutrition, income supports, shelter, and healthcare, 204 they are at a distinct disadvantage in prevailing against agency bureaucracy. Inconsistent representation in child protection proceedings serves to reinforce the disenfranchisement of foster children, and limits the court's ability to accurately determine what is in a child's best


201. Id. § 5106a(b)(2)(A)(ix)(I), (II).

202. Mandelbaum, supra note 26, at 22–23 (describing system shortcomings such as inadequate resources and support for representation).

203. Id.

Without the voice of a court appointed advocate that has knowledge of the child's past and present circumstances, history proves that the vast majority of all foster children will remain in status quo. An independent voice for the child can direct the court's attention to: inappropriate placements, therapy concerns, visitation rights, educational needs, and physical or sexual abuse allegations stemming from a placement—all of which impact the welfare of the child but may be filtered through agency discretion.

H. Training to Recognize Child Sexual Abuse in Foster Care

Child sexual abuse research has consistently concluded that sexual abuse is extensively undisclosed and underreported. Children often fail to report incidents of sexual abuse because they fear disclosure will bring consequences even worse than being victimized again. The length, duration, and severity of the abuse can affect disclosure of the abuse. Some child victims of sexual abuse may not exhibit the effects of the abuse until adolescence or adulthood, when they become involved in intimate relationships. Sexual abuse investigations often rely largely on history and nonexclusive behavioral or emotional symptoms due to the lack of physical injuries.

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205. Mandelbaum, supra note 26, at 52 (arguing why the court cannot adequately protect the child's best interest in protection proceedings); see also Homer, supra note 34 (noting studies showing that judicial reviews and dispositional hearings are not conducted on time in many states and the thoroughness of these reviews are questionable).

206. Id.

207. Id.


209. Faulkner, supra note 208; see also MYERS, supra note 107, at 304 (explaining that many victims of child sexual abuse never disclose their abuse, of those that do, delayed reporting is common).

210. MYERS, supra note 106, at 304.

211. English, supra note 89, at 48 (describing a variety of emotional, psychological and behavioral responses observed in child victims of child sexual abuse). Symptomology of abuse may surface immediately for some children yet be delayed in others) (citing BRIERE & ELLIOT, IMMEDIATE AND LONG TERM IMPACTS OF CHILD SEXUAL ABUSE, THE FUTURE OF CHILDREN 254-69 (1994)).

212. HARALAMBIE, supra note 131 (describing a variety of acts that constitute sexual abuse, such as fondling, oral-genital contact, kissing, rubbing, and touching).
Florida’s DCF has historically rejected agency responsibility to investigate child sexual abuse allegations from within the state foster care system.213 Florida has not, until recently,214 required reporting of a “child-on-child” sexual or physical abuse in foster care where the care provider was not at fault.215 Foster care workers often lack training techniques utilized to detect sexual abuse.216 With no reporting or investigative obligations, there would be no need to train caseworkers on appropriate protocols to investigate these incidents.

A significant percentage of the foster care population displays symptomatic behaviors resulting from various forms of abuse and neglect.217 Without knowing the extent of abuse or neglect attributed to each child in care, it is difficult to predict or detect children that may have sexual behavioral problems.218 Child sexual offenders constitute a markedly heterogeneous group.219 Between 1980 and 1995 juvenile arrest rates for children less than twelve years old escalated 125% for sex offenses (excluding rape) and 190% for forcible rape, while there was only a 24% increase for general crimes during this same period of time.220 This increase underscores the need to provide foster care workers with appropriate training.

Given the lack of systemic protections, foster children appear to be particularly vulnerable to sexual abuse.221 In the absence of a permanent kinship for foster children, the traditional incest taboo does not operate.222 Children residing with non-genetic parents appear to be at greater risk of sexual exploitation.223 Caseworkers must be better trained to recognize warn-

213. Grand Jury Report, supra note 3; see also NCCPR, supra note 40.
217. See generally English, supra note 89, at 48.
218. Id.
219. Tomison, supra note 41.
220. Pithers, supra note 98, at 206.
221. Mushlin, supra note 35, at 204.
222. Id. at 205.
ing signs and employ specific strategies to ensure the safety of all children in foster care from the known danger of child sexual abuse.

VII. FLORIDA'S SYSTEMATIC FAILURE: WARD V. KEARNEY

Considering the abundance of dreadful foster care systems across the nation, there is probably no place where it is worse to be a foster child than in Florida. The Secretary of Florida's Department of Children and Families Kathleen Kearney, has likened the problems of her agency to those of the Titanic. In 1998, a grand jury convened in Broward County to consider evidence regarding Florida's foster care system and specifically the system within Broward County. The report found serious deficiencies with DCF's handling of services to abused and neglected children and found particular danger associated with the foster care system. "[T]he problems facing the Department are extensive and so systemic that the children in the custody of or under the protection of the Department are in peril." The report also indicated that Broward County's foster care system was on the brink of catastrophe and would collapse if serious intervention was not initiated.

One child welfare expert described the situation in Broward County as "dangerously out of control.... These are the worst conditions I am aware of in a child welfare system...."

In addition to physical, emotional, and mental abuse, foster children in Broward County also suffered sexual victimization: an eight-year-old child

225. Kathleen Kearney was appointed as the Secretary of the Department of Children and Families by Governor Jeb Bush. Prior to her appointment as Secretary, Kathleen Kearney was a Broward County Circuit Court Judge in the Seventeen Judicial Circuit of Florida. Judge Kearney spent approximately ten years in the state's juvenile dependency division immediately prior to her appointment as Secretary. Judge Kearney was a vocal critic of Florida's Department of Children Services. She remains a staunch child advocate.
226. Douglas C. Lyons, New Track Needed for this Swamped Boat, SUN-SENTINEL (Ft. Lauderdale), Nov. 6, 1999, at 15A.
228. Id.
229. Id.
230. Grand Jury Report, supra note 3, at 48 (finding "[t]here is agreement from Dependency Court Judges, District employees and other persons familiar with the child welfare system that the problems facing the Department and District Ten are so extensive and so pervasive that they threaten to collapse the entire system and that serious intervention is imperative."). Id.
231. Sunshine State Report, supra note 224.
forced to commit sex acts in foster placement; an eleven-year-old girl lured away by another foster child and then gang-raped by several men; a sexually aggressive teenager placed in a foster home with three younger children—subsequently charged with sexually abusing one of the younger children, a four-year-old girl; foster parents gave a child a whistle to blow if older children in the foster home tried to sexually molest him. Additionally, a court-appointed lawyer swore that he was made personally aware of fifty instances of "child-on-child sexual abuse" involving more than 100 foster children in Broward County alone. During this same period of time, DCF official records indicate only seven complaints because the child abuse registry would not accept reports of such sexual abuse. Prior to October 1, 1998, Broward DCF did not investigate sexual abuse allegations the department considered to be crimes committed by children upon children in foster care. Those complaints were dubbed "child-on-child" and were regarded by the agency as exclusively within the jurisdiction of the police.

A class action lawsuit was filed in October 1998, on behalf of children who had been sexually molested and severely abused while in foster care. The evidence in that case demonstrated that DCF caseworkers repeatedly left children in dangerous homes, falsified department records, and mislead judges. Broward caseworkers were often responsible for fifty to seventy

232. Sally Kestin, Caseworker Has "Lied to the Court;" Sex Abuse prompts Judge to Order Contempt Inquiry, SUN-SENTNEL (Ft. Lauderdale), Oct. 24, 1998, at 1A. The judge ordered the State Attorney to initiate proceedings that could result in criminal contempt for lying to the court. The case worker that placed the teen in the home then pleaded with the family not to tell the judge.

233. Talenfeld, supra note 215.
234. Kestin, supra note 232.
237. NCCPR, supra note 40.
239. Suit was filed by the Youth Law Center, a nonprofit child advocacy group based in San Francisco, California. Professor Michael Dale and Howard Talenfeld were the lead attorneys representing the plaintiffs. Professor Michael Dale is a tenured professor of law at Nova Southeastern University, Shepard Broad Law Center, in Fort Lauderdale, Florida. Attorney Talenfeld is a partner in the law firm of Coladny, Fass and Talenfeld.
240. Compl. at 1, Ward v. Feaver (S.D. Fla. 1998) (No. 98-7137) [hereinafter Ward Complaint]; see also Grand Jury Report, supra note 3; see generally Sally Kestin, Children's Safety Net Collapsing; Grand Jury Finds Cash-Strapped System Fails Kids Again and Again, SUN-SENTNEL (Ft. Lauderdale), Nov. 11, 1998, at 1A.
cases each, over four times the recommended caseload. It also became apparent that, "[a]ccountability, integrity and efficiency" were so lacking from DCF foster care operations that child safety devolved into a secondary issue. During a six-month period of time immediately prior to the settlement announced in Ward v. Kearney, more than thirty foster children had been sexually assaulted by other foster children. DCF could not account for more than eighty children who either ran away from foster care or were simply missing—that number was seventy-seven during 1999.

Florida has a long track record of failing to provide adequate services to children in state care. While the safety and quality of Florida's foster care system continued to decline during the 1990s, other states were developing comprehensive plans to revamp their child protection proceedings and foster care services. Although Florida was also working on its own foster care

241. Ward Complaint, supra note 240.
242. Dep't of Children & Families, Inspector General Report No. 99-0053 (2000); see also Susan Gruskin, Report Blasts DCF Workers Staff Ignored Court Order to Interview Kids—Children Placed in Dangerous Home, SUN-SENTINEL (Ft. Lauderdale), Feb. 18, 2000, at 3B.
243. Id.
244. Settlement was announced indicating that the case would be resolved by consent decree.
245. Shana Gruskin, Broward Foster Care Troubles Settled? Agency Lawsuit May Be Put to Rest Today, SUN-SENTINEL (Ft. Lauderdale), Feb. 15, 2000, at 1A.
248. Aletha R. Stewart Jones & Kathleen R. Brault, Improving Foster Care in Maryland, 33 Md. B.J. 52 (2000). In 1993, Congress appropriated $35 million dollars over a four year period for states to explore and develop more efficient handling of foster care cases by the courts. Id. Jones and Brault provide extensive information compiled from Maryland's Foster Care Court Improvement Project. A three-part approach was adopted to improve juvenile court handling of foster care cases. "[F]irst, a comprehensive assessment of the rules, standards, and criteria imposed under state law effecting abused and neglected children; second, the development of recommendations for implementing change based upon the assessment; third, the implementation of recommended procedures and practices to improve the performance of juvenile court system." Id. at 53.
court improvement plan ("DCIP"),249 many critics continued to point the blame directly at the Florida Legislature for woefully under-funding the child welfare system.

As early as February 1991, Florida Legislature directed Florida DCF officials to investigate child sexual victimization in the state’s foster care system.250 The results were published in a study which indicated that approximately nine and a half percent of the foster care population were “of concern” for exhibiting sexual behaviors.252 The actual number of delinquency referrals represented only twenty-five percent of the actual number of sexual assaults perpetrated by children in foster care; when all child welfare programs were considered, the number of delinquency referrals for sexual battery almost doubled.253 Further, approximately ninety-eight percent of foster care counselors indicated that specialized placements for children that had

[The approach yielded] thirty-seven recommendations to improve the performance of the juvenile court in [child-in-need-of assistance cases], [termination of parental rights], and adoption cases [and can be] categorized as follows: I) uniformity of terminology and reconstructing of information and data collection procedures; 2) training for members of the judiciary assigned to handle [child-in-need-of-assistance] and related cases; 3) statutory revisions; and, 4) standards for counsel representing parties in a child-in-need-of services proceeding.

Id. 249. This plan is called the Dependency Court Improvement Project.

250. The Florida Legislature ordered DCF (then recognized as HRS) to investigate child-on-child sexual abuse, however, the concept of child sexual victimization was not used by DCF in the report.

251. Jones, supra note 248, at 53. No definition of the terminology “of concern” was utilized in that report to explain the concept. However, it seems clear from a review of the report that the agency had sufficient notice that certain children did in fact display sexualized behaviors of sufficient nature to come to the attention of agency operatives.

252. See DEP’T OF HEALTH & REHAB. SERVS. OFFICE OF CHILDREN, YOUTH AND FAMILY SERVS., A Study of Sexual Assault Among Foster Care Children in Florida (Feb. 1991) [hereinafter Dep’t of HRS Study]. The report indicates the following: approximately 1168 children in foster care had engaged in sexual behavior that was of concern to the foster care counselor; foster care counselors identified 200 children who had sexually assaulted another child within the previous 12 months; 147 placement disruptions occurred as a result of foster children sexually assaulting foster children; serious deficits in service provisions to sexual offenders and victims exist; training currently available to foster care staff and foster parents does not adequately address this population. Id. at 1. Notwithstanding the inability of the department to adequately answer questions regarding the scope and severity of the problem, the department described the problem as “a small number of cases of sexual assault among foster children.” Id.

253. Id. at 7.
committed sexual offenses were not available in their district. DCF interpreted data as an indication that child-on-child sexual abuse only represented "a small number of cases."

In 1995, a report prepared by DCF indicated that Broward County had the highest population of foster children known to have been sexually abused—41%. At the same time, it was known that 15% of this population consisted of children that had reported involvement in an incident of sexual assault on another child. The high rate of sexual abuse reported in foster care, 67% greater than the state sample population, was consistent with the high rate of children known to be sexually abused in foster homes that were determined unsafe. The Broward County rate of "unsafe" foster homes was 67% greater than the sample group.

There remains a critical lack of foster care homes in Broward County. In 1986 the situation was described by a previous grand jury as "desperate," and if anything, it has only become worse. Other counties in Florida have also experienced a dramatic shortage of foster home placements as the number of children coming into care continues to surpass available resources.

In June 2000, a statewide class action lawsuit was filed on behalf of foster children alleging they had suffered sexual, physical, and emotional abuse in addition to languishing for years in the states foster care system. After a four-week investigation of the allegations, the court appointed advocate filed

254. Id. at 9.
255. See Dep't of HRS Study, supra note 252. "Child-on-child sexual abuse" was not defined in the 1991 report but it apparently references incidents or behaviors that involve more than one child. See id. at 1.
256. Id.
257. RESEARCH STUDY, DIST. TEN, BROWARD CITY, 177 CHILDREN AND FAMILIES RECEIVING TARGETED CASE MANAGEMENT SERVICES (Oct. 11, 1995) [hereinafter District Ten Research Study] (noting that "areas of Broward County scored significantly higher than the entire group"). Id. ¶ 6.
258. Id. ¶ 4.
259. Id.
260. Id. ¶ 3.
262. Id.
263. Mike Schneider, Agency Issues Rare Plea for More Foster Parents, SUN-SENTINEL (Ft. Lauderdale), June 3, 1999, at 6B.
265. Douglas Halsey, an attorney licensed to practice law in Florida, is an environmental attorney, with the law firm of White & Case, LLP in Miami. He is also a longtime child advocate and was appointed by U.S. District Court Judge Federico Moreno to act as a
a preliminary report with the court which stated, "Florida’s foster care system, which is supposed to protect children, harms, often grievously, many of the children the state takes into custody."266

Statewide, child welfare services appear to be deteriorating. Recent DCF records indicate that the number of children abused in foster care have more than doubled, as children in foster care continue to be abused at alarming rates.267 This bad news was delivered almost two years after lawmakers in Florida doubled the DCF child protection budget.268

VIII. JUDICIAL INTERVENTION

Children in foster care have primarily relied upon the Due Process Clause of the Fourteenth Amendment or other federal statutes as a basis for asserting protection claims in federal court.269 Those cases have sought monetary damages on behalf of individual children and frequently seek immediate injunctive relief from placement conditions on behalf of all children in state care.270 The litigation success of foster children has largely been dictated by their placement status271 or the identifiable harm suffered,272 and the scope of the duty that is imposed upon states by federal legislation.273 Mere negligence has been insufficient to establish liability for constitutional tort claims.274 However, a cause of action will lie where officials are deliberately indifferent to injuries

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guardian ad litem or independent court representative for the twenty-two children plaintiffs suing DCF for harm suffered while in the state foster care system. See also Shana Gruskin, Advocate Boosts Foster Care Suit Judge to Hear Plea for Class Action Status, Which Would Encompass State, SUN-SENTINEL (Ft. Lauderdale), Jan. 24, 2001, at 1B.

266. See id.

267. Miller, supra note 1.

268. Shana Gruskin, Panel Hears DCF Chief Defend Her Agency, SUN-SENTINEL (Ft. Lauderdale), March 7, 2001, at 5B.

269. Michele Miller, Note, Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context, 11 HASTINGS WOMEN'S L.J. 243, 243 (2000); see also SUSAN GLUCK MEZEY, CHILDREN IN COURT: PUBLIC POLICYMAKING AND FEDERAL COURT DECISIONS 109–110 (1996); Homer, supra note 33, at 203.

270. See Homer, supra note 33, at 217–27; see also Ward Complaint, supra note 240.


272. DALE ET AL., supra note 52, ¶ 2.03[2][a]. A special relationship is created when the state takes the affirmative act of placing a child in foster care and so restrains the child's liberty to render the child dependent upon the state to provide for the child's basic needs. By virtue of this special relationship, the state has an affirmative duty to provide the child with protection. Id.


274. Watkinson, supra note 124, at 1245.
children suffer in care when they know of the abuse and fail to take action to address the problem.\textsuperscript{275}

Placement status has been a critical factor in determining state obligations to abused and neglected children.\textsuperscript{276} In\textit{DeShaney v. Winnebago County Department of Social Services},\textsuperscript{277} the Supreme Court adopted a bright line test to determine liability based upon custodial distinctions and the corresponding state obligations to children in state custody.\textsuperscript{278} The Court held that the Winnebago County Department of Social Services did not have a constitutional obligation under the Due Process Clause to protect Joshua DeShaney, from the abuse of his father\textsuperscript{279} where the state did not create the danger but was otherwise aware of it.\textsuperscript{280} The Court opined "[i]t is the state's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."\textsuperscript{281} By declining to protect abused children not in "custody," the Court departed from its previous due process methodology and treatment of special relationships.\textsuperscript{282} However, the Court did not resolve the question of liability for harm suffered by children in foster care.\textsuperscript{283}

\textsuperscript{275.} Id. at 1246.
\textsuperscript{276.} \textit{See generally} Dale et al., supra note 51, \S 2.03[2][a].
\textsuperscript{277.} 489 U.S. 189 (1989).
\textsuperscript{278.} Id. at 200.
\textsuperscript{279.} Id. at 195. The DeShaney Court interpreted the Constitution as a means to protect the people from the state, not to ensure that the state protect the people from each other. The Court held that "[n]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion of private actors. The Clause is phrased as a limitation on the State's power to act, not as a guaranty of certain minimal levels of safety and security." \textit{Id}. at 203.
\textsuperscript{280.} Id. at 203.
\textsuperscript{282.} Laura Oren, \textit{The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context}, 68 N.C. L. Rev. 659, 664 (1990). Professor Oren criticizes the Court's due process analysis as applied to the facts in \textit{DeShaney} and details the Court's development of the implications for a constitutional right to protection based on a custodial or special relationship flowing from a statutory scheme based on: Estelle v. Gamble, 429 U.S. 97 (1976); Martinez v. California, 444 U.S. 277 (1980); Youngberg v. Romeo, 457 U.S. 307
Under limited circumstances, the state may have an affirmative obligation to protect an individual from harm.\footnote{DeShaney, 489 U.S. at 201 n.9.} When a “special relationship,”\footnote{Id. at 198.} exists between the state agency and the individual, the state has an affirmative duty to protect that individual.\footnote{Special relationships are created when the state is aware of a danger to a victim and indicates a willingness to protect that victim. Special relationships are commonly found where the state has created threat of harm to an individual through intervention of a nongovernmental actor. The court must find a “special relationship” in this situation in order to sustain a section 1983 action, for there is, in general, no constitutional duty imposed on state officials to protect members of the public at large from crime. Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983) (holding that “the due process clause . . . does not protect a member of the public at large . . . , at least in the absence of a special relationship between the victim and the criminal or between the victim and the state”); see also Martinez, 444 U.S. at 284–85.} A “special relationship” is frequently limited to situations where the state has taken physical custody of the person\footnote{DeShaney, 489 U.S. at 199–200.} by the affirmative exercise of state power to so restrain an individual’s liberty that it

\footnote{283. DeShaney, 489 U.S. at 201 n.9. The court noted that: Had the State . . . removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case. Id. at 202.}

(1982). In \textit{Estelle}, the Court held that a state’s failure to act when prison officials were consciously indifferent to an inmate’s serious medical needs could violate the inmate’s Eighth Amendment right to be free of cruel and unusual punishment. \textit{Estelle}, 429 U.S. at 97. Inmates deprived of their liberty also lost their ability to care for themselves and must rely on prison authorities who have an obligation to care for them. \textit{Id.} at 104–105. In \textit{Martinez}, the Court held parole board officials were not liable when a parolee tortured and killed a fifteen year old victim even after it was recommended the parolee not be released from imprisonment. \textit{Martinez}, 444 U.S. at 284–85. The Court held the Fourteenth Amendment only protected the victim from deprivation by the state and not a private actor. \textit{Id.} The Court when on to suggest, in dictum that, the holding was based on the facts presented as the victimization was too remote a consequence to trigger civil rights liability. \textit{Id.} In \textit{Youngberg}, the Court held that a mentally retarded person involuntarily committed to state confinement had a constitutional right (rooted in the Fourteenth Amendment) to be free from harm inflicted by himself or from others. \textit{Youngberg}, 457 U.S. at 324. Liability for a civil rights violation by the state could follow when decisions for the inmates care are “a substantial departure from accepted professional judgement, practice, or standards” as to demonstrate that the person responsible did not actually base the decision on such a judgement. \textit{Id.} at 323.
renders him unable to care for himself. "The affirmative duty to protect arises not from the state’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."

Along the same lines, when a child is placed in foster care, a special relationship between the state and the child arises as state power has removed the child from the child’s normal source of protection thereby creating the affirmative duty of care. "A child generally depends on his parents to guard against the dangers of his surroundings . . . . By removing the child from his home, even when the child’s best interest lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma." When a child is placed in foster care, the child becomes dependent upon the state, through the foster family, to meet the child’s basic needs. Placement in foster care does in fact implicate state custody for the purpose of due process rights and protections. Accordingly, children in foster care that have suffered sexual victimization in violation of their civil rights may assert a viable cause of action.

288. Id. at 200.
289. Id.
290. Id. at 199; see, e.g., Youngberg, 457 U.S at 324 (explaining that involuntarily committed mental patients have constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement, and freedom from unreasonable bodily restraints and minimally adequate services); Estelle, 429 U.S. at 97 (explaining that incarcerated prisoners must be protected, and that deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain prohibited by the Eighth Amendment).
292. Id.
293. Id.
296. A sexual assault can be a constitutional injury described as a violation of the substantive due process right to bodily integrity or privacy, and courts of appeal have recognized that the right may be violated by sexual fondling and touching or other egregious sexual contact. See Haberthur v. City of Raymore, 119 F.3d 720, 723 (8th Cir. 1997); see also Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994) (recognizing that a student was deprived of liberty interest under the substantive due process when she was sexually molested by a teacher and that she had a right to be free from sexual abuse and violations of bodily
Foster children have the right to sue for constitutional violations that occur when they are removed from their parents’ care and placed by the state in an alternative custodial placement. Those claims are commonly asserted under section 1983 against agencies or state welfare officials acting under color of state law where the plaintiff is deprived “of any rights, privileges, or immunities secured by the constitution and law” of the United States.

Section 1983 claims may be asserted for rights created by the Constitution or federal statutes unless the statute does not create enforceable rights or privileges within the meaning of section 1983, or the statute itself forecloses enforcement. There is no constitutional right of governmental protection when a private citizen intrudes upon the liberty of another citizen, therefore, public officials cannot be held liable under section 1983 for their inactions when failing to protect children, absent a special relationship or state created danger exception. The Due Process Clause was designed as a limitation on the state’s power to act, not a guarantee of safety.

Foster care has been described as an entitlement program, as such, the Supreme Court foreclosed a right of private of enforcement under the AACWA. The Court ruled in Suter v. Artist, that the reasonable efforts clause of the AACWA neither created rights for children to enforce nor created an implied private right of action. Absent a private right of enforcement, the

integrity); see Harris v. City of Pagedale, 821 F.2d 499, 508 (8th Cir. 1987); Sisters Awarded Millions Foster Care System Contributed to their Repeated Abuse, Jury Concludes, SUN-SENTINEL (Ft. Lauderdale), Oct. 24, 1999, at 1B (discussing a recent 4.4 billion dollar Florida jury award to two sisters for injuries they received while in foster care for repeated incidents of rape, which left one of the sisters with syphilis at the age of nine).

297. Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987).

298. Atwell, supra note 74, at 611 (noting that an essential element of any Section 1983 claim is that conduct alleged constitutional violation must occur while the actor is acting under the color of law).

299. Id. at 611-12.


301. Watkinson, supra note 125, at 1249.

302. DeShaney, 489 U.S. at 196.

303. Suter v. Artist, 503 U.S. 347, 364 (1992) (holding that children in foster care or otherwise under state supervision have no private right of enforcement of federally mandated services under the Child Welfare Act—the only right to enforcement would belong to the Department of Health and Human Services via the Child Welfare Act).

304. Id.

305. Id. The Adoption Assistance and Child Welfare Act did not create a private right of enforcement. Congress must confer enforceable rights, privileges, or immunities unambiguously when it intends to impose conditions on grant of federal moneys before rights, privi-
Supreme Court has indicated that states may still be liable for harm when a child is “in custody” of a state agency. Thus, states may have a bare minimum obligation to protect a child from at least physical harm while placed in foster care.

The failure to effectuate meaningful foster care reform lead to “Child Welfare Reform Litigation” as a primary tool in the effort to protect foster children around the country. Doe v. New York City Department of Social Services, was the first case to award damages based on a right to safety claim asserted in a foster care context. There are at least twenty-one states, or regions therein, and the District of Columbia, currently embroiled in class action litigation because of their inability to protect children from abuse while in their foster care system. These cases are often filed in federal court and seek injunctive relief, declaratory relief, and monetary damages for violations of constitutional rights arising from the operation of a state or local welfare system. Since damage awards draw from limited resources and have little impact on systemic change, individual damage claims may be more appropriately reserved for plaintiffs to file separate suits.

leges, and immunities may be enforceable under section 1983. Both section 1983 and section 671(a)(15) impose only a rather generalized duty under the “reasonable efforts” clause to be enforced by the Secretary of DHHS, not private individuals. Id. at 1370. But cf. Robinson, supra note 72 (arguing the efficacy of the act notwithstanding the lack of a private right of enforcement).

306. DeShaney, 489 U.S. at 199.
307. See generally Doe v. Taylor, 975 F.2d 137, 146 (5th Cir. 1992). In Taylor, the court held that a rudimentary duty of safety was owed to children in care. Id.
308. Homer, supra note 33 (discussing Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) (conceptualizing “child welfare reform litigation” as a mechanism to improve conditions facing children in public institutions through litigation). Id. Homer notes that prior to a 1976 class action brought by foster children in New York seeking injunctive, declaratory, and damages relief, this form of litigation was virtually nonexistent. Id.
309. 649 F.2d 134 (2d Cir. 1981).
310. Although the Second Circuit in Doe v. N.Y. City Department of Social Sevices did award damages based on the right to safety claim, the court did not identify the source of the constitutional right nor did it address the application of such a right in a foster care context. The court did differentiate the nature of the foster care claim from those of prison inmates. Id.
311. Talenfeld, supra note 215, at II.
312. DALE ET AL., supra note 51, ¶ 2.03[2][a]; see also Marisol A. v. Giuliani, 185 F.R.D. 157–62 (S.D.N.Y. 1999). The court approved the parties’ settlement which called for monitoring and reform of the New York City Foster Care system. Id. In so doing, the court noted that it does not preclude individuals from seeking equitable relief for individual circumstances or from pursuing individual claims against the state for damages. Id.
313. Homer, supra note 33, at 217–19 (explaining that damages as a form of relief for systemic deficiencies in state foster care systems are problematic for three essential reasons:
A common resolution to Child Welfare Reform Litigation often employs the use of a consent decree incorporating some type of plan to ameliorate state harm to children in care. Such decrees characteristically encompass comprehensive systemic relief and have required state child welfare officials to alter foster care programs dramatically. Consent decrees have become a popular and relatively effective mechanism to address systemic failure for a variety of reasons. First, they often provide far-reaching mandates which require child welfare agencies to immediately employ corrective measures for the amelioration of systemic failures. Consent decrees also devote funds to improve foster care programs, which benefit all children and which may serve to enhance quality and performance of the child welfare system. And they bring together various system operatives in the development of new collaborative relationships to collectively address system failures. This tool attracts judicial, public, and legislative attention on the plight of foster children and to the child welfare reform agenda. Consent decrees are no panacea for systemic overhaul, but they may be one of the few palatable remedies available to foster children. There are at least twenty-seven states and many more localities presently ordered by a court to improve child welfare services.

IX. CONCLUSION

Despite more than ten years of welfare reform litigation, foster care systems across the nation continue to experience miserable failures when it comes to protecting foster children from all forms of abuse and neglect in as a policy matter, their capacity to reform recalcitrant child welfare genic is questionable; qualified immunity protects many officials from constitutional challenges; and the foreclosure of a private right to enforce federal child welfare statutes may obviate claims even where immunity doctrines do not apply).

314. See Ward Complaint, supra note 240.
315. Homer, supra note 33, at 323.
316. Id.; see also Taylor, 818 F.2d 791. The Taylor settlement included: prohibition of corporal punishment by foster parents; exploration of relative placement alternatives; screening of potential foster parents; monthly face-to-face child visitation by foster care workers; response to complaints of abuse within 48 hours; and exchange of information between foster child and parent. Id.
317. Homer, supra note 33 (suggesting injunctive relief may hold more promise to reform foster care policies and practice in comparison to damage awards which may provide little incentive for change to recalcitrant child welfare agencies).
318. Id. at 12.
319. Id.
320. Mushlin, supra note 35, at 250.
foster placements. Foster children remain particularly vulnerable to sexual abuse in care. Recent attention focusing on children with sexual behavioral problems has clearly demonstrated that these children have specialized needs and present particularized concerns when they are placed in the general foster care population. State agencies must develop comprehensive policies and practices to identify and respond to children with sexual behavioral problems. Critical foster care placement decisions must be scrutinized by agency officials to ensure that child victims of sexual abuse and children with sexual behavioral problems are provided with adequate therapeutic intervention. Agencies must recognize quality that therapeutic intervention is necessary not only to address the suffering of individual children, but also to attempt to reduce the overall incidents of sexual abuse in care.

Children in foster care have a limited arsenal of legal protections. The federal government, bureaucratic foster care agencies, and state legislators have clearly demonstrated a collective failure to effectively protect children in state care from harm. Incompetent caseworkers, agency administrators, and legislators indifferent to the sexual victimization of foster care children have only served to perpetuate the victimization on a massive scale. Florida, and in particular Broward County, has experienced an unprecedented rise in the number of sexual assaults that occur among children in the foster care population and has demonstrated abysmal failure in dealing with the problem. There must be system accountability for every child in care. Judicial intervention may be the only way to address foster care systems which refuse to protect children in their care.
For more than a month now, I have worried about what to say, what tack to take this noontime. In these past two years of a new life and career, I have spoken to literally thousands of people. No audience means more to me than this one. For I have become convinced that unless the business and civic community can become energized and involved in this matter of “school readiness” for all our children, then we will make no enduring difference in thousands upon thousands of lives. That will be a tragedy for these children, and it will be a tragedy for all of us.

My mission is straight talk on a matter fundamental to our community being a good place for the future—a good place for our children, a good place for all of us.

Like you, I choose to live in Greater Miami. Like you, I love who we are and what we can become. But if we are to be honest with one another, we also must acknowledge that for all the progress we have made, we also live in a place that is undereducated, underemployed, and, in many ways, growing poorer. It is worth your knowing, for example, that just over eighteen percent of our population twenty-five years and older has at least a four-year college education; the national average is above twenty-five percent. That is not where we need to be.

School “readiness” is not about children learning to read by age three. It is about children growing—socially, emotionally, physically, and intellectually—so that they are ready and eager to learn by the time they reach first grade. It is about the blending of education and health and nurturing in the earliest years. We know from the science of “readiness” that these first several years of life are crucial in a way that most in our community do not yet realize.

Listen to this quotation from a book called *Ghosts from the Nursery*, by Robin Karr-Morse and Meredith Wiley:

> While she is still wet from the womb, as she breathes her first breath, cries her first cry, feels her first gusts of cool air, her brain is building itself at a rate never to be repeated. She already knows the sound of her mother’s voice and turns to it. She gazes at her mother’s face with great concentration. Synapses in her tiny brain
are sprouting in response to each sensation. The most powerful computer in the world has been waiting for these moments of light, and smell, and touch, and sound, and taste—the carpenters of the human brain. She is fully equipped to learn, to connect. Every system is poised to take in information—for the first and perhaps the most incisive impressions of a lifetime.

In behalf of that baby and each of the 31,000 babies who will be born in our community this year, I have come to know that an integrated, comprehensive approach—covering health and education and nurturing for all children between birth and age five—is our best hope for lasting progress. We must do much better than the present hodgepodge of programs—good programs invariably led by good people, but so often disconnected from other good people, other good programs.

Our mission must embrace all children, which is not the way the present “system” works. Instead, well intended, good-hearted people target one deeply disadvantaged neighborhood or another, and then devote extra resources, which, because those resources are disbursed in such a non-holistic way, so often add up to precious little progress for children. Meantime, the rest of the community sees how we target our resources and reasons: “[o]h, I see, it is about those children.” But “readiness” is not and should not be just about those children; rather, “readiness” should be about, and for, everyone’s child.

Listen to this letter that I received just recently from Monica Serra, who lives on Carlyle Avenue on Miami Beach:

I am a single mother with two children. My older son is seven years old and in the second grade. My younger son will turn four on January fifth. I wanted my youngest son to start pre-kindergarten. At Biscayne Elementary I got the application to a program called Head Start. This program is for children three to five years old. I went to the interview, and I was denied. They told me I made too much money. I’m really upset. My annual income is $23,500.

Ladies and gentlemen, Mrs. Serra might not fit the federal definition of poverty, but $23,500 and two children leaves her a great distance from middle-class existence. Here, then, is a working parent—like so many others—who wants to do right by her children, and the so-called “system” has no room for her children. They lose. So do we all.

I am neither utopian dreamer nor socialistic revolutionary. If your family, or my own, can afford to pay for basic and quality services, then we
should. But if a family cannot, then it is in the community’s interest, our interest, to make available those basic and quality services.

Mrs. Serra’s children need all the quality early care and education that your children and my own need: love and nurturing; all their shots; excellent nutrition; the fullest opportunity to be safe; stimulating pre-K experiences; child care that engages the mind, not the “warehousing” that most children receive. One startling statistic: of the 1357 licensed child-care centers in Miami-Dade County, just fifty-five are nationally accredited, meaning that those you can have assurances of a stimulating environment for your child.

You and I cannot afford to do anything less than provide high-quality early childhood care and education to all children who need it. We cannot afford to do anything less than provide first-rate health care for all children.

How can we live with ourselves when literally tens of thousands of children between birth and age five in our county go to the emergency room for basic medical care because they have no health insurance and no family pediatrician? How can we afford to do anything less than commit to every child and every parent that we are prepared to devote the resources, in public and private partnership, that will give every child the chance to be truly ready for school and for life?

How tragic that up to thirty percent of the children in first grade in our community are significantly behind, and so many will never catch up. But you might say to me: “Children at this age have young and fertile minds. They will quickly catch up.” How very wrong you would be. I give you a most compelling figure from an American Reading Association study of two years ago: if one hundred children come out of the first grade not really being able to read, then eighty-eight of them will really not know how to read after the fourth grade either. Surely that is a wakeup call for readiness for all children.

How do I convince you that “readiness” is our mutual mission? How do I convince you that this must be done?

Do I make the case with tough facts, tough figures, a mind-blowing dose of reality?

The twenty-nine percent of our fourth graders who did miserably on Florida’s writing assessment test. Our math scores that fall way short of the national median. The forty percent of our ninth graders who do not complete high school. The 35,000 children in our community who need mental health services, which most do not get. The 2498 low birthweight babies born here last year. The 1497 babies born to twelve to seventeen-year-olds. The violent teen crimes up more than thirty five percent in the past five years. The 17,457 reported incidents of fighting last year in Miami-Dade...
Or do I appeal to your sense of civility and decency?

In this community of great decency and so many giving people, surely every child is entitled to a decent beginning in life. To use the words of the great educator John Dewey: "[w]hat the wisest and best parents want for [their] own children, [so] must the community want for all its children." Or, to quote the great thinker W.E.B. Du Bois: "[i]n the treatment of the child the world foreshadows its own future."

Or do I appeal to your sense of economic imperative and business investment?

Readiness is, in fact, a matter of business investment as well as in the self-interest of all of us. An educated community is a safer, more prosperous, more optimistic community for everyone. We know from the research that if we were ever to spend a dollar wisely up front—that is, from prenatal to age five—we would not have to spend seven dollars at the other end on police and prosecution and prison, and remedial education of all sorts. Ladies and gentlemen, you and I will either pay a few dollars more up front in children's lives, or we will pay many more more dollars when they get older. A more educated, contributing citizenry literally depends on children coming to first grade eager and able to learn. The greatest gift we could give our schools, Roger Cuevas would confirm, is more children ready for success in the first grade and, hence, in life.

Ladies and gentlemen, I have been to first grade classrooms in Miami-Dade County where teachers tell me that more than half of their students are severely, distinctly behind. How could a prudent community permit this? How could a wise community ignore this? If we want our children and grandchildren to be able to choose this community for their lives, their work, their prosperity, their futures, then we are going to need to care about everyone's child.

There are, to be sure, companies here that see "readiness" as a business imperative—Ryder, Baptist Health Systems, Royal Caribbean, Mt. Sinai, Bank of America, First Union, the University of Miami and the Assurant Group, among others. Companies that understand that parents not worried unduly about their children are more productive. Companies that understand the lessons of the New Economy—that is, a company culture of caring about children is not only right, but also smart business. Business people frequently complain about the quality of graduates—most of these business people simply not realizing that the path to hiring the most capable, most
qualified employees begins with a child's earliest years. You in business know more than anyone of the power of investment. Remember, then, that these beginning years of life furnish the optimum window for investment.

Toward that investment there is now underway in our community a crucial undertaking in behalf of children and families. It was preceded by a generous and continuing commitment and investment from four citizens of this community—Dr. Jane and Jerry Katcher and Jan and Dan Lewis—that launched The Early Childhood Initiative Foundation. Work toward "readiness" for all children here began twenty-two months ago with months of community forums and strategic planning and the full support and leadership of Mayor Alex Penelas. Thirteen months ago, 4500 people participated in the Mayor's Children's Summit on Miami Beach, where we launched four major task forces: 1) Early Development and Education; 2) Child Health and Well Being; 3) Parent and Family Skills, Services and Information; and 4) Prevention and Intervention of Violence, Abuse and Neglect. This year we are embarked on three major projects: 1) the building of an "inventory" so we know who is served, who is not, and what the gaps in service are in Miami-Dade; 2) a survey of 2000 plus parents here on attitudes and needs, with results to be revealed next month; and 3) a major, at least three-year-long campaign for public awareness on this topic, a broadcast print and website approach. That campaign, to be launched next year (and co-branded by United Way/Success by Six and The Early Childhood Initiative Foundation), will first target parents and caregivers who will be able to call—in English, Spanish or Creole—any hour of the day or night for information that ranges from "my child has been crying for hours; what should I do?" to "how do I find really good child care that I can afford?"

The work of this early childhood initiative is closely connected with the work of the Miami-Dade School Readiness Coalition, one of fifty-seven such coalitions in our state. That coalition of twenty-five members—more than a third from the business community and the private sector—includes six Chamber representatives. One of those is Bud Park, among the coalition's best, most giving members. Another stalwart is the coalition president, Chuck Hood, who left a successful career in shopping center management to toil full-time in the vineyards of "-readiness." Know that I am heartened by the Chamber's involvement. The movement for readiness must be a public-private venture, with some of the most visible leaders coming from business. People both open and tough-minded. People with a long-term passion and compassion in behalf of "readiness" for all children.

We need your commitment and your leadership to move toward a genuinely holistic readiness plan covering the 158,000 children between birth and age five in our community. That means we must work toward these five goals, and more:
1) High quality, nationally accredited child care available for all children. High quality child care, ample research informs us, makes a big difference in whether children grow up to be successful adults.

2) A quality "medical home" for every child pre-natal to age five—not the emergency-room-as-basic-medical-care that thousands of children receive in our community. Every child should be entitled to first-rate health care.

3) Progress toward availability of a quality pre-K experience—though not mandatory—for every four-year-old. This would incorporate public and private approaches, including Head Start and high quality child care options for parents.

4) "Home visiting" availability—using trained professionals or paraprofessionals—for all children from prenatal through the first two or three years of life. Important research going back two decades shows this approach leads to more successful children, more successful adults, and greater spacing between babies—three powerful and proven outcomes. We could make that happen here.

5) Parent skill building that recognizes the necessity of parents and families being fully involved in "readiness." A child's first teacher—the parent—needs to be the child's best teacher.

Ladies and gentlemen, could we not be wise enough to come together to "own" a portrait of what we would want for every child? Is this not a matter of wise investment in their future and our own? Is it not basic American fairness that every child have a real chance to succeed?

What I seek from you today is your eagerness to build a "movement" that embraces all children. I want you to educate yourselves on the critical nature of these earliest years for children. I want you to think about how your company—through quality child care, through your benefits programs and in other ways—can do even more to make a difference in the lives of your employees and their offspring. I want you to see how you might get involved in these task forces—led by Carole Abbott, Wil Blechman, Ophelia Brown-Lawson, Marisel Elias-Miranda, Deise Granado-Villar, Sara Herald, Obdulio Piedra, and Peter Roulhac.
I believe that a community with the strength and compassion to overcome the terror of Hurricane Andrew could build a community where no one’s child is left behind. Indeed, you and I should insist on that.

Should we fail to do so, I remind you of the words of the great psychiatrist Karl Menninger: “[w]hat we do to children,” said Dr. Menninger, “they will do to society.”

Ladies and gentlemen, the choice for our children is ours. When we do right by our children, all of our children, we will do right by ourselves.

Thank you.
Listening to Silenced Voices: Examining Potential Liability of State and Private Agencies for Child Support Enforcement Violations

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I. INTRODUCTION

This article argues that private individuals may sue government agencies and employees for failing to enforce child support statutes. Failure to enforce child support orders is a systemic problem which directly affects countless children, including foster care children, who depend upon the money promised in child support enforcement orders for their existence. The ramifications of this failure to pay spread beyond the boundaries of the

* For their helpful suggestions, I would like to thank Bill Fraser (West Palm Beach) and Carolyn Salisbury (University of Miami Youth Law Clinic), children's advocates. I would also like to thank Kathryn Gainey, law student at Harvard Law for her research and other assistance.
individual family unit, however, as custodial parents and children are forced to depend upon public assistance as a substitute rather than as what could potentially be a substitute.

This article does not purport to conduct a comprehensive analysis of the national child support enforcement policy. Rather, it focuses specifically upon the Florida support enforcement system, juxtaposed with examples elicited from other support enforcement schemes. Through a survey of primary sources, including federal and state statutes, Florida case law, and selected case law from other jurisdictions, this article intends to argue that state enforcement agencies and private agencies may be held responsible for their mismanagement of child support enforcement. It applies the primary source material two similar cases: children in the foster care system and children who reside with a custodial parent. It also analyzes private causes of action against government agencies and government employees, and argues that individuals should have a private cause of action for failing to collect child support enforcement.

Part II describes the extent of the support enforcement problem in Florida, which suggests that this problem is endemic to our society as a whole. Part II also describes the complex federal and state statutory scheme governing child support in an effort to highlight the separation of powers between federal and state government. This statutory analysis reveals additional reasons why private citizen suits are necessary, including lack of legal representation of the child's interests in current support enforcement suits.

Part III examines federal law as a potential source of liability, and argues that the application of section 1983 of title 42 of the United States Code ("section 1983"), which provides individuals with the ability to file private citizen lawsuits for violation of either constitutional or statutory rights, has resulted in varying outcomes. Part III examines the predominant standards announced in decisions of the United States Supreme Court and the Eleventh Circuit that are used to determine whether section 1983 is satisfied. The common law does not clearly establish whether one of the tests prevails, but instead illustrates the usage of several tests. This analysis of case precedents

1. 42 U.S.C. §1983 (1994 & Supp. IV 1998). The statute provides as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

_id._
dent is designed to elicit factors that the courts commonly consider in deciding liability under section 1983 so as to apply these factors to the case of children and child support payments.

Part IV argues that government agencies may be held liable under section 1983 through violations of the Social Security Act, despite the welfare reforms which took place in 1996. Children may not recover through section 1983 for violations of substantive due process because the courts have not been willing to grant a property right to children in promised, but uncollected, child support payments. Despite welfare reforms which eliminated entitlement programs, a viable due process argument remains for foster care children. The right of non-foster children to recover under section 1983 was limited by the welfare reform law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), because such children can no longer claim that a due process violation arises from property rights to an entitlement when the State of Florida has explicitly established a welfare system that is not an entitlement. After the welfare reforms, section 1983 can be invoked for violations of due process only in those states where the welfare benefit remains an entitlement.

Part IV examines federal statutory liability by considering the provisions of the Social Security Act. In order to receive block grants from the federal government, state governments must "substantially comply" with the statutory provisions regulating collection of child support payments. However, the criterion of standard compliance is only seventy-five percent, but serves as an incentive and condones state action which fails to collect and distribute a fourth of the child support orders. In Blessing v. Freestone the Supreme Court held that Title IV-D of the Social Security Act did not bestow a private cause of action upon custodial mothers under section 1983 for a state's failure to operate its system in substantial compliance, but it left open the possibility that "some provisions of Title IV-D give rise to individual


For the purpose of enforcing the support obligations owed by non-custodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available... to all children (whether or not eligible for assistance under... [AFDC]) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

_Id._

rights." For example, Blessing does not preempt the possibility of a private recovery in instances of failures to distribute pass-through payments and failures to comply with gap-filling provisions. If a state fails to distribute the predetermined portions of child support payments after collection, then it violates the rights of children who live with their custodial parents. Such a private right of action is necessary so children may seek enforcement of the child support orders to which they are entitled. Part IV argues that the courts would sustain a private action beyond summary judgment if that action is brought for child support that the state is obligated to distribute to children upon collection.

Part V examines sovereign immunity and the State of Florida to determine what factors are necessary for the state to be held liable.

Part VI applies the concept of sovereign immunity, and argues that the State of Florida is liable under sovereign immunity for violation of statutory provisions in collecting and distributing child support amounts on behalf of children.

II. UNREPRESENTED INTERESTS IN CHILD SUPPORT ENFORCEMENT

Child welfare, family responsibility, and decreased welfare rolls—each is an asserted policy interest of the state in establishing and enforcing child support orders. In creating child support policies, states must balance the interests of family autonomy and fiscal economy with concern for the child’s standard of living; as a result, “fiscal interest” or “self-supporting families” dominate child support policy. An issue emerges from this interest balancing as to how to construct the optimal procedure for child support enforcement that would protect the rights of the children without unduly burdening the fiscal resources of the state. This article asserts that private citizen suits against the public and private agencies are one additional means which empower custodial parents and children to protect their own interests while encouraging states to abide by the statutory provisions to which the legislatures have agreed. The purpose of Part I is to assess the current federal and Florida state procedures in child support enforcement in an effort to frame the importance of private citizen suits.

6. Id. at 345.
7. Id.
8. Id. at 345–46.
10. Id. at 149.
A. Federal Statutes as a Skeleton for Child Support Enforcement Programs

Federal statutes provide the skeletal framework within which states formulate child support enforcement programs. Federal child support enforcement began with the enactment of Title IV-D of the Social Security Act, the Child Support Enforcement Amendments ("CSEA") of 1984, and the Family Support Act ("FSA") of 1988. The Social Security Act requires each state to establish a Title IV-D child support enforcement agency, which serves both recipients and nonrecipients of welfare benefits. Furthermore, the Office of Child Support Enforcement ("OCSE") is responsible for "monitoring and assisting" the Title IV-D state agencies. The CSEA mandated that each state establish formulas for calculating child support orders, but the courts were not bound to invoke them and the amount calculated from the formulas was not treated as "presumptively correct." However, the FSA, enacted four years later, established a rebuttable presumption that the amount calculated by the formulas is correct unless it is demonstrated to be "unjust or inappropriate in a particular case" through a written record. The cumulative effect of these three federal statutes was to structure states' child support enforcement activities and to render legitimacy to the calculation of child support awards.

Additional provisions offered further definition to states in formulating child support enforcement programs, including provisions that ensured state accountability. The PRWORA included a state mandate that each state

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11. NANCY S. ERICKSON, CHILD SUPPORT MANUAL FOR ATTORNEYS AND ADVOCATES 6 (1992). Title IV-D was enacted in 1974. Id.
12. Id. at 7.
13. Id.
14. Id. at 9.
15. 42 U.S.C. § 667(b) (1994). The statute provides as follows:
(1) The guidelines established pursuant to subsection (a) shall be made available to all judges and other officials who have the power to determine child support awards within such State.
(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

Id. Florida has adopted an "income sharing" model in which the income of both custodial and noncustodial parents is augmented to calculate the child support contribution. ERICKSON, supra note 11, at 192–93. The guidelines are set forth in section 61.30 of the Florida Statutes.
conduct an annual report pertaining to its child support enforcement program and submit a copy to the Secretary of the Department of Health and Human Services. 16 This represented a shift in policy to “focus on data reliability and to assess performance outcomes instead of determining compliance with process steps.” 17 While the federal government subscribes to results-oriented child support legislation, state governments retain authority to execute the federal requirements through individual child support programs. 18 Federal statutes provide the boundaries within which, and the limits according to which, state governments must formulate and enact child support enforcement programs.

Federal legislation also includes an indomitable incentive for states in the formulation of child support enforcement provisions. The federal statutes include a system of penalties to be imposed upon state governments for their failure to establish child support enforcement programs. 19 For example, under Title IV-D, states forfeit block grants for Temporary Assistance for Needy Families ("TANF") if they fail to achieve certain paternity percentages, if they submit “incomplete or unreliable” statistical information, or if they fail to “substantially comply,” unless the violation is corrected within the following year and the statistical information submitted for the following year is not “incomplete or unreliable.” 20 The fiscal penalties imposed upon

17. Id. at 7774.
18. Id. The federal government’s suggested role was described as assisting the states in conducting and evaluating their self-assessment reviews, supervising the enactment of state self-assessment, referring states to the optimal procedures of the other states, and considering the potential success of possible self-assessment actions. See id. at “Federal Role.”
19. See id.
   (i)(I) [II] the State program failed to achieve the paternity establishment percentages . . . or to meet other performance measures that may be established by the Secretary;
   (II) on the basis of the results of an audit or audits conducted . . . that the State data submitted . . . is incomplete or unreliable; or
   (III) on the basis of the results of an audit or audits conducted . . . that a State failed to substantially comply with 1 or more of the requirements of part D; and
   (ii) that, with respect to the succeeding fiscal year-
   (I) the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance as described in subparagraph (A)(i); or
   (II) the data submitted by the state pursuant . . . is incomplete or unreliable; the amounts otherwise payable to the State . . . shall be reduced by the percentage specified in subparagraph (B).

Id. (emphasis added).
the states vary from one to five percent according to the number of consecutive years in which the state procedure fails to conform with federal child support enforcement regulations. The federal statute wields a sword against states as a compelling incentive for the enactment of child support enforcement provisions that satisfy federal requirements. Indeed, a Florida statute specifically acknowledged that noncompliance with PRWORA could lead to severe economic tragedy, which "poses a direct and immediate threat to the health, safety, and welfare of the children and citizens of the state and constitutes an emergency." Given the potential for federal penalties, the states have little alternative but to satisfy the federal statutes to the letter when creating child support enforcement schemes. In fact, some agencies have recognized the current statutory scheme as overly burdensome. For example, the National Child Support Enforcement Association passed a resolution that urged Congress to "simplify the distribution of child support to provide additional support to families attempting to reach self-sufficiency and to provide relief for states and families from the burdensome complexity of the PRWORA distribution rules" given the welfare reforms in the 1990s.

Each state formulates its own child support enforcement program through which intrastate child support orders can be enforced by a variety of means, including garnishing wages, seizing tax refunds, or placing the obligor in jail. However, approximately one third of child support enforcement cases are interstate cases, in which the non-custodial parent resides in a different state than the custodial parent and child. Jyl Josephson describes interstate child support cases as more complex: while he suggests that the child support enforcement system be uniform across the country adminis-

21. § 609 (a)(8)(B). The statute provides as follows:
The reductions required under subparagraph (A) shall be-
(i) not less than 1 nor more than 2 percent;
(ii) not less than 2 nor more than 3 percent, if the finding is the 2nd consecutive finding made pursuant to subparagraph (A); or
(iii) not less than 3 nor more than 5 percent, if the finding is the 3rd or a subsequent consecutive such finding.

Id.

22. FLA. STAT. § 61.1826(1)(e) (2000); see also § 61.1826(1)(d) (providing that "[n]oncompliance with federal law could result in a substantial loss of federal funds for the state's child support enforcement program and the temporary assistance for needy families welfare block grant").


24. JOSEPHSON, supra note 9, at 148.

25. Id.
tered by a federal agency, such as the Internal Revenue Service, rather than each state conducting its own support enforcement program, he recognizes that this change is most likely not feasible. The Uniform Reciprocal Enforcement of Support Act ("URESAs") was designed to enforce interstate child support obligations. However, the Uniform Interstate Family Support Act ("UIFSA") was enacted in 1998 to replace URESA. Unlike URESA, which lacked uniformity among the states, UIFSA was designed to provide "uniform rules, procedures, and forms for interstate cases." Congress also passed the Child Support Recovery Act in 1992 in an effort to address the enforcement problems that arise in interstate cases. Policy efforts regarding interstate child support cases are designed to increase collection percentages by integrating state procedures. However, interstate child support enforcement continues to challenge the statutory scheme.

B. Florida's Legislative Response

In response to federal legislation, the State of Florida granted the authority to adopt and administer child support enforcement provisions to the Department of Revenue ("DOR"), and custodial parents who have a child support order that is more than thirty days past due may solicit the DOR to collect the overdue support payment. Under Florida law, child support

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26. Id. at 153. Josephson describes "administrative upheaval" as the reason why child support enforcement could not be conducted on a federal rather than a state level; this would most likely include systemic costs in combining the various provisions from each of the fifty states into a uniform federal standard. See id.

27. ERICKSON, supra note 11, at 306.


29. ERICKSON, supra note 11, at 306.


1. willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;

2. travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or

3. willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000.

Id.

31. FLA. STAT. § 61.13 (2000). The statute provides that "[t]he Department of Revenue shall have the authority to adopt rules to implement the child support enforcement provisions of this section." § 61.13(1)(b)(4); see also State of Florida Department of Revenue,
orders made after January 1, 1985, or made before January 1, 1985, but subsequently modified shall "direct that the payments of child support be made . . . through the depository in the county where the court is located." The depository is the default method according to which child support awards are paid. Parties may avoid the depository per the statute, but only upon their mutual agreement and only if it is in the "best interest of the child." The Public Information Office of the Florida Office of Child Support Enforcement indicated that the information with respect to whether the majority of orders uses the depository's exact members was not readily available. Florida statutes also direct "each depository to perform duties with respect to the operation and maintenance of a State Disbursement Unit and the non-Title IV-D component of the State Case Registry." The state defines the relationship between the DOR and the depository as a cooperative agreement that permits access to the State Disbursement Unit and non-Title IV-D provisions of the State Case Registry, which "complies with all state and federal requirements." In Title IV-D cases, the rights of the obligee regarding the depository are conveyed to the government agency.

The clerks of court are charged with collecting, enforcing, and distributing child support payments. In furtherance of this duty, the clerks created a statewide system that permits automated processing of child support payments. Specifically, the Florida legislature noted that only a contract between the DOR and the Florida Association of Court Clerks would ensure state compliance sufficient to avoid a federal financial penalty.

The actual application of Florida procedure to the child support enforcement system may be sufficient to avoid federal penalties, but it is not adequate for collecting child support. In fact, one DOR Quarterly Report indicates that $45 million more in child support was collected than distrib-


32. §§ 61.13(1)(d)1.
33. §§ 61.13(1)(d)3.
34. April 2, 2001 telephone conversation with OCSE Public Information Officer Dave Burns.
35. § 61.1826(1).
36. § 61.1826(2). The depositories also must enter into a "written agreement" with the Florida Association of Court Clerks and the Department of Revenue. Id.
37. §§ 61.13(1)(d)5.
38. See § 61.1826(1)(a).
39. § 61.1826(1)(g) (recognizing the establishment of the Clerk of Court Child Support Enforcement Collection System).
40. See § 61.1826(1), (3), (4) (recognizing the importance of the clerk's involvement and directing the Department of Revenue [hereinafter DOR] to contract with the Florida Association of Court Clerks).
uted to the children for the quarter covered, even though Florida law specifies that collected support ought to remain in the depository for only two days. In addition to child support money that is not collected, the child support enforcement program in Florida exhibits a fundamental problem in distributing the money collected, as evidenced by the DOR holding sizeable amounts that should have been distributed. In the current system, the interests of the State of Florida are satisfied because the child support enforcement program avoids federal penalty. However, the result is an ineffective, inequitable, and unjust system. Children, whether they reside with their custodial parents or in foster homes, do not receive the support to which they are entitled. The system, although the result of complex statutory interaction and interest balancing between family autonomy and state fiscal interest, fails in its primary goal: to provide financial support to children. This systemic failure in Florida warrants the extension of private citizen suits against public and private entities to ensure that the child support orders are enforced and distributed correctly.

In addition to the failure to distribute child support awards, another systemic feature provides support for private citizen suits. Under the current statutory scheme, the DOR specifies that an attorney-client relationship does not exist between the attorneys which it hires to enforce child support orders and the custodial parent; rather, the client is the DOR itself. The DOR has the authority to collect child support orders, and it may impose remedies upon noncustodial parents, including seizing IRS tax refunds, freezing and seizing bank accounts, income deduction, liens on real and personal property, liens on workers’ compensation and unemployment compensation, and by suspending professional licenses and drivers licenses. Thus, the attorney who is hired to seek child support enforcement is an advocate for the state and not for the interests of the custodial parent. Nancy Erickson notes that because the attorney is representing the interests of the state, the attorney will not represent the interests of the custodial parent (or the child) when they are in conflict with or do not coincide with those of the state. Furthermore, Erickson cites the following examples of the conflict between the interests of the state and those of custodial parents: when a state seeks child support from the noncustodial parent even if the custodial parent does not desire it or

41. October 1999 report submitted by Florida Department of Revenue office of Child Support Enforcement to federal OCSE in HHS.
42. State of Florida Department of Revenue, supra note 31.
43. Id. Other remedies include: suspending Florida driver, professional, and hunting licenses; issuing interstate arrest warrants; reporting nonpayment of child support to credit bureaus and garnishing wages; denying passport applications or causing passports to be suspended (if the unpaid obligation is $5,000 or more). FLA. STAT. §§ 409.2551, .2598 (2000).
44. ERICKSON, supra note 11, at 128.
when a state supports custody for the father in an effort to eliminate the mother and child from public assistance.\textsuperscript{45}

If Erickson’s assertion is correct, there is a systemic interest in permitting custodial parents their own representation. This systemic feature provides a compelling argument that custodial parents must retain a corollary right to sue to protect their individual interests. If a custodial parent is not allowed to sue for support enforcement under Title IV-D, the result would be the disenfranchisement of an entire segment of custodial parents and their children. Congress would not intend, and the courts would not allow, this result. Indeed, a custodial parent may sue a noncustodial parent even after and even though their right to receive child support was assigned under Title IV-D.\textsuperscript{46} Erickson reports that it is essential for a custodial parent to retain the private right to sue the noncustodial parent because the interests of states do not necessarily coincide with those of the custodial parent.\textsuperscript{47} The question that this article pursues extends the justification stemming from lack of representation of custodial parents against noncustodial parents to the issue of whether one has a right to sue private and public agencies who are responsible for child support enforcement. As privatization of public agency enforcement increases through application of section 409.25575 of the \textit{Florida Statutes}, this remedy can be even more important to ensuring timely distribution of child support collected to the child’s custodian.\textsuperscript{48}

Part II described the federal legislation in child support enforcement that resulted in state enforcement programs by virtue of the threat of severe penalties. The child support enforcement system in Florida is no exception. Part II also explored the failure of the current Florida statutory scheme to fully distribute money owed to children and to represent the interests of children in enforcing support orders. A private cause of action against public or private agencies in charge of collecting and distributing child support funds is necessary to correct these systemic failures.

\section*{III. Federal Law as a Source of Liability}

Federal law offers a possible source for private action against agencies that fail to enforce child support orders or that fail to distribute child support funds collected, which are necessary to the livelihood of foster children and children who live with their custodial parents. If an individual is acting as an agent of the state, then that individual may be sued for a violation of section

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 127–28.
\item \textsuperscript{46} See \textit{id.} at 129.
\item \textsuperscript{47} \textit{Id.} If the custodial parent is able to collect the child support money, the potential for attaining freedom from public assistance increases. \textit{Id.}
\item \textsuperscript{48} \textsection 409.25575.
\end{itemize}
Section 1983 allows citizens to sue those who act "under the color of any statute . . . of any State" for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Section 1983 provides two possible foundations on which a suit for noncompliance with a child support order can be based: a private action must arise from a violation of either constitutional or statutory rights. Part III will apply the provisions of section 1983 to constitutional violations of procedural and substantive due process in addition to statutory violations of Titles IV-D and IV-E of the Social Security Act.

The common law is less than clear as to when individuals have a private right of action under section 1983. If the statute providing the rights allegedly being denied contains an express prohibition against the bringing of an independent action pursuant to section 1983, or if the statute includes remedial measures that were sufficient to demonstrate congressional intent to exclude such a remedy, then no private right of action will likely be allowed to go forward pursuant to section 1983. For example, the enforcement mechanisms of the Federal Water Pollution Control Act and the administrative mechanism from the Education of the Handicapped Act both demonstrated that Congress intended to preempt the private action remedy established in section 1983. Furthermore, if a state alleges that the statute either expressly prohibits or provides sufficient mechanisms such that section 1983 becomes unnecessary, then the state has the burden of proof in establishing that a private cause of action does not arise.

The United States Supreme Court and the Eleventh Circuit courts have predominantly applied combinations of the criteria announced in Wright v.

49. Maine v. Thiboutot, 448 U.S. 1 (1980). An implied cause of action was no longer necessary to private enforcement under section 1983, and the four-part inquiry was simplified because section 1983 allows for recovery for a violation of rights under a federal statute. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 525–26 (1990). The court mentions one common requirement that remained between both implied causes of action and section 1983: the statutory language "must confer identifiable enforceable rights." Id. at 526. It is important to remember that the Eleventh Amendment precludes actions for any relief directly against the state itself, and also precludes damage actions against state government employees and agents in their state representative capacity. U.S. CONST. amend. XI. The Eleventh Amendment does not, however, preclude damage actions against state personnel in their individual capacity, nor does the Eleventh Amendment preclude actions for declaratory or equitable relief against state personnel in their representative capacities. Id.


53. Wilder, 479 U.S. at 521.
City of Roanoke Redevelopment & Housing Authority and Wilder v. Virginia Hospital Association. The standards applied in Wright and Wilder, although formulated differently, encompass similar criteria. In Wright, the Court applied section 1983, holding that the regulations gave low income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute. The Court noted that the Brooke Amendment evinced a mandatory right and a clear intent to benefit the tenants. In Wilder, the Court considered whether the legislature intended to benefit the tenants in the utility and rental rates, and articulated the prevailing test used to determine whether a private cause of action arises under section 1983: 1) the statutory or constitutional provision must be "intended to benefit the putative plaintiff;" 2) the obligation upon government must be mandatory; and 3) the plaintiff's interest must not be "too vague and amorphous" such that it is 'beyond the competence of the judiciary to enforce.'

Although the criteria enunciated in Wilder provides a useful test, Golden State Transit Corp. v. Los Angeles formulates the section 1983 test along different lines. The Court in Golden State described the question of a private cause of action under section 1983 in terms of two criteria: 1) violation of a federal right; and 2) Congress "specifically foreclosed a remedy under [section] 1983." In determining whether a violation of a federal right occurred, Golden State cited Wright as precedent and considered issues such as whether the provision created binding obligations upon the state, whether the plaintiff's interest was too vague to be enforceable, and whether the provision benefited the plaintiff. However, in addition to the criteria applied from Wright, the Court also considered whether Congress intended to preempt a private action under section 1983. In response, Golden State cited

54. Id. at 418 (finding a private cause of action under section 1983 against the public housing authority for violating the rent ceiling of the Brooke Amendment to the Housing Act and the regulations of the Department of Housing and Urban Development).
55. 496 U.S. at 498 (holding that the Boren Amendment to the Medicaid Act includes a private cause of action for health care providers to seek reimbursement of costs from state officials).
56. Wright, 479 U.S. at 420.
57. Id. at 430.
58. Wilder, 496 U.S. at 509.
60. Golden State, 493 U.S. at 106.
precedent where the provision included ample enforcement procedures, and where a suit by plaintiff "would be inconsistent with Congress' carefully tailored scheme." Thus, the *Golden State* Court conducted an analysis similar to that developed in both *Wright* and *Wilder*.

However, *Suter v. Artist M.* appeared to retreat from the standard enunciated in *Wilder* in failing to apply *Wilder* to decide whether a private cause of action exists under section 1983. It was not sufficient that the provisions of the Adoption Assistance and Child Welfare Act were mandatory; this fact alone did not give rise to section 1983 liability. The Supreme Court in *Suter* found it significant that the provisions of the Adoption Assistance and Child Welfare Act did not include a formula or percentage by which to quantify "reasonable efforts," and the Court interpreted the legislative intent as intending to exclude recovery under section 1983 if rights instilling such a cause of action were omitted from the statutory language. The Court distinguished *Suter* from *Wilder* in that the statute in *Wilder* specified that the "reasonable utilities" costs were limited and rent costs were limited to thirty percent of the recipient's income; *Wilder* gave rise to a cause of action under section 1983, while *Suter* did not. In holding that section 1983 did not supply a private cause of action, *Suter* conducted a "careful examination of the language... in the context of the entire act," which led to the conclusion that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries.

Unlike *Wilder* and *Wright*, the Court in *Suter* adopted a standard of intense statutory scrutiny to determine whether a right suitable for section 1983 enforcement arises. The dissent in *Suter* described the majority opinion's holding not only as "plainly inconsistent" with *Wilder*, but also conspicuously lacking the application of the common law principles to determine section 1983 liability. However, the majority did not explicitly

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61. *Id.* at 107 (quoting *Smith*, 468 U.S. at 1012).
63. *Id.* (holding that children beneficiaries of the Adoption Assistance in Child Welfare Act did not have a section 1983 cause of action against the Illinois agency responsible for exerting "reasonable efforts" to administer the placement of foster care children because such language was too vague to be enforceable).
64. *Id.* at 358.
65. *See id.* at 360.
66. *Id.* at 361–62.
68. *Id.* at 365 (providing a thorough summary of principles for finding a private right of action under Section 1983). The dissent stated: "I cannot acquiesce in this unexplained disregard for established law." *Id.*
overrule Wilder's three-part analysis, thus leaving it unclear which analysis should or will be conducted.69

In the more recent Blessing decision, the Court indicated that the analysis from Wright and Wilder remains good law as shown when the court applied a three-part test to determine whether a private cause of action exists under Title IV-D of the Social Security Act.70 The Blessing Court reversed the lower court's order recognizing a cause of action for failure of the Arizona child support system to meet the federally mandated "substantial compliance" requirement of the federal statute, commenting that neither the plaintiffs nor the lower court had engaged in the proper analysis of the specific rights infringed upon. The Court also found, however, that the child support statutory scheme was not comprehensive enough to preclude section 1983 liability and found there was no express preclusion.71 The Court went on to suggest amendment of the complaint to include a request for relief connected to plead failure to distribute the support payments due, which it implied would be action pursuant to section 1983.72

Other decisions reveal that the Eleventh Circuit and related district courts also treat the test formulated in Wilder favorably. For example, in Doe v. Chiles,73 the issue was whether the failure of the Florida Department of Health and Rehabilitative Services to furnish Medicaid within the reasonably prompt time mandated by the Medicaid Act74 constituted a valid basis for the lower court's providing of injunctive relief pursuant to section 1983.75 The circuit court distinguished Suter, analyzed Wilder and Wright, and held that the plaintiffs had a federal right to reasonably prompt Medicaid assistance and found the right properly enforceable under section 1983.76 In Mallo v. Public Health Trust of Dade County,77 the court used the two-part test to determine whether a private right of action exists under section 1983,

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69. See Ashish Prasad, Comment, Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act, 60 U. Chi. L. Rev. 197, 206 (1993), for a thorough discussion and comparison of standards enunciated in both the Wilder and Suter decisions. It should also be noted that Congress amended the statute after the ruling in Suter, with the statute-related notes and legislative history suggesting congressional desire to effectively overrule Suter.

71. Id. at 338–39.
72. Id. at 345–46.
73. 136 F.3d 709 (11th Cir. 1998).
75. Chiles, 136 F.3d at 714. The complaint alleged the time being taken exceeded four years. Id.
76. Id. at 709.
77. 88 F. Supp. 2d 1376 (S.D. Fla. 2000).
and the Wilder framework is encompassed within this test. The burden of the first step falls upon the defendants, who must demonstrate that Congress either explicitly or implicitly intended to "foreclose such private enforcement." The court held that the defendants failed to meet the burden that Congress intended to preclude recovery private action in conjunction with the Medicaid Act. The burden of the second step falls upon the plaintiffs, who must demonstrate that their federal rights were violated. As part of the second step, the court incorporated the Wilder three-part test "to determine whether statutory provisions implicitly create [a] federal right." Thus, the three-part test from Wilder remains in good standing in the Eleventh Circuit.

Part III analyzed the development of common law standards for determining whether a private cause of action arises under section 1983, arguing that, although there is not one definitive standard, the prevailing law represents a combination and relationship of factors developed from cases such as Wilder and Golden State. Part IV will apply the tests to argue that federal law-violations of the constitutional guarantee to due process and violations of the Social Security Act-gives rise to a private cause of action of both custodial parents and foster children.

III. VIOLATION OF A CONSTITUTIONAL OR A STATUTORY RIGHT

A. Constitutional Right

Child support orders implicate issues raised by the Fifth and Fourteenth Amendments. The CSEA mandates that states establish "expedited processes" in instances of Title IV-D child support enforcement. Accordingly, states must protect the due process rights of the parties in such expedited processes, and custodial parents are entitled to notice and to an opportunity to be heard. However, this exception does not provide an avenue for liability under section 1983 because the problem of failure to enforce does not trigger the due process requirement of the expedited processes. Rather, this article examines the issue of whether a state or a private agency acting under the

78. Id. at 1379.
79. Id. at 1380 (citing Wright, 479 U.S. at 423).
80. Id.
81. Id.
82. Mallo, 88 F. Supp. 2d at 1381.
83. Erickson, supra note 11, at 355.
84. 45 C.F.R 303.101(c)(2) (2000). The regulation provides as follows: "[u]nder expedited processes . . . the due process rights of the parties involved must be protected." Id. Section 303.101(c)(1) of Title 45 of the Code of Federal Regulations specifically governs the issue of paternity determination. Id.
color of state authority may be held liable for mishandling or failing to collect child support.

When injunctive relief is sought, rule 65 of the Federal Rules of Civil Procedure requires the Court to consider the following four factors: 1) the substantial likelihood that plaintiff will succeed on the merits; 2) the substantial threat that plaintiff will suffer irreparable injury if the temporary restraining order is not issued; 3) the threatened injury outweighs the harm a temporary restraining order may cause the defendants; and 4) the grant of a temporary restraining order will not disserve the public interest.\(^\text{85}\) As to the four factors, "'no particular quantum of proof is required as to each of the four criteria.'"\(^\text{86}\) The four factors, which also govern the grant of preliminary injunctive relief, favor the issuance of a temporary restraining order in this case. Likelihood of success on the merits is not to be equated with success on the merits.\(^\text{87}\)

As to children in foster care, the government cannot condition receipt of a benefit, such as remaining in foster care, on the relinquishment of a constitutional right.

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command di-

\(^{85}\) E.g., Levi-Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995).


\(^{87}\) Paul Y. v. Singletary, 979 F. Supp. 1422, 1425 (S.D. Fla. 1997) (citing Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981)); Norman v. Johnson, 739 F. Supp. 1182, 1190 (N.D. Ill. 1990) (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386–87 (7th Cir. 1984)) (holding in an action against the Illinois' state child welfare agency for inadequate caseworkers and other services the party requesting a preliminary injunction must show as a threshold matter, that they have "some likelihood of succeeding on the merits" in the sense that their "'chances are better than negligible'").
rectly." [citation omitted] Such interference with constitutional rights is impermissible. 88

"At a minimum, 'due process requires that government officials refrain from acting in an irrational, arbitrary or capricious manner.'" 89 "The absence of standards governing the withdrawal or modification of services permits arbitrary decisionmaking" in violation of due process. 90 This is equally true if the government agency imposes standards that are different from those established by written policies or regulations. 91

It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. [citation omitted] For this reason alone due process requires that selections among applicants be made in accordance with "ascertainable standards," [citation omitted] .... 92

Administering a government program "using unwritten standards leads to rule by decree and not by law." 93

The property and liberty interests that are protected by procedural due process are creatures of state law, including statutes, regulations, and decisional law interpreting state common law or the federal constitution. 94 The touchstone for a property interest is that it creates "a legitimate claim of entitlement" to a benefit. 95 "[R]ules and understandings, promulgated and fostered by state officials ... may justify [a] legitimate claim of entitlement" to the benefit. 96

88. Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990) (alteration in original) (quoting Perry v. Sinderman, 408 U.S. 593, 597 (1972)); see also, e.g., O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) ("[t]he State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process").


92. Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968).


95. Id. at 577.

96. Perry v. Sinderman, 408 U.S. at 602; see also Brown v. Ga. Dep't of Revenue, 881 F.2d 1018, 1027 (11th Cir. 1989) (fact that rules provide for a hearing to challenge dismissal weighs in favor of finding a protected interest); Shahawy v. Harrison, 875 F.2d 1529
The recipient has a property interest in a benefit if the government cannot terminate it except for good cause, and the existence of procedures to challenge the termination is evidence of the state's recognition that the interest is protected. A protected interest is created if state law restricts the government's discretion in extending or terminating benefits.

When state law creates an entitlement to a benefit, the next issue is what process is due. In *Mathews v. Eldridge*, the Court articulated the three factors that must be considered in determining the sufficiency of the process that is afforded:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

When the nature of the benefit is such that its termination deprives the former recipient of the "means to obtain essential food, clothing, housing, and medical care," only a pre-termination hearing will suffice. Foster care is unquestionably such a benefit.

Foster children have a protected interest in remaining in foster care past their eighteenth birthday. The analysis of Plaintiffs' property right begins with the statute that establishes the availability of foster care for youngsters over eighteen years of age. Section 409.145(3)(a) of the *Florida Statutes* provides:

The department is authorized to continue to provide the services of the children's foster care program to individuals 18 to 21 years of age who are enrolled in high school, in a program leading to a high school equivalency diploma as defined in s. 229.814, or in a full-
time career education program, and to continue to provide services of the children's foster care program to individuals 18 to 23 years of age who are enrolled full-time in a postsecondary educational institution granting a degree, a certificate, or an applied technology diploma, if the following requirements are met:

1. The individual was committed to the legal custody of the department for placement in foster care as a dependent child;
2. All other resources have been thoroughly explored, and it can be clearly established that there are no alternative sources for placement; and
3. A written service agreement which specifies responsibilities and expectations for all parties involved has been signed by a representative of the department, the individual, and the foster parent or licensed child-caring agency providing the placement resources.\textsuperscript{102}

Section 409.145(3)(b) of the \textit{Florida Statutes} provides that "[s]ervices shall be terminated upon completion of or withdrawal or permanent expulsion from high school" or other enumerated educational program.\textsuperscript{103}

Section 409.145(3) may give DCAF the discretion whether to create a program of providing foster care services beyond a child's eighteenth birthday, but once the program is in place, DCAF's discretion is restricted concerning which youngsters will be entitled to continue to receive the benefits.\textsuperscript{104} The program is limited to youngsters who attend one of the enumerated educational or vocational programs, who were in foster care prior to reaching eighteen years of age, and for whom no other placement resource has been identified despite a thorough search.\textsuperscript{105} DCAF cannot extend foster care benefits to a youngster who does not meet these requirements and, obversely, cannot deny the benefits to a child who meets the listed criteria.

\textsuperscript{102}FLA. STAT. § 409.145(3)(a) (2000).
\textsuperscript{103}§ 409.145(3)(b).
\textsuperscript{104}See § 409.145(3).
\textsuperscript{105}A DCAF document that clearly is specifically intended for foster youth who have turned eighteen years of age, states as follows:

\textit{You are 18! You made it! Now what? Many teens, staff and foster parents have asked what happens to a teen in foster care when he or she turns 18. You have several options: ... You may choose to remain in foster care to complete your education. You may remain in a foster home, group placement, or Supervised Practice Living through the Independent Living Program. ... To remain in foster care after 18, you must be attending a full time educational program. This could be high school, a G.E.D. Program, technical school or college. ... Once you are 18 if you do not attend school full-time, you are no longer eligible to be in foster care.}

\textit{Id.} There are no other eligibility requirements cited in this document.
"Once the Department begins to provide services [under section 409.145(3)(a)], its obligation is not voluntary. Subsection 409.145(3)(b) mandates that the services continue so long as the individual complies with the statutory requirements."\(^{106}\)

Section 409.145(3)(b) and this operating procedure recognize that an individual can be involuntarily discharged from the program only for cause, that is, noncompliance with the case plan or program. Under *Memphis Light* and related cases, this fact establishes foster youth have a protected property interest in remaining in foster care past their eighteenth birthday.\(^{107}\)

Applying the *Mathews v. Eldridge* analysis and analogizing to the welfare recipients in *Goldberg v. Kelly*, it is clear that a pre-termination hearing before an impartial decision maker is essential to achieve due process. The interest at risk for the youth being discharged is in having minimally adequate food, shelter, and clothing. In the words of *Goldberg*, such children will face "brutal need" upon discharge. Indeed, their need will be at least as great as that faced by an adult welfare recipient who is not disabled.\(^{108}\) Consequently, like welfare recipients, children must be allowed to retain the benefit by remaining in foster care pending review of DCAF's discharge decision.

Disputes concerning whether the foster youth was, in fact, out of compliance with the program or the case plan and, implicitly, whether the case plan was appropriate to the young adult's individual needs, involve intensely fact-sensitive issues which require an opportunity for an oral presentation before an impartial fact finder in an environment that is suited to the foster youth's abilities. Finally, the government has a very substantial interest in retaining youth in foster care until they are able to live independently. Not only will there be long term financial benefits from reduced welfare rolls and these individuals' contributions to the state's economy, defendants, as these youngsters' custodian, also have an interest in seeing former foster children succeed in life.

The Eleventh Circuit has held that "[a] showing of irreparable harm is 'the sine qua non of injunctive relief.'"\(^{109}\) The Fourth Circuit decision in *L.J. v. Massinga*\(^{110}\) is illustrative of the test for irreparable injury in the foster care setting. Foster children in the custody of the Baltimore City Department of Social Services brought an action against state and city officials for their part


\(^{107}\) Occean, 123 F. Supp. 2d at 624.

\(^{108}\) Goldberg, 397 U.S. at 261.


\(^{110}\) 838 F.2d 118 (4th Cir. 1988).
in administering Maryland's foster care program. Plaintiffs alleged that as a result of the Defendants' "maladministration of the program, they were victims of physical and sexual abuse as well as medical neglect" and "sought broad interim and permanent injunctive relief to redress the deficiencies in the administration of the program and money damages." The district court in Massinga found that there was a likelihood of irreparable harm to the Plaintiffs if the interim relief was not granted.

The irreparable harm that foster youth face if terminated from foster care without the opportunity to complete their education and develop necessary job and independent living skills is borne out by the well-documented outcomes of many youth discharged from foster care upon reaching age eighteen. Because foster youth are not adequately prepared to survive on their own at eighteen, the foster care system has created a whole new category of homeless. Indeed, nationwide studies have shown that twenty to forty percent of our country's homeless population consists of former foster youth. In fact, a 1991 National Association of Social Workers study found that more than one fifth of teens at homeless shelters arrive directly from foster care nationwide.

In addition to comprising a large segment of our homeless population, foster youth are disproportionately represented on public assistance rolls, in state mental hospitals, and in state prisons. These youth are more likely to end up in prison or on welfare, and they often turn to drugs or prostitution.

111. Id. at 119.
112. Id.
113. Id. at 120.
115. See Study by the Nat'l Ass'n of Social Workers, A Summary of Findings from a National Survey of Programs for Runaway and Homeless Youth and Programs for Older Youth in Foster Care (1991) (on file with the Nat'l Ass'n of Social Workers).
116. See Somini Sengupta, Youth Leaving Foster Care with Few Skills or Resources, N.Y. TIMES, Mar. 28, 2000, at A1; Barbara Vobejda, At 18, It's Sink or Swim; For Ex-Foster Children, Transition is Difficult, WASH. POST, July 21, 1998, at A1; Sonia Nazario, Sex, Drugs, and No Place to Go, L.A. TIMES, Dec. 12, 1993, at A1; see also Diana J. English, Sophia Kouidou-Giles & Martin Plocke, Readiness for Independence: A Study of Youth in Foster Care, 16 Children and Youth Services Review, 147, 157 (1994) (indicating the skills that youth lack by the time they emancipate from state foster care seriously impact their successful transition to adulthood).
Further, a recent study on former foster youth conducted by the University of Wisconsin found that "by 12-18 months past discharge, 37 percent of the young adults had not yet completed high school, [and that only] nine percent had entered college." Additionally, "one-quarter to one-third of the youths reported a perceived lack of preparedness in several skill areas [including managing money, living on own and parenting]." Moreover, it has been found that only fifty percent of post-foster care youths are employed twelve to eighteen months after leaving the foster care system.

It was because of findings such as these that Congress originally created the federal Independent Living Initiative to ensure that all foster youth sixteen years old and older would receive independent living services and skills training in order to prevent these children from ending up homeless, on welfare, or in jail.

Most recently, in enacting the Foster Care Independence Act of 1999, Congress found:

Congress has received extensive information that adolescents leaving foster care have significant difficulty making a successful transition to adulthood; this information shows that children aging out of foster care show high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior; they are also frequently the target of crime and physical assaults.

The Nation's State and local governments, with financial support from the Federal Government, should offer an extensive program of education, training, employment, and financial support for young adults leaving foster care, with participation in such program beginning several years before high school graduation and

118. Mark E. Courtney and Irving Piliavin, Foster Youth Transitions to Adulthood: Outcomes 12 to 18 Months After Leaving Out-of-Home Care, at 2 (July 1998 (Revised Aug. 1998)).
119. See id.
continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of age.\textsuperscript{122}

Society is best served by enabling youth who are committed to the foster care system as dependent children and who have not completed their education to remain in foster care after age eighteen in order to complete their education and make a successful transition to adulthood. It is unquestionable that the public interest is best served by a well-run, humane, and effectively administered foster care system, which will preserve the lives, health, and safety of foster youth. Without such a system, the harm to the public interest is substantial and tragic, with increased numbers of older foster care children suffering neglect of the most damaging nature and the costs to the youth, as well as the costs to our communities, continuing for a lifetime.

Numerous studies conducted throughout the nation and numerous legislative hearings leading up to the enactment of the Foster Care Independence Act of 1999 have come to the same conclusion, as has, most recently, President Bush who stated:

The personal and emotional costs are especially high for young people who leave foster care at age eighteen without having been adopted. Research indicates that these young people experience alarming rates of homelessness, early pregnancy, mental illness, 

\textsuperscript{122} Foster Care Independence Act of 1999, 106 Pub. L. No. 106-169, § 101, 113 Stat 1823 (1999). Through the Foster Care Independence Act of 1999, Congress doubled the annual federal funding from $70 million to $140 million to enable states to serve foster youth through the age of twenty-one. See id. The legislation provides for expanded training and educational opportunities, access to health care, housing assistance, counseling and other services for teenagers and young adults in foster care to help them make a successful transition to adulthood. See id.; see also 42 U.S.C. § 677 (1994 & Supp. IV 1998). As noted by Rep. Mark Foley (Fla.) in the House debate on this bill,  

Last year Florida had 3,103 youths who were eligible for independent living programs. Although some of these kids have foster parents who stick with them and are willing to help, including giving them money out of their own pockets, many have been shuffled around so much that they do not have anyone to turn to. These foster children have barely been able to be kids, and suddenly they are forced to become instant adults. It is no wonder that many of them end up on the streets or on welfare, or as teenaged parents.  

145 CONG. REC. H4962 (daily ed. June 25, 1999) (statement of Sen. Foley) This new law has had a significant impact on Florida's Independent Living budget for older foster youth, raising it from $900,000 to $6.1 million. See Shana Gruskin, State to Help Foster Kids Master Adult Life, SUN-SENTINEL (Fl. Lauderdale), Jan 2, 2000, at 1B.
unemployment, and drug abuse in the first years after they leave the system.\textsuperscript{123}

Florida courts have held that Florida law does not permit the retention of circuit court juvenile jurisdiction over a person after the age of eighteen when she continues to receive services from the Department of Children and Family Services.\textsuperscript{124} Hence, if Leslie F. is improperly deprived of her right to continued foster care benefits, she has no other means to seek any legal remedy in the Florida state courts to make her whole.

B. Social Security Act

Agencies established under Title IV-D "must pursue enforcement" of child support enforcement rights because families must "assign their support rights to the state."\textsuperscript{125} Just as the Supreme Court held in \textit{Wright} that HUD has "authority to audit, enforce annual contributions contracts, and cut off federal funds [b]ut these generalized powers are insufficient to indicate a congressional intention to foreclose [section] 1983 remedies,"\textsuperscript{126} so too should the Court hold that Title IV-D of the Social Security Act permits private enforcement through section 1983.

Pursuant to the CSEA, state agencies must collect child support "in order to reimburse the federal and state governments for the costs of maintaining children in the federal IV-E foster care program."\textsuperscript{127} Specifically, the Federal Payments for Foster Care and Adoption Assistance provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A and plan approved under part D, to secure an assignment to the State of any rights to support on behalf

\textsuperscript{123} \textit{A Blueprint for New Beginnings: A Responsible Budget for America's Priorities}, EXEC. DOC. No. 041-001-00560-9, at 76 (2001) available at http://www.whitehouse.gov/news/usbudget/blueprint/blueprint.pdf. To help this class of youth, President Bush has proposed that the new federal budget "provide $60 million through the Foster Care Independence Program specifically for education and training vouchers to youth who 'age out' of foster care." \textit{Id.}

\textsuperscript{124} L.Y. v. Dep't of Health & Rehabilitative Servs., 696 So. 2d 430 (Fla. 4th Dist. Ct. App. 1997); see also N.L. v. Dep't of Children & Family Servs., 770 So. 2d 220 (Fla. 3d Dist. Ct. App. 2000).

\textsuperscript{125} \textsc{Erickson, supra} note 11, at 10–11.


\textsuperscript{127} \textsc{Erickson, supra} note 11, at 379.
of each child receiving foster care maintenance payments under this part. 128

Erickson describes policy concerns that arise under assignment and children in foster care that do not arise under assignment and AFDC: the assignment should be made only if it is appropriate and should be postponed because of the propensity for economic instability of the former custodial parent. 129 If the child returns home, then the support should be sent directly to the custodial parent, provided that they are not welfare recipients. 130 In this instance, the issue of right of action of foster care children merges with that of children who reside with their custodial parent.

V. SOVEREIGN IMMUNITY AND THE STATE OF FLORIDA

A. In General

As was demonstrated previously, the Eleventh Amendment of the United States Constitution protects the State of Florida and its representatives from federal law based damage actions and protects the state itself [though not representatives] from suits seeking declaratory or injunctive relief. 131 The state’s liability is different under state law, and the significance of the differences varies depending on whether the suit is one sounding in tort or contract. The analysis begins with Florida’s Constitution, which reflects a presumption of pre-existing state immunity from suit. It reads: "SECTION 13. Suits against the state. Provision may be made by general law for bring- ing suit against the state as to all liabilities now existing or hereafter originating." 132

The 1973 Legislature officially passed a partial waiver of sovereign immunity in tort cases, with various preconditions required and limitations on damages recoverable. 133 In pertinent part, the current statute provides as follows:

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives

129. ERICKSON, supra note 11, at 379-80 (citing Carol Golubuck, Cash Assistance to Families: An Essential Component of Reasonable Efforts to Prevent and Eliminate Foster Care Placement of Their Children, 19 CLEARINGHOUSE REV. 1393, 1399 (April 1986)).
130. Id. at 381.
131. See also FLA. STAT. § 768.28(17) (2000).
133. 1973 Fla. Laws ch. 73-313, § 1.
sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.\textsuperscript{134}

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.\ldots\textsuperscript{135}

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as

\textsuperscript{134} § 768.28(1).
\textsuperscript{135} \textit{Id.} § 768.28(5). For each separate incident of negligence that causes or contributes to damage, the statutory caps can be stacked. \textit{See}, \textit{e.g.}, Pierce v. Town of Hastings, 509 So. 2d 1134 (Fla. 5th Dist. Ct. App. 1987).
a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. 136

B. Liability in Tort Cases

The sovereign immunity waiver statute applies to all government entities, although municipalities were historically treated differently and could be held liable where a special duty to the injured person existed, even though another government entity may have been immune. 137 The 1973 adoption of the statute has effectively eliminated the different treatment of municipalities. 138 The Florida waiver statute essentially imposes liability on government entities when their negligent conduct is the type of conduct which would result in a private citizen being liable for damages caused by the same type of negligent conduct. 139 In analyzing the types of conduct for which waiver of immunity exists and those governmental non-private types of acts for which immunity continues without waiver, the Supreme Court of Florida adopted the following four-part test:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

136. § 768.28(9)(a).
137. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967).
138. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).
139. § 768.28(1).
(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? 140

As a further litmus test, the court also adopted the analysis of *Johnson v. State*141 to differentiate between planning and operational levels of decision making, with the waiver of tort immunity applying solely to nongovernmental, discretionary, operational level negligence.142

It is important to note that the statute can also have an effect on the liability of government employees and agents in their representative and individual capacities. The statute precludes personal liability suits against individuals in their individual capacity for any act "within the scope" of their employment or agency "unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."143

Thus, individual liability remains for acts "not within the scope" and for egregious acts meeting the bad faith, malicious purpose, or willful disregard threshold.144 A clerk of court officer whose duties expressly include the proper indexing of documents relating to real property can be sued in tort for damages caused by negligence in recording a title document; no immunity precluded the suit or the liability.145 There can clearly be individual government employee liability for acts outside the scope of employment;146 the

141. 447 P.2d 352, 360 (1968).
142. *Commercial Carrier*, 371 So. 2d at 1022.
143. § 768.28(9)(a).
144. *Id.* By statute, for non-egregious, covered acts "within the scope" the only proper defendant is the government entity itself. *See id.*
146. § 768.28(9); O.A.G. 80-57 (1980); *see* White v. Crandon, 156 So. 303 (1934) (member of county commission board will be held personally liable for money voted and paid out without authority of law where the payment is equivalent to misappropriation of public funds).
determination of whether a particular wrongful act is within the scope of employment or not is ordinarily a question for the trier of fact.\textsuperscript{147}

As one contemplates potential theories of action against a state agency, it should be noted that the immunity stated relates to "liabilities,"\textsuperscript{148} and actions against a government body for injunctive or other equitable relief are not necessarily precluded by sovereign immunity under state or federal law.\textsuperscript{149}

Although the legislature has not enacted any law waiving sovereign immunity in contract actions, Florida's courts recognize the inequity that would be present if the state could violate its contractual obligations with impunity, and have allowed actions to go forward against the state. In \textit{Pan-Am Tobacco v. Department of Corrections},\textsuperscript{150} the Supreme Court of Florida unequivocally held, in answering a question certified by the district court to be of the utmost importance, that sovereign immunity cannot be properly raised by government as a defense to an action for breach of an express, written contract.\textsuperscript{151} In so doing, the court relied upon the general powers of state agencies to enter into contracts and reasoned that because such contracts would be valid only if mutually enforceable the legislature obviously intended for state agencies to be amenable to suits for breaches of said express contracts.\textsuperscript{152} In \textit{Champagne-Webber v. Fort Lauderdale},\textsuperscript{153} the court held that an action for breach of an implied covenant of good faith inherent in the express contract would also lie.\textsuperscript{154} Similarly, governmental liability for prejudgment interest has been allowed, despite an absence of any statute expressly waiving immunity for same.\textsuperscript{155} A cause of action may also be

\begin{itemize}
  \item \textsuperscript{147} Alvarez v. Cotarelo, 626 So. 2d 267, 268 (Fla. 3d Dist. Ct. App. 1993).
  \item \textsuperscript{148} \textit{Fla. Const.} art. X, \S~13.
  \item \textsuperscript{149} \textit{E.g.}, Seminole Co. v. Mertz, 415 So. 2d 1286 (Fla. 5th Dist. Ct. App. 1982) (injunction requiring county to prevent the flow of surface water onto lower-lying property; sovereign immunity not applicable); \textit{Mallo}, 88 F. Supp. 2d at 1381 (injunction requiring reimbursement of excess funds demanded and received by county).
  \item \textsuperscript{150} 471 So. 2d 4 (Fla. 1984).
  \item \textsuperscript{151} Id. at 5.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} 519 So. 2d 696 (Fla. 4th Dist. Ct. App. 1988).
  \item \textsuperscript{154} Id. at 698. In \textit{Champagne-Webber}, the contractor relied on the city's representation that the soil on which construction would occur was all sand, and made its bid accordingly. \textit{Id.} at 696–97. The rock discovered under the sand during construction increased the work to be done and the cost. \textit{Id.} at 697. The \textit{Champagne-Webber} court's rationale was expressly approved by the Supreme Court of Florida. County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049, 1051 (Fla. 1997).
  \item \textsuperscript{155} \textit{See generally} Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990) (from date of demand); Florida Livestock Bd v. Gladdens, 86 So. 2d 812 (Fla. 1956); Public Health Trust of Dade v. State, 629 So. 2d 189 (Fla. 3d Dist. Ct. App. 1993).
\end{itemize}
stated against an individual employee personally in an action for breach of a contractual duty of a gratuitous bailee.\footnote{156}

VI. APPLICATION OF FLORIDA LAW TO CHILD SUPPORT ENFORCEMENT VIOLATIONS

There are two situations in which it is likely that liability for violating the child support enforcement laws will easily be found. First, when the noncustodial parent is known, but no action is taken to obtain a support order, the state violates its nondiscretionary ministerial obligation under federal and Florida law. Suit would therefore be proper to compel the official to obtain the support order.

If the child is in foster care in the state’s custody as a dependent child pursuant to section 39 of the \textit{Florida Statutes}, there is an absolute duty to provide all basic services up to age twenty-one under federal law\footnote{157} and the extended assistance provided under state law up to age twenty-three for foster youth who continue to pursue their educations\footnote{158}. An action for injunctive relief on behalf of an in-school foster youth would be appropriate here as well, to compel the state to comply with its nondiscretionary duties.

In the case of non-foster children for whom the state receives money, but fails to distribute funds to the custodial parent for the benefit of the child, available remedies under the authorities cited above would appear to include actions for damages under tort or contract law against the state itself or the official whose nonfeasance or misfeasance delayed or prevented the distribution, as well as equitable remedies such as a suit for mandamus or other injunctive relief.

VII. CONCLUSION

Under federal and Florida law, legal action is appropriate to enforce the state’s obligations to collect and distribute for the direct benefit of children the child support which the noncustodial parent has been ordered to pay. Such a suit can be brought against the agency head responsible for enforcement of the obligations pertaining to a non-foster child, and against the responsible official of the Department of Children and Families in the case of foster children.

\begin{footnotes}
\item[156] See generally \textit{Palm Court Corp. v. Smith}, 137 So. 234 (1931).
\item[157] Foster Care Independence Act of 1999, \textit{supra} note 122.
\item[158] See generally \textit{id}.
\end{footnotes}
"Please Let Me Be Heard:" The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution

Bernard P. Perlmutter & Carolyn S. Salisbury*

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The remarks and suggestions made by foster care graduates contained a recurrent theme—the importance of consultation with the young people themselves. They felt like pawns—subject to the many powers of others. They felt disregarded, that it did not matter what they wanted or had to say, because too often they were never asked. Whether it was a decision about a foster home, about

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changes in placement, about visiting arrangements with kin, or about their goals in life, they felt they should have been heard.¹

I. INTRODUCTION: THE STORY OF MICHAEL AND HIS STRUGGLE TO BE HEARD

“Michael” is a teenage foster child who was committed by the Florida Department of Children & Families (“DCF”) to a psychiatric institution after a five-minute hearing at which he was not present, in which he had no opportunity to participate, and at which no evidence was presented. The commitment order signed by the juvenile court judge required Michael to be transported under armed police escort to the institution. While at this institution, Michael was forcibly administered psychotropic drugs, placed in four-point leather restraints, and punished by being placed in seclusion, prohibited from speaking to other patients, or telephoning his family.

Michael was one of nine children born in Miami to a poor, single mother. At the age of six, Michael and his siblings were removed from his mother’s custody and placed in foster care due to allegations of abuse and neglect. During his many years in state custody, Michael was placed by DCF in several different settings, including foster homes, group homes, hospitals, and his mother’s home. While in foster care, he sometimes ran to his mother’s home.

During his long period in foster care, Michael was also hospitalized on several occasions for crisis stabilization and evaluations. Two doctors who evaluated Michael during one of these hospital stays disagreed as to the type of placement that was appropriate for him. One, a psychiatrist, recommended “‘a residential placement emphasizing self-responsibility, self-identity, and independent living skills . . . .’” ² Another, a psychologist, recommended that a foster placement in which the foster mother would be most “‘accessible and available’” to this adolescent child would be most therapeutic.³ Michael’s court-appointed attorney asked the court to appoint another psychologist to perform an independent examination. The independent psychologist recommended that Michael be given “individual therapy, psychotropic medications, and that he be placed in therapeutic foster care.”⁴ Later, his case was reviewed by a DCF multi-disciplinary case review committee charged under Florida law with determining children’s eligibility

¹. Trudy Festinger, No One Ever Asked Us: A Postscript to Foster Care 296 (1983).
². M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).
³. Id. at 93.
⁴. Id. at 94.
for residential treatment.\textsuperscript{5} The committee considered another assessment, one prepared by a psychologist hired by DCF. This assessment opined that Michael "did not appear to be at risk for suicidal attempts or self-injurious behaviors but he is at risk for running away and the dangers associated with this."\textsuperscript{6} The psychologist, however, recommended Michael’s placement in a "supportive, but locked residential environment wherein [Michael] will be able to develop relationships with others and can participate in family therapy . . . ."\textsuperscript{7} Without interviewing Michael, or hearing from Michael’s court-appointed lawyer, the committee adopted this psychologist’s recommendation.\textsuperscript{8}

DCF then appeared in court and asked Michael’s presiding juvenile court judge to order than he be placed in a locked residential environment.\textsuperscript{9} Michael’s attorney asked the judge, prior to ordering this placement, to allow an evidentiary hearing under the Baker Act\textsuperscript{10} to take place in order to sort out the conflicting evidence and allow Michael to present evidence that residential placement was not necessary.\textsuperscript{11} The dependency judge refused to conduct such a hearing, found that a locked residential placement was "appropriate," and set an evidentiary hearing six weeks later, over the protests of Michael’s attorney.\textsuperscript{12}

While in the locked program, Michael was interviewed by a newspaper reporter. The reporter described him in the following manner:

Michael has been confined to Lock Towns for more than a year. He turned 16 inside the pink walls and behind locked metal doors. He is not allowed out, except to go to court or see a doctor. When he does leave, Lock Towns’ staff puts his legs in shackles to prevent him from running away . . . . He is on several powerful drugs, and he says he has been mistreated and harshly punished. "It feels like I’m in jail," Michael said. To an untrained eye, Michael does not appear to be disturbed. He answers questions thoughtfully though with few words. He likes the Dallas Cowboys and Denver Broncos and has a teen-ager’s awkward shyness. As he sits in his case-

\textsuperscript{6} M.W., 756 So. 2d at 94.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 95.
\textsuperscript{10} Fla. Stat. § 394.451-.4789 (2000). The Act is also known as The Florida Mental Health Act. See § 394.467.
\textsuperscript{11} M.W., 756 So. 2d at 95.
\textsuperscript{12} Id.
worker’s office, he fidgets with her computer. He downs two orange sodas and a large bag of potato chips. 13

Michael’s story is not an isolated, or even unusual, one. In No One Ever Asked Us: A Postscript to Foster Care, 14 the author reported on an extensive study on the views of former foster care youth. 15 One of the most “unsettling and confusing” aspects of a foster child’s is the experience of moving from one foster home to another, or from a foster home to a psychiatric hospital, or from a foster home to a temporary shelter. 16 The youths surveyed in the study had no opportunity to be heard before such changes in placement occurred. 17 Foster children felt bounced around like a “ping-pong ball,” to use their words. 18 “‘There has to be a greater understanding that one is moving people, not furniture’ and ‘Children are not objects... like merchandise’ were common refrains.” 19 No change in placement is more traumatic to a foster child than the removal from a foster home and an alternative commitment to a locked psychiatric institution.

The commitment of foster children to long-term, locked psychiatric institutions is a matter of great importance affecting the privacy and liberty rights of many foster children in the state’s custody. This article will address the right of a foster child to procedural due process prior to commitment to a psychiatric institution. First, the article will provide an overview of the Supreme Court of Florida’s holding in M. W. v. Davis 20 and the context of the decision. Second, the article will review the relevant Florida statutes that govern the psychiatric commitment of a foster child in state custody. Third, the article will address the foster child’s right to privacy under the Florida Constitution when the state seeks to commit the child to a psychiatric institution. Fourth, the article will discuss what procedural safeguards should be set forth in the new rule of court that resulted from the M. W. decision. Finally, the article will review the therapeutic jurisprudence considerations that were implicated by the M. W. decision, which support greater

14. FESTINGER, supra note 1.
15. Id. at 275.
16. Id.
17. Id.
18. Id. at 281.
20. 756 So. 2d 90 (Fla. 2000).
procedural due process for children in state custody who face psychiatric commitment.

II. M.W. V. DAVIS

A. Procedural History of the Litigation

The M.W. decision was the culmination of a two-year battle waged on behalf of Michael, a seventeen-year-old who spent ten years in the foster care system. Michael experienced multiple placements during that time after which he was ordered into the residential treatment program at Lock Towns Adolescent Care Program, a locked psychiatric facility on the grounds of South Florida State Hospital, after a five-minute hearing in the juvenile court.

Michael and his counsel, members of the University of Miami Children & Youth Law Clinic, appeared at the hearing, but were denied the opportunity to present evidence that he did not meet the criteria under the Baker Act to be involuntarily placed in such a restrictive setting. The trial court set an evidentiary hearing more than six weeks after his placement. Shortly after his placement in Lock Towns, the Clinic filed a petition for habeas corpus in the Fourth District Court of Appeal, arguing that the commitment was illegal because the trial court failed to provide a pre-placement adversarial hearing with findings by clear and convincing evidence that involuntary commitment was required and that no less restrictive treatment alternative was available.

The district court initially agreed, and granted the writ, holding that Michael’s commitment by DCF violated his rights to an adversarial hearing under sections 39.407(4) and 394.467 of the Florida Statutes.

On DCF’s motion for rehearing, rehearing en banc and certification, the district court withdrew its earlier opinion and denied the child’s petition for habeas corpus relief, holding that no further hearing on Michael’s commitment was required. The court of appeal denied further rehearing requested

21. Id. at 95 n.12.
22. Counsel was appointed by the dependency court as an attorney ad litem. Id. at 92 n.3.
23. Id. at 95.
24. Id.
25. Id.
27. M.W., 722 So. 2d at 969.
by Michael, but certified to the Supreme Court of Florida as a matter of great public importance the following question:


The Supreme Court of Florida held that neither the statutory framework in chapter 39, nor the United States Constitution, requires an evidentiary hearing that complies with section 394.467(1), before the juvenile court orders a child in the legal custody of DCF to be placed in a residential facility for mental health treatment.29 However, the court stated that "[a]n order approving the placement of a fifteen-year-old dependent child in a locked residential facility against the wishes of that child deprives that child of liberty and requires clear-cut procedures to be followed by the dependency court judge."30 The court directed the Juvenile Court Rules Committee to develop a rule that above all that affords the child "a meaningful opportunity to be heard" before the court orders the child's placement against his will in a psychiatric institution.31

The court instructed the Juvenile Court Rules Committee to prepare a proposed rule that will set forth the procedures to be followed by the dependency court that "give[s] due regard to both the rights of the child and the child's best interests."32

28. M.W. v. Davis, 729 So. 2d 481 (Fla. 4th Dist. Ct. App. 1999). The certified question prompted the filing of several amicus briefs in the Supreme Court of Florida in the case of M.W. v. Davis, 756 So. 2d 90, 91 (Fla. 2000), including one filed jointly by the ACLU Foundation of Florida, the Children First Project at Nova Southeastern University Shepard Broad Law Center, the Advocacy Center for Persons With Disabilities, the National Association of Counsel for Children, and others by the Legal Aid Society of Palm Beach County's Juvenile Advocacy Project and the Guardian Ad Litem Program for the Eleventh Judicial Circuit, reflecting the importance of this litigation to children's, civil rights, and disability rights advocates throughout the state and nation.
29. M.W., 756 So. 2d at 92.
30. Id. at 107.
31. Id. at 109.
32. Id.
B. M.W. in Context: Residential Treatment of "Troublesome" Youth

The M.W. litigation was brought against a backdrop of growing skepticism about the effectiveness, necessity, and cost-benefit value of residential treatment of emotionally disturbed or behaviorally disordered children and adolescents in state care. In recent years, advocates for children and mental patients have voiced and documented their concerns about the overuse and misuse of private mental hospitals to institutionalize "trouble-some youth" diagnosed with relatively mild adolescent disorders such as "conduct disorder," "oppositional defiant disorder," and "adolescent adjustment reaction." Many of these youths "do not appear to suffer from anything more serious than normal developmental changes" associated with adolescence.

According to Ira M. Schwartz, Dean of the School of Social Work at the University of Pennsylvania, who has criticized the mental hospitalization of "oppositional" adolescents, "[t]hese names sound as though they have diagnostic precision... but they don't." In fact, they include a wide variety of typical teenage behaviors: running away, aggression, opposition to parental values and rules, engaging in excessive sexual activity, or serious antisocial behavior.

Increasingly, in recent years, child welfare, juvenile justice, and mental health policy experts have come to regard residential treatment as an ineffective, unnecessary, and expensive solution to these problems, which can usually be treated through less restrictive, community-based interventions such as therapeutic foster care and family builder programs. In Florida,

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33. See, e.g., Lois A. Weithorn, Note, Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 STAN. L. REV. 773, 788–91 (1988) (noting that "fewer than one-third of juveniles admitted for in-patient psychiatric treatment were diagnosed with severe or acute disorders such as psychotic, serious depressive, or organic disorders as necessary for such admissions").

34. Id. at 789.

35. Nina Darnton, Committed Youth: Why Are So Many Teens Being Locked Up in Private Mental Hospitals?, NEWSWEEK, July 31, 1989, at 66, 68; see also Ira M. Schwartz, Rethinking the Best Interests of the Child, in JUSTICE FOR JUVENILES 131–48 (Lexington Books 1989) (characterizing unnecessary hospitalization as "being abused at better prices").

36. Darnton, supra note 35, at 68.

this skepticism was fueled by revelations over the years that many children locked up in long-term treatment facilities are often mistreated, overmedicated, abused, and held longer than therapeutically warranted. Newspapers throughout Florida for the past decade have published chilling accounts of children being asphyxiated by "basket hold" physical restraints administered by staff in psychiatric hospitals to de-escalate aggressive behavior, children with mild emotional disturbances shackled and overmedicated in facilities for the acutely disturbed, and children confined in psychiatric wards months and years after being discharged because DCF has nowhere else to put them. 38

Nationally, a review of data from several states has indicated that at least forty percent of children and youth committed to psychiatric institutions are inappropriately placed. 39 Also, studies of the psychiatric commit-
ment of adolescents have shown that "[f]ewer than one-third of those children admitted for inpatient mental health treatment were diagnosed as having severe or acute mental disorders of the type typically associated with such admissions (such as psychotic, serious depressive, or organic disorders)." Disturbingly, "the rising rates of psychiatric admission of children and adolescents reflect an increasing use of hospitalization to manage a population for whom such intervention is typically inappropriate: 'troublesome' youth who do not suffer from severe mental disorders.'

Many of the "troublesome" youth who are committed to psychiatric institutions are children who have been abused, abandoned, or neglected and placed in state foster care. Indeed:

[A] very large proportion of children in mental hospitals and other residential treatment facilities are wards of the state .... The GAO [General Accounting Office] found that half of the youths institutionalized in 'health' facilities in the three states it examined (Florida, New Jersey, and Wisconsin) were referred by welfare authorities. [citing Residential care: Patterns of child placement in three states (report No. GAO/PEDM-85-2)] .... Once children are placed in state custody, a new set of problems emerge. Social service placements often are far from children's families and therefore, promote an institutional climate. Children find themselves amid a slow bureaucracy in which they are stuck in restrictive settings for long periods of time without effective recourse.

Children who are committed to psychiatric institutions remain there indefinitely. In fact, once hospitalized, juvenile psychiatric patients remain in the institution approximately twice as long as do adults. Additionally, foster children who are in state custody remain institutionalized longer than children who are in their parents' custody. Indeed, as the United States Supreme Court has noted, "[t]he absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital...."
For a child without natural parents, we must acknowledge the risk of being "lost in the shuffle."\textsuperscript{45}

Sound policy reasons should prevent a state child welfare agency from being equated with a parent for the purpose of institutionalizing a child. "The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . ."\textsuperscript{46} A natural parent who makes treatment decisions is emotionally bonded with the child, observes the child on a regular basis, and knows the child's history. By contrast, as a foster child navigates the child's journey through state custody, the child interacts with a long series of state agents—social workers, shelter staff, foster parents, etc. Unlike a parent, a state agency granted temporary legal custody of a child does not form an emotional attachment with a child and does not achieve "the intimacy of daily association."\textsuperscript{47}

In recent years, literally hundreds of foster children in Florida placed in residential treatment centers by the state have been "lost in the shuffle."\textsuperscript{48}

\textsuperscript{45.} Parham v. J.R., 442 U.S. 584, 619 (1979) (holding that the child's Fourteenth Amendment liberty interests are not violated when a parent or the state commits a child to a psychiatric facility without a formal due process hearing, but requiring independent review of the child's condition after commitment to the facility as a necessary check against possible arbitrariness in the initial admission decision).


\textsuperscript{47.} As Gary B. Melton and his collaborators, in their examination of the legal framework and policy relating to the commitment of minors to residential treatment, observe: Mhe notion of identical interests between foster child and state guardian is nonsensical. With the turnover in state social workers, large caseloads, and, most importantly, lack of family ties, the contention that guardians can and will protect the interests of their wards in the same manner as watchful parents defies common sense . . . . Also, because state social workers are part of the very bureaucracy that is responsible for the administration or regulation of residential treatment facilities, they may have little discretion in monitoring the welfare of their wards placed within them . . . . At a minimum, state social workers are apt to have the appearance of a conflict of interest. Therefore, rejection of the myth of 'voluntary' placement of children is especially important when the admitting 'parent' is the state guardian. MELTON, supra note 37, at 157–58.

\textsuperscript{48.} According to DCF, approximately 800 children were admitted to residential treatment centers or therapeutic group homes during fiscal year 1997–1998 for the purpose of receiving treatment for emotional disturbance. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, CS/SB 682 (2000). The agency also reported that during fiscal year 1998–1999, there were 411 residential placements of children and 877 other placements in therapeutic group homes funded through the DCF children's mental health budget. Id.
The South Florida Sun-Sentinel in a series of articles examining Florida's practice of warehousing these children in private residential treatment programs reported:

In Florida, some children have been sent to locked treatment centers simply because the state has no place else to put them.... Once confined, some children have spent years in treatment centers because of the state's perennial lack of foster homes. The average length of stay in a treatment centers statewide is nine months. But in some parts of the state, it is much higher: sixteen months in Gainesville for instance, and two years in Tampa.49

Erroneous placement in a residential treatment facility can have an extremely harmful and traumatic impact on a child:

A recent review of psychological research concluded that certain degrees of freedom of movement, association, and communication are critical to the psychological well-being of children and adolescents. Mental hospitalization may entail substantial periods of isolation, particularly in the case of recalcitrant children and adolescents, and may be characterized by involuntary administration of heavy doses of psychotropic medication (that is, medication used to alter psychological functioning), invasions of privacy, and social pressure to conform behavior to certain norms....

Certain aspects of mental hospitalization can be extremely frightening for some children. Children who are not seriously emotionally disturbed may be greatly upset by exposure to children who are. In addition to the possible assault on one's psychological well-being, an involuntary hospitalization may be harmful to one's physical health....50

Moreover, children erroneously committed to mental hospitals often experience behavioral deterioration because "[t]he psychiatric hospital can also be a place to learn some previously unconsidered behaviors, such as suicide attempts."51

49. Sally Kestin, No Place Else to Go Florida Has Never Measured the Effectiveness of Treatment Centers for Troubled Children, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 1A.

50. Weithorn, supra note 33, at 797 (footnotes omitted) (citing MELTON, ET AL., NO PLACETO GO: THE CIVIL COMMITMENT OF MINORS (1998)).

51. Gerald P. Koocher, M.D., Different Lenses: Psycho-Legal Perspectives on Children's Rights, 16 NOVA L. REV. 711, 723 (1992). Moreover, "[t]he stigma of a history of [psychiatric] institutional placement also is well-known. The effects on youth who are on the
Furthermore, many children are abused in psychiatric institutions. The abusive treatment to which Florida's foster children have often been subjected in psychiatric facilities throughout this state has long been documented. One instance of children being abused in psychiatric institutions was brought to light by Broward County Court Judge Ginger Lerner-Wren and substantiated by the DCF Inspector General.

In March of 1999, during a visit to the Brown Schools of Florida, a thirty-bed residential facility for emotionally disturbed children in Sunrise, Florida, Judge Lerner-Wren witnessed a staff member twisting the arm of a fourteen-year-old pregnant patient in the program. Alarmed by what she had witnessed and by other accounts of abuses and overmedication of children in the program, Judge Lerner-Wren scheduled hearings for all children at the Brown Schools under her jurisdiction, citing "significant safety concerns" about their treatment. The heightened judicial scrutiny of the children in the facility, and resulting media coverage, prompted the Secretary of DCF, Kathleen Kearney, to send in teams of experts from Tallahassee program offices to investigate allegations of improper restraint in the facility.

DCF's Inspector General launched a separate investigation of the program. Its August 1999 report found that the majority of the children could be treated on an outpatient basis in less restrictive, non-residential settings, with quality case management, wrap-around treatment and support. Over half of the children in the program had been improperly admitted. At least one quarter did not have a diagnosed major mental illness. The report was

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52. See generally newspaper articles, supra note 38.
54. See Sally Kestin, State Team to Review Youth Center Restraints, Brown Schools Monitoring Flawed, SUN-SENTINEL (Ft. Lauderdale), Mar. 25, 1999, at 1A.
55. Id.
56. Id. Concerns about the injuries and even deaths suffered by children in psychiatric hospitals because of the excessive use of force by hospital staff while physically restraining them are by no means confined to Florida. See, e.g., Blint & Poitras, Boy, 11, Crushed During Restraint: Aides at Psychiatric Facility Put on Leave During Probe, HARTFORD COURANT, Mar. 24, 1998, at A1.
57. See Office of Inspector General, Internal Audit, Management Review of the Brown Schools of Florida, Inc. (covering July 1, 1998 through April 1, 1999) (finding violations of DCF administrative protocols for the placement of emotionally disturbed children in residential treatment; no multi-disciplinary eligibility assessments for many children admitted to the facility; improper uses of chemical and physical restraints; and incomplete abuse and neglect incident reports); see also Gruskin, supra note 53, at 4B.
especially critical of the "serious shortage of this level non-residential intensive, individualized mental health treatment" programs for DCF children in Broward.58

The lack of available placements for emotionally disturbed children in Broward County, and the "abusive practice" of housing these children at "assessment centers," without providing them necessary mental health treatment or medical services, was the subject of a separate round of news articles in Broward and court hearings before Judge Lerner-Wren.59

C. Sun-Sentinel Series: "Throwaway Kids"

The most disturbing revelations about conditions in children's psychiatric facilities in Florida came to light in November of 1999, when the South Florida Sun-Sentinel published a seventeen-part investigative series on the state's practice of locking up children in costly psychiatric institutions where many did not belong, where many languished months and years after completing treatment, and where care and treatment provided to children confined in these institutions was often of dubious value.60 The series graphically documented the treatment (or maltreatment) provided to the more than 500 children "too troubled for foster care... grow[ing] up in institutions," costing taxpayers up to $109,500 a year per child, often subjected to physical and sexual abuse, overmedication, and the improper use of physical restraints, resulting in serious injuries and even death.61

The series reported the children were sent to these residential treatment centers which operate with lax or no oversight or regulation from government agencies such as DCF and the Agency for Health Care Administra-
It cited reports by the state showing that at least one quarter of the children placed in these programs did not belong there, but were confined in these facilities because the state had nowhere else to place them. It chronicled cases of parents relinquishing custody of children to the foster care system in order to access needed, but costly, mental health treatment, and then unable to reclaim custody of their children from that very system after becoming frustrated with the abuses suffered by their children in that residential care. The effectiveness of treatment, utilizing rigid and often punitive behavior modification techniques and other controls, also was called into question. Additionally, the series reported that numerous children had been subjected to overuse of physical restraints, seclusion, illegal communication restrictions, and overmedication with psychotropic drugs, and that many of the children had also been victims of emotional, physical, and sexual abuse while locked up in the institutions. Children were placed in the care of poorly trained, poorly educated staff who sometimes abused them. The articles disclosed at least fifty-five cases of children abused or neglected by staff in these institutions over the preceding three years.

Finally, spurred by the revelations in the Sun-Sentinel series, DCF responded to the serious concerns of these children and sent teams of inspectors to eight treatment centers. DCF terminated its $1.4 million annual

62. Sally Kestin, Children’s Centers Lack Oversight, Treatment Facilities Operate with Few Regulations and with Little Monitoring by State or Federal Governments, SUN-SENTINEL (Ft. Lauderdale), Nov. 9, 1999 at 1A.
63. Kestin, supra note 49.
64. Sally Kestin, Parents Helpless After State Assumes Custody, SUN-SENTINEL (Ft. Lauderdale), Nov. 6, 1999, at 1A. This predicament has challenged parents of mentally ill children across the nation. For at least the past two decades, parents in many states, including Florida, have been confronted with the dilemma of giving up custody of children to the child welfare or juvenile justice system in order to obtain publicly funded treatment for their children’s mental health problems. See generally BAZELON CENTER FOR MENTAL HEALTH LAW, RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN’S MENTAL HEALTH NEEDS (Mar. 2000).
65. Sally Kestin, Treatment’s Results Hard to Gauge Lacking Standards, the State is Unable to Judge the Effectiveness of Children’s Therapy in Psychiatric Centers, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 19A; Sally Kestin, The Rules Are Strict, the Punishment Swift and Stiff, Experts Disagree on Whether Some Centers’ Rigid Structure Benefits Children or Hurts Them, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 19A.
66. Sally Kestin, Environment Sometimes Leads to Abuse Investigations Lack Depth, Children’s Input, SUN-SENTINEL (Ft. Lauderdale), Nov. 9, 1999, at 6A.
67. Id.
68. Id.
69. Sally Kestin, State Goes After Youth Centers Crackdown Aimed at Halting Abuse, Neglect, SUN-SENTINEL (Ft. Lauderdale), June 18, 2000, at 13A.
contract with Lock Towns, which housed Matthew for almost two years. The agency found that staff used excessive force in restraining children and the staff gave powerful medications to control their behavior but did not monitor these children for side effects. DCF also found Lock Towns did not provide youths with individual therapy and unlicensed, unqualified workers were conducting most group therapy sessions. According to the chief of mental health services for DCF in Miami-Dade County, "[w]hat stopped me in my tracks was there was no therapist on staff [at Lock Towns] since February.... These are some of our sickest kids. That is just unacceptable."

D. The New Legislation

In response to the Sun-Sentinel Throwaway Kids series’ revelations about the many abuses of children in residential treatment centers, Democrat Senator Howard Forman, of Pembroke Pines, co-sponsored legislation in the 2000 session. The legislation is designed to provide greater legal protection for children inappropriately admitted to or held in psychiatric facilities.

Addressing the Sun-Sentinel’s concerns about lax regulation of residential programs by state agencies, the new legislation requires children’s residential treatment centers to be licensed and regulated by the Agency for Health Care Administration (“AHCA”). The legislation also directs DCF, in consultation with AHCA, to issue rules governing residential treatment centers for children and adolescents which specify licensure standards for a number of the problems identified in the series. These include: admission, length of stay, program and staffing, discharge and discharge planning, treatment planning, seclusion, restraints, time-outs, rights of patients under

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70. Id.
71. Id.
72. Id.
73. Id. The children in the Lock Towns program were moved to different facilities throughout South Florida. Id. Fourteen were transferred to a facility on the grounds of South Florida State Hospital, operated by Citrus Health Network, in a building described by the DCF mental health chief as “much nicer.” Id.
74. CS/SB 682 (Fla. 2000); HB 2347 (Fla. 2000).
75. Sally Kestin, Bill Would Add Legal Protection for Kids, SUN-SENTINEL (Fl. Lauderdale), Nov. 29, 1999, at 1B.
76. FLA. STAT. § 394.4785 (2000).
77. § 394.875(10).
section 394.459 of the Florida Statutes, use of psychotropic medications, and standards for the operation of such centers. 78

The bill also amended portions of chapters 39 and 394 by requiring guardians ad litem to represent children and to have a suitability examination and assessment conducted by a "qualified evaluator" appointed by the Agency for Health Care Administration before being placed in residential treatment centers. 79

The legislation, which took effect October 1, 2000, provides procedural safeguards for children, after their placement in the facilities by DCF, to ensure they are not institutionalized for lengthy periods of time without judicial oversight. It requires DCF to notify the court and the child’s guardian, "[i]mmediately upon placing a child in a residential treatment program," that the child has been placed in a facility. 80 The residential treatment program must report monthly to DCF and the guardian on the child’s progress and DCF must submit monthly status reports to the juvenile court. 81 The legislation further provides a court hearing shall take place no later than three months after the child’s placement in the program, that includes a clinical review by a qualified evaluator addressing the need for continued residential placement. 82 Further, judicial reviews must be conducted every

78. Id. Proposed rule 65E-9 of the Florida Administrative Code Annotated, governing licensure of children's residential treatment centers, was published in 27 Fla. Admin. Weekly 8 (Feb. 23, 2001), but advocates have criticized the limited public notice and comment opportunities afforded by DCF, in violation of section 120.542(c) of the Florida Statutes. Letter from Brent R. Taylor, Policy Director, Advocacy Center for Persons with Disabilities, to Jim Poindexter, Operations and Management Consultant, Department of Children and Families (Feb. 26, 2001).

79. See FLA. STAT. § 39.407(5), (5)(c) (2000). "Suitability for residential treatment" means that the qualified evaluator has found that: 1) the child appears to have an emotional disturbance serious enough to require residential treatment and is reasonably likely to benefit from treatment; 2) the child has been provided a clinically appropriate explanation of the nature and purpose of treatment; and 3) all less restrictive modalities of treatment have been considered, and a less restrictive alternative offering comparable benefits to the child is unavailable. § 39.407(5)(a)3.

These standards, which allocate to the "qualified evaluator" the principal role in determining a child’s suitability for placement in a residential setting, appear to be derived from Parham v. J.R., 442 U.S. 584, 609 (1979). In Parham, the Court noted that the questions of whether to have a child institutionalized for mental health care "are essentially medical in character," that provision of a "neutral [non-judicial] factfinder" adequately protects against erroneous admission, and that judicial review does not heighten the reliability and validity of the psychiatric diagnosis. Id. at 607.


81. § 39.407(5)(f)-(g).

82. § 39.407(5)(g)(2).
ninety days after the initial three-month review by the juvenile court.\textsuperscript{83} Additionally, the court may order the child be placed in a less restrictive setting any time the court determines the child is not "suitable" for continued residential placement.\textsuperscript{84}

The legislation is notably silent on whether pre-commitment adversarial hearings are required, although the statute permits DCF to involuntarily examine or place the child in a residential treatment setting pursuant to section 394.463 or section 394.467 of the Baker Act.\textsuperscript{85} The statute, while mandating the appointment of a guardian ad litem, is also silent on whether appointed legal counsel for the child is required.\textsuperscript{86} The pre-commitment hearing procedures and the requirements of appointed counsel are the subjects of a proposed rule of Juvenile Procedure, which the Supreme Court of Florida is currently considering in the aftermath of the \textit{M.W.} decision.\textsuperscript{87}

\section*{III. The Florida Statutes}

The statutes at issue in \textit{M.W. v. Davis} were sections 39.407(4) and 394.467 of the 1998 \textit{Florida Statutes}. At the time of Michael's commitment to the locked program, section 39.407(4) provided that, "if it is necessary to

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{83} § 39.407(5)(h).
  \item \textsuperscript{84} § 39.407(5)(g)(4).
  \item \textsuperscript{85} § 39.407(5). The legislation's focus on the post-commitment procedures concerning a child's suitability for residential placement, rather than pre-commitment procedures, was due in part to the legislature's awareness that the pre-commitment procedures were the subject of the \textit{M.W.} case, then pending before the Supreme Court of Florida. \textit{See Senate Staff, supra} note 48. Ironically, the supreme court's decision in \textit{M.W.} issued on May 4, 2000, the day before the Senate vote on SB 682, noted that "legislation is pending that would explicitly set forth certain procedures to be used before a child who has been adjudicated dependant may be placed in a residential psychiatric facility. The amendment of section 39.407 would be an important step in specifying what steps are required to be taken before a child may be placed in residential treatment." \textit{M.W.}, 756 So. 2d at 107 n.34 (citations omitted). This stand-off between the legislature and the judiciary inevitably forced the original purpose of the law, namely to establish court hearings before the child's placement in order to avoid an erroneous commitment to a residential facility, to fall into the cracks.
  \item \textsuperscript{86} \textit{Cf.} \textit{Fla. Stat.} § 39.4085(20) (2000) (establishing as a goal for children in shelter and foster care that "a guardian ad litem [should be] appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem [should be] appointed to represent their legal interests").
  \item \textsuperscript{87} \textit{See In re} Amendment to the Rules of Juvenile Procedure, Case No. SC00-2044, Placement of Child in Residential Mental Health Treatment Facility (noting that when originally filed, SB 682 required a court hearing before placement of a child in a residential treatment facility; but this provision was "affirmatively removed" by the legislature and replaced with the "extensive process" of evaluations, reports and reviews, due process safeguards similar to those in \textit{Parham}).
\end{enumerate}
\end{footnotesize}
place the child in a residential facility for such [mental health] services, the procedures and criteria established in s. 394.467 or chapter 393 shall be used. . . .” 88 This statute cross-referenced section 394.467, commonly known as the “Baker Act,” which provides that before a person may be involuntarily placed for psychiatric treatment, there must be a finding by “clear and convincing evidence” that the person is mentally ill, cannot care for himself, or is likely to “inflict bodily harm,” and that a less restrictive setting cannot provide the necessary treatment for the patient. 89

Prior to M.W., several Florida district courts of appeal had unanimously ruled a court could not commit a child in state custody through delinquency proceedings to a psychiatric institution without following the Baker Act’s procedures. 90 In addition, in a case where the child’s parent appeared to oppose the child’s commitment, Florida’s Second District Court of Appeal had ruled that the child could not be committed unless the requirements of the Baker Act were met. 91

Moreover, in L.W., the Fourth District held that the court could not order a dependent child in the DCF’s legal custody to be placed in a thera-


89. Chapter 394 also specifically references the involuntary placement provisions of section 394.467 of the Florida Statutes. See FLA. STAT. § 394.490-.4985 (“Comprehensive Child and Adolescent Mental Health Services”). Section 394.492(6) of the Florida Statutes defines a child or adolescent who has a serious emotional disturbance or mental illness as including a child or adolescent who meets the criteria for involuntary placement under section 394.467(1). See also FLA. STAT. § 394.492(5) (defining “a child or adolescent who has an emotional disturbance” as not including “a child or adolescent who meets the criteria for involuntary placement under s. 394.467(1)”).

90. See Dep’t of Health & Rehab. Servs. v. A.E., 667 So. 2d 429, 429 (Fla. 2d Dist. Ct. App. 1996) (directing that proceedings to commit a child to a mental health facility be commenced under FLA. STAT. §§ 39.046, 394.467, and 393.11), T.L. v. State, 670 So. 2d 172, 174 (Fla. 4th Dist. Ct. App. 1996) (stating that “chapter 39 specifically cross-references chapter 394 in providing that if it is necessary to place a child in a residential facility for mental health services, the procedures and criteria established in chapter 394 shall be used”); Dep’t of Health & Rehab. Servs. v. State, 655 So. 2d 227, 228 (Fla. 5th Dist. Ct. App. 1995) (declaring that it was error for the trial court to order the child committed to an interim long-term residential mental health placement without following the procedures of the Baker Act); see also State ex rel Smith v. Brummer, 426 So. 2d 532 (Fla. 1982) (indicating that while the Public Defender’s Office was authorized to represent a child in a chapter 394 involuntary commitment proceeding, the Public Defender’s Office could not file a class action on behalf of all children similarly situated).

91. In re L.A., 530 So. 2d 489, 490 (Fla. 1st Dist. Ct. App. 1988) (reversing the trial court’s commitment of a child to a mental health hospital because the involuntary commitment criteria of section 394.467(1)(a)2.a. and 394.467(1)(b) were not met).
apeutic facility without following the provisions in the Baker Act. 92 Ironically, in *L.W.*, it was DCF that objected to the order of placement and appealed the court's order, arguing that the Baker Act involuntary placement procedures apply to children in both shelter and foster care. 93 DCF objected to the court order not on the basis of any articulated interest in the child's well-being or needs, but on the basis of a "lack of financial funding." 94

In Michael's case, a lack of resources, namely a sufficient array of therapeutic foster homes, was the guiding reason that DCF placed him in a locked psychiatric facility. 95 Unlike *L.W.*, in *M.W.*, the Fourth District was presented with a case where DCF placed a foster child in a psychiatric facility, but it was the child who objected. The Fourth District ruled that this was a "voluntary" placement that did not require the Baker Act, since the child was in the Department's legal custody and the Department placed him.

In reviewing the Fourth District's decision in *M.W.*, the Supreme Court of Florida did not hold that Michael's commitment was a "voluntary" placement. Instead, the court ruled that since section 39.407(4) of the *Florida Statutes* referenced children in the "physical custody" of DCF, it did not apply to children in DCF's legal custody. 96 Thus, the Supreme Court of Florida rejected the Fourth District's holdings in both *L.W.* and *M.W.* that the statute applied to children in both the agency's physical and legal custody. During the pendency of the *M.W.* litigation, the legislature replaced the term "physical custody" in section 39.407(4) with the phrase "out-of-home care." 97 Michael argued this amendment clarified the provision applied to all children who are in out of home care, including those children who are in the legal custody of DCF. However, the Supreme Court of Florida rejected this argument and ruled this statute did not apply to foster children in DCF legal custody. 98

As noted above, during the 2000 session the legislature further amended section 39.407 of the *Florida Statutes* to require a "suitability examination and assessment" conducted by a "qualified evaluator" for any child that DCF

92. *In re L.W.*, 615 So. 2d 834, 835 (Fla. 4th Dist. Ct. App. 1993) (reversing and remanding the trial court's commitment of a dependent child to residential treatment because the court failed to follow the provisions of sections 39.407(4) and 394.467(1)).

93. *Id.* at 836.

94. *Id.*

95. DCF, in its briefs to the Supreme Court of Florida in *M.W.*, acknowledged that its decision to institutionalize a child in a psychiatric facility involves not only "a best interest of the child calculus" but also "budgetary and availability constraints," an especially disturbing position to take in view of the needs of children for a continuum of care irrespective of the budgetary constraints.


97. *See H.B. 2347* ( Fla. 2000).

98. *Id.* at 109.
seeks to place in a residential facility, in addition to other procedures. Although the court held that neither the statutory framework nor the Fourteenth Amendment requires an evidentiary hearing prior to the child's commitment, in directing the Juvenile Court Rules Committee to develop procedures for commitment that afford the child a "meaningful opportunity to be heard," the Committee had to consider both the Supreme Court of Florida's ruling in *M.W. v. Davis* and the recent amendment to section 39.407 of the 2000 Florida Statutes. Additionally, the privacy interests of the child, under the Florida Constitution is a consideration in the promulgation of the procedural rule, if the child is to have a truly "meaningful opportunity to be heard" prior to the loss of his liberty. 99

IV. A MINOR'S RIGHT TO PRIVACY UNDER THE FLORIDA CONSTITUTION

In *M.W.*, the Supreme Court of Florida declined to address a child's right to privacy under the Florida Constitution, but such a right should be taken into account by the court in adopting a rule of court that governs a foster child's commitment to a residential facility. Florida's citizens chose in 1980 to include an explicit right to privacy in the state constitution guaranteeing that "every natural person has the right to be let alone and free from government intrusion into his private life." 100 As the Supreme Court of Florida has stated, minors are "persons" in the eyes of the law, and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights." 101

In *In re T.W.*, the Supreme Court of Florida first established that minors have the right to privacy under the Florida Constitution and that this privacy right extends to medical procedures. 102 Additionally, the court has extended the right to choose or reject medical treatment, under the Constitution's guarantee of a right to privacy, to incompetent or incapacitated persons,

99. *Id.*
100. *Fla. Const.* art. I, § 23. "'Privacy' has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest." *In re Guardianship of Browning*, 568 So. 2d 4, 9–10 (Fla. 1990).
102. *Id.* (holding that the right to privacy under the Florida Constitution encompasses a minor's right to consent to an abortion without first obtaining parental consent or court authorization); *see also* Jones v. State, 640 So. 2d 1084 (Fla. 1994) (indicating that a minor's privacy right extends to other medical and surgical procedures besides abortion, and to the "conduct of others," including the state).
because "the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike."\textsuperscript{103}

In \textit{T.W.}, the court ruled that the child’s right to privacy included her own decision as to whether to terminate her pregnancy.\textsuperscript{104} Thus, the minor obtained the right to make the decision about whether to have a medical procedure that affects her body.\textsuperscript{105} Michael and other foster youth have not sought the decision-making autonomy that the Supreme Court of Florida accorded to \textit{T.W.} under the Florida Constitution’s privacy clause. Indeed, foster children like Michael do not seek to make the decision as to whether they will be committed to a psychiatric institution. Rather, these children seek meaningful due process before their privacy is invaded by institutionalization at locked psychiatric facilities where their bodies are forcibly and involuntarily subjected to four-point restraints, seclusion, and psychotropic medications.

In \textit{Winfield v. Division of Pari-Mutuel Wagering},\textsuperscript{106} the Supreme Court of Florida first established the appropriate test to be applied when the right to privacy is implicated:

The right to privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.\textsuperscript{107}

In reviewing the state’s intrusion on a minor’s fundamental right to privacy, the supreme court applied the \textit{Winfield} test.\textsuperscript{108} With regard to the first prong of the test, the court reiterated that the burden is on the state to prove that it has a compelling, not merely significant, state interest before the state can impinge on a minor’s privacy right:

\begin{quote}
We agree that the state’s interests in protecting minors and in preserving family unity are worthy objectives. Unlike the fed-
\end{quote}

\textsuperscript{103} \textit{In re Guardianship of Browning}, 568 So. 2d at 12 & n.9 (defining "incompetent" and "incapacitated" persons, to whom the right of privacy extends, as "those individuals unable to make medical decisions on their own behalf" and holding that the constitutional right to refuse medical treatment is not lost or diminished by virtue of mental incapacity or incompetence); see also J.F.K. Mem’l Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984).

\textsuperscript{104} \textit{In re T.W.}, 551 So. 2d at 1189.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Winfield v. Div. of Pari-Mutuel Wagering}, 477 So. 2d 544 (Fla. 1985).

\textsuperscript{107} \textit{Id.} at 547 (citations omitted).

\textsuperscript{108} \textit{In re T.W.}, 551 So. 2d at 1193.
eral Constitution, however, which allows intrusion based on a "significant" state interest, the Florida Constitution requires a "compelling" state interest in all cases where the right to privacy is implicated.¹⁰⁹

The court acknowledged that, where minors are concerned, the State has worthy interests in protection of the immature minor and in preservation of the family unit. However, the court specifically held that "neither of these interests is sufficiently compelling under Florida’s privacy amendment."¹¹⁰ In the context of psychiatric treatment, although the state similarly has an interest in protecting foster children because they are minors, the Supreme Court of Florida has already established the state’s interest in protecting minors is not sufficiently compelling to override the minor’s constitutional right to privacy.

Even if the state had a compelling interest that outweighed the minor’s privacy right, it cannot commit a minor in its custody to a long-term, locked psychiatric institution without providing the minor due process, because the state must accomplish its objective through use of the least intrusive means, which is the second prong of the *Winfield* test.¹¹¹ In reviewing the state’s intrusion on a minor’s right to privacy, and the means of furthering the state’s interest, the Supreme Court of Florida has held that "[a]ny inquiry under this prong must consider procedural safeguards relative to the intrusion."¹¹²

In the *M.W.* litigation, DCF contended that it could commit a minor in its custody to a long-term, locked psychiatric institution, subject only to the judicial review provisions of chapter 39 of the *Florida Statutes*.¹¹³ However,

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¹⁰⁹. *Id.* at 1195 (quoting *Winfield*, 477 So. 2d at 547). The court in *T.W.* noted that an unemancipated minor could give consent to any medical procedure pertaining to her pregnancy or care for her unborn child, pursuant to section 743.065 of the *Florida Statutes*, regardless of its intrusiveness or potential danger. *Id.* However, the same unemancipated minor was prohibited from giving consent for an abortion under the challenged 1988 statute, section 390.001(4)(a) of the *Florida Statutes*. *Id.*

¹¹⁰. *In re T.W.*, 551 So. 2d at 1194.

¹¹¹. *Winfield*, 477 So. 2d at 547.

¹¹². *In re T.W.*, 551 So. 2d at 1195–96; *see also* Singletary v. Costello, 665 So. 2d 1099, 1105 (Fla. 4th Dist. Ct. App. 1996) (stating that when the right of privacy is involved, "the means to carry out such a compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual").

¹¹³. *Fla. Stat.* § 39.701 (2000). The court has continuing jurisdiction to periodically review the status of the dependent child, including the progress being made to place the child for adoption, the status of independent living services being provided to an adolescent child, the financial support given to the child by the child’s natural parents, and the compliance of the parties with their tasks in the case plan, among other items. *Id.; see also In re L.W.*, 615
these provisions are not sufficient to authorize the child's commitment to a psychiatric institution against the child's will, as they do not mandate notice to the child, an opportunity for the child to be heard, or the appointment of counsel if the child contests his commitment. Indeed, as the supreme court noted:

Considering the statutory framework of Chapter 39 and the ongoing judicial review once a child is adjudicated dependent, it is reasonable to conclude that the Legislature would require different procedures to apply when the Department takes the extraordinary step of requesting the court to order residential mental health treatment for a child who is not yet in its temporary legal custody versus a child who has been adjudicated dependent and placed in the Department's legal custody.\(^{114}\)

Thus, these provisions are constitutionally inadequate to withstand the test established by the Supreme Court of Florida when the fundamental rights implicated here are at stake because they contain no procedural safeguards.\(^{115}\)

In formulating a procedural rule that provides a dependent child a "meaningful opportunity to be heard" prior to commitment, the court must provide safeguards that, at a minimum, assure the child notice, the appointment of counsel, a pre-placement hearing, the opportunity to be present at the hearing, and to present and rebut evidence.

In the *M.W.* decision, the Supreme Court of Florida noted that one of the purposes of chapter 39 is "[t]o provide judicial and other procedures to assure due process through which children . . . are assured fair hearings by a . . . respected court . . . and enforcement of their constitutional and other legal rights . . . ."\(^{116}\) The court observed that although there are abundant procedures concerning other aspects of treatment and care for children in the dependency system, no statute or rule specifically set forth procedures that DCF and the court must follow to place a child in a residential facility for mental health treatment.\(^{117}\) The court noted:

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So. 2d 834 (Fla. 4th Dist. Ct. App. 1993) (purpose of judicial review is to assure that the state is making reasonable efforts to promote adoptive placement or return the child to the family unit).

115. See *Winfield*, 477 So. 2d at 544.
116. *M.W.*, 756 So. 2d at 106 (quoting FLA. STAT. § 39.001(1)(f) (2000)).
117. *Id.* at 106.
[N]either Chapter 39 nor our own procedural rules adequately address whether an attorney for the child should be appointed before a commitment to a residential facility takes place, what type of hearing is required, what standard of proof should apply and whether the child should have the right to put on evidence before the court orders a placement in a residential psychiatric facility.  

Moreover, because the amendment to section 39.407 is insufficient to ensure what type of hearing is required, what standard of proof should apply and whether the child should have the right to put on evidence before the court orders a placement in a residential treatment facility, it is especially critical that the rule adopted by the court afford children with safeguards that protect the privacy interests under the Florida Constitution.  

V. THE RULE OF JUVENILE PROCEDURE  

Although the court in M.W. did not reach the constitutional question under Florida’s right to privacy clause, it did hold that there must be procedural safeguards that give the child a meaningful opportunity to be heard. It urged the Juvenile Court Rules Committee to consider a proposed rule submitted by the Guardian ad Litem program amicus, to look at rules in other jurisdictions and in particular the New Jersey procedural rules addressing this issue. In essence, then, in formulating an appropriate procedural

118. Id. at 106–07 (internal footnotes omitted).  
119. While New Jersey was the one state identified by the court, it should be noted that several other states’ supreme courts have already considered the constitutional rights of minors facing psychiatric commitment and have granted minors due process protections, greater than those afforded to minors under the Fourteenth Amendment, consistent with their state constitutions. See, e.g., Washington ex rel. T.B. v. CPC Fairfax Hosp., 918 P.2d 497 (Wash. 1996) (granting a fifteen-year-old mentally ill minor’s petition for writ of habeas corpus on the ground that the involuntary incarceration of the minor in a mental hospital against her will violated Washington state law and the minor’s constitutional right to liberty); In re N.N., 679 A.2d 1174 (N.J. 1996) (holding that even though the state has an interest in ensuring the mental health of its children, that interest is not sufficiently compelling to justify infringement upon a child’s due process and liberty rights and ruling that a minor who is in need of intensive institutional psychiatric therapy may not be committed without a finding based on clear and convincing evidence that the minor without such care is a danger to others or self); In re P.F. v. Walsh, 648 P.2d 1067 (Colo. 1982) (holding that a minor has a substantial and protectable liberty interest in being free from the physical restraints attendant to commitment in a psychiatric hospital); In re Roger S., 569 P.2d 1286 (Cal. 1977) (holding that no interest of the state sufficiently outweighs the liberty interest of a mature minor (over age 14) to independently exercise his right to due process in a commitment to a mental hospital).
rule, the Supreme Court of Florida is considering the "procedural safeguards relative to the intrusion."120

There are four main procedural safeguards at issue: 1) the right to notice and to be heard; 2) the right to an attorney; 3) the right to a pre-placement court hearing; and 4) the right to present evidence and to have a burden of proof met.

The Juvenile Court Rules Committee drafted proposed Rule 8.350, Placement of Child Into Residential Treatment Center After Adjudication of Dependency, attempting to give consideration both to the court's directives in M.W. v. Davis and the recent amendments to section 39.407 of the Florida Statutes.121 The proposed rule, approved by a vote of 18-7-0 (and by the Florida Bar Board of Governors, 8-3) unfortunately failed to mandate counsel, require a pre-placement hearing, define the standard of proof, or spell out what evidence, if any, the child could present at the hearing.122 It also failed to consider amending rule 8.140(c), governing case plan modification, as directed by the court.

The Committee's proposed rule required notification to the parties of the child's placement in a residential treatment center, including the written findings of the qualified evaluator, within seventy-two hours of placement; the appointment of a guardian ad litem and/or representation by counsel; the submission of a report by the guardian within fourteen days of placement, including a recommendation regarding placement and a statement of the child's wishes; discretionary appointment of counsel by the court upon notification of the child's placement; the setting of a "status hearing" requiring the presence of the guardian and/or attorney (but not the child) within five working days after placement; and a directive to the guardian and/or attorney to attempt to ascertain whether the child consents to placement.123 The rule additionally set out procedures for an initial placement review, to be set upon motion of any party or if the guardian's report indicates the child objects to placement within the time requested by the moving party or within fourteen days of the filing of the motion or the GAL report.124

120. In re T.W., 551 So. 2d at 1195–96. In formulating juvenile court rules, the Supreme Court of Florida has stated, "[w]e have the authority to establish proper procedures for juvenile proceedings to implement constitutional rights." R.J.A. v. Foster, 603 So. 2d 1167, 1171 (Fla. 1992) (holding that juvenile rule of procedure regarding a time period took precedence over the legislative enactment).


122. Id.
123. Id.
124. Id.
125. Id.
Under the proposed rule, the placement hearing considers the following: based on an independent assessment of the child, the recommendation by DCF that residential treatment is in the child’s best interest and that it is the least restrictive alternative available; the GAL’s recommendation; the recommendation of the multidisciplinary case review committee, if any; written findings of the evaluation and suitability assessment prepared by a qualified evaluator.\(^{126}\) Any party can present evidence concerning “suitability of placement” at this hearing. The court is required to order DCF to place the child in a less restrictive setting best suited to the child’s needs if the court determines that the child is not suitable for continued placement. \(^{127}\)

Finally, the proposed rule, tracking recently enacted section 39.407(5) of the Florida Statutes, requires an initial review hearing within three months of admission, and continuing review hearing every three months thereafter, until the child is placed in a less restrictive setting. The child must be present at all hearings except the initial five day status hearing. \(^{128}\)

The two issues that generated the most discussion in both the plenary Committee and a Dependency Subcommittee were whether a pre-placement court hearing was required and whether the appointment of counsel should be mandated for every dependent child recommended for placement in a residential facility. \(^{129}\) The disagreement over the appointment of counsel in turn prompted a sharply worded Minority Report, which resulted from close and conflicting votes on a draft of the proposed rule that read as follows: “Upon notification that a child has been placed into a residential treatment center, the court shall appoint an attorney to represent the child.” \(^{130}\)

The proposed rule also prompted the filing of eight separate comments critical of various aspects of the rule. The comments were filed by Univer-


\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) See Amendment to FLA. R. JUV. P. 8.100(a), 26 Fla. L. Weekly S171 (Fla. Mar. 15, 2001). The minority argued that a “meaningful opportunity to be heard is the hallmark of procedural due process,” which requires fairness to the litigant, and that for a child to have a meaningful opportunity to be heard in a commitment proceeding, the child must be represented by counsel. The minority stressed that the child as a separate party through his case must be given the opportunity, through his lawyer, to subpoena witnesses, present testimony and evidence, cross examine witnesses and present argument. The report also noted the irony and inconsistency of mandating the appointment of counsel for the lay guardian, while depriving the child himself of legal representation in this proceeding. Id. See also Dep’t of Children & Family Servs. v. I.C., 742 So. 2d 401, 406 (Fla. 1999) (stating that “the child, the alleged object of everyone’s concern, has no voice and no capacity to reach the court in many cases”).

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sity of Miami Children & Youth Law Clinic; University of Miami Law Professor Susan Stefan and the Bazelon Center for Mental Health Law; the Advocacy Center for Persons with Disabilities; the Florida Public Defender Association; the Florida Bar Public Interest Law Section; the Children First Project at Nova Southeastern University; University of Miami Law Professor Bruce Winick and Broward County Judge Ginger Lerner-Wren; and attorney Karen Gievers, representing the Children’s Advocacy Foundation, Inc. All of the comments argued that the rule should, at a minimum, provide for notice, counsel, and a meaningful opportunity to be heard before children can be involuntarily placed by DCF in residential treatment centers.

The essential elements that the rule should contain, in order to comport with the privacy interests of the child at stake in this type of proceeding, and to afford the child a meaningful opportunity to be heard, are the following.

A. The Right to Notice and to be Heard

In M.W., the Supreme Court of Florida held that the foster child facing commitment to a psychiatric institution must be provided “a meaningful opportunity to be heard.” The court recognized the importance of “whether a child believes that he or she is being listened to and that his or her opinion is respected and counts.” Indeed, former foster children were extremely troubled that they were not heard when critical decisions were being made about their lives. A recurrent theme in their comments was the importance of consulting with children and allowing them to share in, and contribute to, decisions that need to be made.

The fundamental principles of due process require notice and the opportunity to be heard, but a child in foster care is typically provided neither. Chapter 39 provides for judicial review hearings at six month intervals for children in foster care. With the recent statutory amendments, chapter 39 now provides for judicial review hearings at three month intervals for foster children placed in residential treatment centers. However, chapter 39 does not include the child among those who must be noticed for a
judicial review hearing, and it does not provide the child with the right to be heard at a judicial review hearing.137

The Florida Rules of Juvenile Procedure provide that a child is a party to his dependency case,138 and therefore the child is entitled to receive the same notice as any other party.139 The Florida Rules of Juvenile Procedure further entitle the child to be heard at court hearings.140 However in reality, most children are not provided with notice of their hearings and are not heard by the court.

For example, statistics compiled in the District XI (Miami-Dade County) Florida Foster Care Review's Annual Data Summary Reports demonstrate that there is a near absence of children's participation in their foster care review hearings. In a recent year, out of 1214 cases reviewed with children over the age of ten, involving a total of 1766 children, only 234 children participated in the review hearings of their cases.141

On a daily basis in Florida, judicial review hearings take place in dependency court, and every party is heard from, except the most important party—the child. In addition, routinely only one party is present for foster care review hearings and therefore only one party is heard from—the Department of Children & Families. Without hearing from the child or from anyone other than DCF, the court cannot know if it is being provided with inaccurate or incomplete information, as frequently occurs.

The experiences of various clients of the Children & Youth Law Clinic illustrate the need for the court to hear from them and to listen to them.142 One client of the Clinic, upon reaching the age of majority, read her court file and discovered various reports and evaluations submitted to the court unbeknownst to her which contained inaccurate and prejudicial information. This information had resulted in her commitment to a locked psychiatric facility where she was subsequently abused. She described how she was taken to the facility by her DCF worker and a police officer, without being able to talk to a judge. It was not until she saw her court file and looked at

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137. See § 39.701(5)(a)-(f) (notice must be provided to such persons as the social service agency charged with the supervision, custody or guardianship of the child, the foster parents or legal custodian, the parents, the guardian ad litem, among others but not the child).
139. FLA. R. JUV. P. 8.225(c); 8.235(a).
140. FLA. R. JUV. P. 8.100(a).
141. DISTRICT XI FLORIDA FOSTER CARE REVIEW'S ANNUAL DATA SUMMARY REPORTS (1997–98). Additionally, out of 1681 total reviews heard, children only had an assigned guardian ad litem in 348 cases. Id.
142. See generally Jill Chaifetz, Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care, 25 N.Y.U. REV. L. & SOC. CHANGE 1 (1999) (discussing the importance of listening to the real foster care experts, the children severed by the system).
the numerous court orders in the file that she realized there had been regular court hearings and reviews of her case from which she had been systematically excluded. Unfortunately, this foster youth’s experience is typical of the experiences of children in foster care who are committed to psychiatric facilities.

Numerous foster youth have described to the attorneys and interns in the Clinic & Youth Law Clinic their experiences and feelings when they have been locked up in psychiatric institutions, subjected to seclusion, four point restraints, the forced administration of potent psychotropic medications, and limitations imposed on family contact and visitation, without ever having been heard by the juvenile court. Even if a foster child is not noticed or heard in foster care review proceedings on a regular basis, as the child should, the child must be provided notice and an opportunity to be heard in a proceeding involving the child’s commitment to a locked psychiatric facility where the child’s liberty and privacy rights are at stake. No foster care hearing regarding the child’s psychiatric commitment should proceed without providing the child notice and the opportunity to be heard directly by the court.

The juvenile court in a delinquency proceeding in all certainty would not proceed to adjudicate the child and thereby deprive him of liberty, without first ascertaining that the child was provided notice and the opportunity to be heard directly by the court. In M.W., the Supreme Court of Florida stated: “[i]ronically, our rules provide more procedural protections in this situation for children in the custody of the state because they are delinquent than for those children who are in the custody of the state because they have been adjudicated dependent through no fault of their own.” 143 A foster child facing commitment to a psychiatric institution is entitled to the same notice and opportunity to be heard as a delinquent child who faces the same commitment.

In fact, in rejecting a proposal that juvenile detention hearings in delinquency proceedings be conducted through audiovisual devices rather than the children’s personal appearance in court, the Supreme Court of Florida stated:

Florida’s oft-repeated pledge that ‘our children come first’ cannot ring hollow in—of all places—our halls of justice. Not simply allowing, but mandating that children attend detention hearings conducted through an audio-visual device steers us towards a sterile environment of T.V. chamber justice, and away from a system where children are aptly treated as society’s most precious resource. It is time that we understand that these youths are indi-

individuals and require sufficient resources if we are to expect a brighter tomorrow. . . . Personalized attention and plans are necessary to properly address the multiple and complex problems facing today's children.\(^{144}\)

A foster child has as much of a right to be heard directly by the juvenile court at a foster care hearing as does a delinquent child at a delinquency hearing.

Further, a foster child facing commitment to a locked psychiatric institution through a dependency proceeding suffers the same loss of liberty and privacy as a child facing the same psychiatric commitment in a delinquency proceeding. In Michael's case, he could not understand why children placed in the same locked psychiatric facility as he was placed had received a full hearing before the juvenile court prior to being committed to the facility, while he did not. Michael could understand that children do not have the same rights as adults, and therefore he did not receive the procedural due process given to the adults committed to South Florida State Hospital in the mental wards that were yards away from him. However, he could not understand why another child in state custody placed in a bed next to him, in the same locked facility, had received so much greater procedural due process from the juvenile court prior to being committed than he received.

B. The Right to Counsel

In addition to notice and the opportunity to be heard, a foster youth must be provided with an attorney if the youth seeks to contest his or her commitment. In T.W., the Supreme Court of Florida held that "[i]n proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution."\(^{145}\) Indeed:

A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to

\(^{144}\) Amendment to FlA. R. Juv. P. 8.100(a), 25 Fla. L. Weekly S516 (Fla. Mar. 15, 2001) (internal citation omitted).

\(^{145}\) In re T.W., 551 So. 2d 1186, 1196 (Fla. 1989).
navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.\textsuperscript{146}

The Supreme Court of Florida has required the State to be represented by counsel in all dependency proceedings, including judicial review proceedings.\textsuperscript{147} In \textit{In re D.B.}, the supreme court held that counsel for the parent is mandatory in dependency proceedings where the parent-child relationship is in danger of being severed, but counsel for the child is discretionary.\textsuperscript{148} In proceedings involving an infringement of the parent-child relationship, the parent’s attorney can adequately protect both the parent’s and the child’s mutual constitutional right to family integrity. Thus, separate counsel for the child is not necessary to protect the child’s right to family integrity. However, in a dependency proceeding involving the child’s commitment to a psychiatric institution, it is the child’s constitutional rights to liberty and privacy that are at stake and there is no other counsel to protect this right. Even if a minor is not ordinarily entitled to an attorney in dependency proceedings, the minor must be provided with counsel in a proceeding involving his commitment to a long-term, locked psychiatric institution, as this proceeding would wholly deprive him of his ability to exercise his fundamental right to privacy under the Florida Constitution.\textsuperscript{149} Therefore, under these circumstances counsel for the child is mandatory.

Finally, contrary to the Majority in its attempt to justify a rule that mandated guardians but not counsel for children in these proceedings, an appointed guardian is no substitute for legal counsel. As correctly noted by the Minority Report, an attorney provides the child with important and irreplaceable protection of a child’s constitutional interests that a guardian cannot provide:

\textsuperscript{146} Id. (quoting Indiana Planned Parenthood Affiliates Ass’n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983)).

\textsuperscript{147} Florida Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989).

\textsuperscript{148} \textit{In re D.B.}, 385 So. 2d 83, 91 (Fla. 1980).

\textsuperscript{149} Not only is the child a party to his or her dependency case under chapter 39 and the \textit{Florida Rules of Juvenile Procedure}, but the child is a “patient” and as such is protected by the safeguards enumerated in chapter 394. Under section 394.875(10) of the \textit{Florida Statutes}, children placed in residential treatment centers are accorded the rights of patients set forth in section 394.459. See § 394.875(10) (2000) Indeed, when placed in residential treatment, “[c]hildren’s rights, as specified in Section 394.459, F.S., for patients, shall be safeguarded. Children shall be informed of their legal and civil rights, including the right to legal counsel and all other requirements of due process. Receipt of such information shall be documented by parent or guardian, and the child’s signature.” \textit{FLA. ADMIN. CODE ANN. r. 65E-10.021} (2001).
The minority believes that this advocacy cannot be provided by the guardian ad litem or the guardian ad litem's attorney, as set forth in subdivision (a)(3) of the proposed rule. See § 39.820(1). Fla. Stat. (1998). The American Bar Association's Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (approved by the ABA House of Delegates, February 5, 1996), provide that a child's attorney is charged with providing "legal services for a child" and "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." In contrast, a lawyer who is appointed as a guardian ad litem is "appointed to protect the child's interests without being bound by the child's expressed preferences." Thus only an attorney for the child can properly advocate for the child and provide him or her with a "meaningful opportunity to be heard."150

C. The Right to a Pre-Placement Court Hearing

Procedural due process under the United States Constitution guarantees that the states shall give every person "fair notice" and "a real opportunity to be heard" in a "meaningful manner" and at "a meaningful time."151 In M.W., the Supreme Court of Florida stated: "we cannot eschew the necessity for a hearing before a dependent child is placed in residential treatment against his wishes simply because other statutorily mandated hearings are already required or because it would otherwise burden our dependency courts."152 The Juvenile Court Rules Committee was under the belief that it could not mandate a pre-placement hearing for a child facing commitment to a long-term residential treatment facility because the recent amendment to chapter 39 did not require such a hearing. However, the Supreme Court of Florida can require that the child be provided a pre-placement court hearing.153

150. See Minority Report; see also Jan C. Costello, Representing Children in Mental Disability Proceedings, 1 CENTER FOR CHILDREN & THE CTS. J. 101 (1999) (recommending that lawyers for children in civil commitment proceedings pursue the client's legal interests and avoid functioning as a guardian ad litem or therapist, and observing that "[b]y skillful and zealous representation they must seek to empower the child client").

151. Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 960 (Fla. 1991) (citation omitted).


153. In the M.W. decision, the Supreme Court of Florida noted that legislation was then pending that would clearly set forth the procedures to be used before a dependent child may be placed in a residential psychiatric facility. M.W., 756 So. 2d at 107 n.34. However, the enacted legislation is silent as to a pre-placement hearing procedure, which makes the necessity for such a proceeding through the Juvenile Court Rules even more critical.
In addition to the child’s rights under the Florida Constitution, the circuit court has both the constitutional authority and the inherent power to protect children, which cannot be restricted by statute. The doctrine of inherent judicial power is necessary for the court to protect its independence and integrity and to make its lawful actions effective. As the Supreme Court of Florida has stated, “[t]he invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights.” The court stressed that “where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements.”

The court’s protection of children and their fundamental rights is perhaps the court’s most important inherent power. This inherent power, which stems from the duty of chancery courts to protect the interests of minors, is well-established. Indeed:

Independent of statute or rule a court of chancery has inherent jurisdiction and right to control and protect infants . . . [Courts] must exert the utmost vigilance to see that the rights of so protected a class as that of infants are not infringed on or destroyed. The court itself is, in legal contemplation, the infant’s guardian.

Although the court is the infant’s guardian:

Courts lack the physical ability to efficiently carry out custodial functions at all stages of dependency proceedings . . . . In recognition of this fact the legislature gave the courts the prerogative to divest themselves of the actual physical care of children alleged or adjudicated to be dependent while still maintaining the exclusive original jurisdiction of the courts. All powers not expressly divested by the court are retained by it.

154. FLA. CONST. art. V, § 5(b).
155. See, e.g., Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978).
156. Id. at 137.
157. Id.
158. Dep’t of Health & Rehab. Servs. v. Hollis, 439 So. 2d 947 (Fla. 1st Dist. Ct. App. 1983). “Chancery is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom.” Id. at 949 (citing Cooper v. Cooper, 194 So. 2d 278, 281 (Fla. 2d Dist. Ct. App. 1967) (internal quotations omitted)).
159. Id. at 949 (citing Brown v. Ripley, 119 So. 2d 712, 717 (Fla. 1st Dist. Ct. App. 1960)).
Indeed, it is not conceded that under our Constitution, vesting as it does the circuit courts with equity jurisdiction, this power could, under our Constitution as it stands, be taken away by statute.\textsuperscript{161}

The Supreme Court of Florida holds that "[a] statute which attempts to restrict the inherent powers will be broadly interpreted as laying down reasonable guidelines within which the power operates rather than as a sole or actual source of the power."\textsuperscript{162} Additionally, where the supreme court promulgates rules relating to the practice and procedure of the courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.\textsuperscript{163}

In developing the new rule of court, as noted previously, the Committee did not respond to the court's directive to consider existing rule 8.410(c) that governs court approval of amendments to the child's case plan, but this is integral to the proposed rule. The dependency court adopts a case plan for each child in foster care, in which it orders the "type of placement," and "type of home or institution" where the child is to be placed and specifies the placement that is in the "least restrictive and most family-like setting available . . . in as close proximity as possible to the child's home."\textsuperscript{164} This is not just a requirement of state statutory law,\textsuperscript{165} and the existing juvenile rules of court,\textsuperscript{166} but is also a requirement of federal law.\textsuperscript{167} Moreover, this is part of the circuit court's constitutional and inherent power to protect children.

Once the court adopts the case plan, it becomes an order of the court. A statute cannot authorize DCF to unilaterally change the conditions of the child's placement, in contravention of the court's existing order. Michael's own case provides a stark example, as his court-ordered case plan placed him in a foster home, with the goal of reunification and regular family therapy with his mother. In contravention of the court-ordered case plan, DCF instead placed him in a locked psychiatric institution in another county.

\begin{thebibliography}{99}
\bibitem{161} Cooper, 194 So. 2d at 281.
\bibitem{162} Rose, 361 So. 2d at 139 n.14; see, e.g., Smith v. Miller, 387 P.2d 738 (1963); State v. Webb, 21 N.E.2d 421 (1939); Bass v. County of Saline, 106 N.W.2d 860 (1960).
\bibitem{163} Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991).
\bibitem{164} Although the court cannot name the specific foster home or facility where the child is to be placed, it is well-established that the court can name the type of placement. See, e.g., In re L.W., 615 So. 2d 834 (Fla. 4th Dist. Ct. App. 1993); In re F.B., 319 So. 2d 77 (Fla. 1st Dist. Ct. App. 1975); see also Henry & Rilla White Found., Inc. v. Migdal, 720 So. 2d 568, 574 (Fla. 4th Dist. Ct. App. 1998) (indicating that "the department and the court have overlapping and concurrent power over matters relating to dependency and delinquency proceedings").
\bibitem{166} Fla. R. Juv. P. 8.410, Form 8.967.
\end{thebibliography}
far away from his mother. This required a court-ordered amendment to the case plan, after notice and an evidentiary hearing.\(^{168}\)

A psychiatric institution where the child is subject to restrictive and potentially hazardous treatment modalities is a drastically different type of placement than a foster home. When the child's court-ordered case plan requires placement in a foster home, DCF may move the child from foster home to foster home without prior court approval. However, a change in the type of placement from foster home to psychiatric institution requires an amendment to the child's case plan, following notice and an evidentiary hearing.\(^{169}\) The court's constitutional authority to protect children mandates a court hearing prior to the child's placement being changed to a locked psychiatric institution.

Moreover, when a child is involuntarily committed to a psychiatric institution where the child is subject to physical and chemical restraint, as well as a documented risk of serious mental and physical injury and even death, the child's right to privacy under the Florida Constitution is clearly implicated. A residential treatment center for children and adolescents

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168. In the child's case plan, the court orders the "type of placement," and "type of home or institution" where the child is to be placed, and the child cannot be placed in contravention of a valid, existing court order. FLA. STAT. § 39.601 (2000). Additionally, while the amendment to section 39.407 of the Florida Statutes is silent on the necessity for a pre-placement hearing, chapter 39 continues to mandate that DCF, as temporary legal custodian, can only provide a child with ordinary psychiatric and psychological treatment, unless the court orders otherwise. § 39.01(70).

169. Where the child requires short-term hospitalization or treatment in a crisis facility, then there is no need for the court to conduct a pre-placement hearing. However, when the type of the child's long-term placement is changed from a foster home to a psychiatric institution in contravention of the court-ordered case plan, then a pre-placement hearing is required. Moreover, viewed from both the child's perspective and from the child's best interests, the child should not be subjected to the intrusiveness and harmful effects of this type of placement, nor should the child be bounced around like a "ping-pong ball," being sent to a residential treatment center in a different county, only to be discharged by the court days or weeks later.

170. Moreover, as the Supreme Court of Florida noted in M.W., providing pre-placement hearings for children facing long-term commitment to residential centers should not be eschewed just because it would be burdensome to the dependency courts. M.W., 756 So. 2d at 109. In fact, the courts would not be unduly burdened by having to conduct such hearings, as the number of foster care children in residential psychiatric settings represents a relatively small percentage of the total population. For example, in Miami-Dade County the number of foster care children placed in long-term psychiatric residential treatment facilities in 1999–2000 totaled only 94, representing only three percent of the children in foster care in the county. FOSTER CARE REVIEW, INC., ANNUAL RECAPITULATION REPORT (July 1999–July 2000).
utilizes "a variety of treatment modalities in a more restrictive setting," \(^{171}\) including the use of psychotropic drugs, restraints, and seclusion. \(^{172}\) Under these circumstances, the "procedural safeguards relative to the intrusion" \(^{173}\) should include a pre-placement court hearing.

D. The Right to Present Evidence and the Burden of Proof Required

In developing the rule, the court must also consider the question of the evidentiary standard to be met. In \(M.W.\), the Fourth District ruled that because the juvenile court has an "ongoing relationship" with a dependent minor, the presentation of evidence is not necessary in court reviews involving the child's commitment to a psychiatric institution. \(^{174}\) In the ideal system, a juvenile court judge does have an ongoing relationship with a child. In reality, though, just as the dependent child often has a constant turnover of social workers, so too does the child often have a number of juvenile court judges presiding over the case during the time the child may spend in the state foster care system. In addition, given the extraordinary number of cases in each juvenile judge's docket, even if there is one consistent judge presiding, it is difficult for a judge to recollect every child in his or her docket. As demonstrated in Michael's case, even though there had been several hearings before the court, the court stated at the start of the hearing in which the child was committed: "I don't remember this child, so tell me a little about the case." \(^{175}\) No judge can possibly remember the details of the hundreds of cases in his or her docket. Without a meaningful hearing, the court cannot know if it is being provided with erroneous or incomplete information, as \(M.W.\) maintains occurred in his case, and has the potential to occur in every case where a minor is being institutionalized by the state. In a proceeding involving the child's commitment to a psychiatric institution, a perfunctory hearing before the juvenile court does not provide the child with

171. FLA. STAT. § 394.67(22) (2000).
172. See § 394.875(10); FLA. ADMIN. CODE ANN. r. 65-10.021(8) (discussing procedures for use on children of mechanical restraints, canvas jackets, and cuffs and requiring additional justification for other hazardous procedures or modalities that place the child at physical risk or which are potentially painful); see also Godwin v. State, 593 So. 2d 211, 216 (Fla. 1992) (Kogan, J., concurring in part and dissenting in part) ("we tend to forget exactly what civil commitment means: [t]he person is taken out of society, deprived of liberty... and involuntarily subjected to examination and treatment. There is very little difference between this procedure and incarceration for crime"); Tal-Mason v. State, 515 So. 2d 738, 740 (Fla. 1987) (equating a psychiatric institution to a jail because of the facilities for enforced confinement).
174. M.W. v. Davis, 756 So. 2d 90, 104 (Fla. 2000).
175. Record at 29, M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).
any meaningful protection. A child must be provided the opportunity to present and rebut evidence in a proceeding where the child’s liberty and privacy is at stake.

Moreover, when constitutionally protected rights are being impinged upon by the state, the state has a burden of proof, which can be no less than clear and convincing evidence.\textsuperscript{176} Indeed, the Supreme Court of Florida “has consistently held that the constitution requires substantial burdens of proof where state action may deprive individuals of basic rights.”\textsuperscript{177} In non-criminal contexts, the court has held that constitutionally protected individual rights may not be impinged with a showing of less than clear and convincing evidence.\textsuperscript{178} Chapter 39 does not provide any evidentiary standard for the court to follow in judicial review proceedings, nor does it provide for the rules of evidence to be followed at the hearing. Even if the rules of evidence are not followed during judicial review hearings regarding the child’s general status, the rules of evidence must be followed in proceedings involving the minor’s commitment to a long-term, locked psychiatric institution, as the minor’s constitutional rights are at stake.

As the supreme court has made clear, “[t]he seriousness of the deprivation of liberty and the consequences which follow in adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual’s liberty is in jeopardy.”\textsuperscript{179} This is necessary because of the uncertainty and risk of erroneous psychiatric diagnosis may result in inappropriate commitment to a mental institution.\textsuperscript{180}

Additionally, in the context of psychiatric commitment, the Supreme Court of Florida has required the trial court, by clear and convincing evidence, to “eliminate the possibility of successful treatment through some less restrictive alternative.”\textsuperscript{181} As one commentator has noted:

The doctrine of the least restrictive alternative found in mental health law has its roots in basic constitutional doctrine. A state-imposed bur-

\textsuperscript{176} See generally Dep’t of Law Enforcement v. Real Prop., 588 So. 2d 957, 967 (Fla. 1991).
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} In re Beverly, 342 So. 2d 481, 489 (Fla. 1977).
\textsuperscript{180} See In re Roger S., 569 P.2d 1286 (Cal. 1977) (holding that neither the state nor the parent has an interest in committing a child to a state mental hospital if the child is not in need of treatment and if commitment is based on erroneous information and evaluation); see also In re Michael E., 538 P.2d 231 (Cal. 1975) (establishing criteria for admission of minors who are wards of the state where the state seeks to commit the minors to psychiatric institutions).
\textsuperscript{181} In re Beverly, 342 So. 2d at 490.
den on a 'fundamental' right, such as certain liberty [or privacy] rights, is constitutional only if the burden is necessary to further a compelling government interest. Thus, if the government's interest can be promoted by a means that imposes a lesser burden on the right, the more burdensome means is constitutionally impermissible.\textsuperscript{182}

VI. PARHAM V. J.R. AND THE NEW SOCIAL SCIENCE RESEARCH

In ruling that a dependent child must be provided a meaningful opportunity to be heard prior to commitment to a residential facility, the court rejected the arguments that Florida law and the U.S. Constitution afford the child this right. The lynchpin of its decision in \textit{M. W.}, and the directive to the Juvenile Court Rules Committee was its observation that:

While the child's best interests may in fact be paramount in the eyes, minds and hearts of every participant in the dependency proceeding, it is important that our procedures in dependency cases ensure that each child is treated with the dignity to which every participant in a dependency proceedings should be entitled. It is true that the dependency court, a citizen review panel, the Department and multiple psychiatrists and psychologists were involved in M.W.'s case and all were concerned with his best interests. However, of paramount concern is the question of whether M.W. perceived that anyone had his best interests at heart when he was placed against his wishes in a locked psychiatric facility without the opportunity to be heard.

Indeed the issue presented by this case extends beyond the legal question of what process is due; rather, this case also presents the question of whether the child believes that he or she is being listened to and that his or her opinion is respected and counts.\textsuperscript{183}

Over twenty years ago, in 1979, the United States Supreme Court decided \textit{Parham v. J.R.}, in which the Court ruled that the Fourteenth Amendment to the United States Constitution does not bar parents or the

\textsuperscript{182} Weithorn, \textit{supra} note 33, at 787 n.85. (citations omitted) (emphasis added).

\textsuperscript{183} M.W. v. Davis, 756 So.2d 90, 107-08 (Fla. 2000); see \textit{MELTON}, \textit{supra} note 37, at 146-47 (stating that children obtain psychological benefit from procedural protections prior to being placed in psychiatric treatment facilities).
state from committing children "voluntarily" to a mental hospital.\footnote{184}{Parham v. J.R., 442 U.S. 584 (1979).} In its ruling, the Court relied upon an \textit{amicus} brief submitted by the American Psychiatric Association and the social science research prevalent at the time.\footnote{185}{Id. at 603.} Two decades later, the social science research now stands inapposite. In \textit{Parham}, Justice Burger stated that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."\footnote{186}{Id. at 606.} However, this \textit{dicta} by the Supreme Court is one of a number of outmoded "assumptions" that the Court relied upon in its ruling.

Indeed, the social science research now indicates that "at least in their reasoning about treatment decisions, adolescents are indistinguishable from adults."\footnote{187}{Gail S. Perry & Gary B. Melton, \textit{Precedential Value of Judicial Notice of Social Facts: Parham as an Example}, 22 J. Fam. L. 633, 649 (1983–84) (citations omitted).} In a leading research study, clinical psychologists:

\begin{quote}
[P]resented hypothetical dilemmas about medical and psychological treatment decisions to nine, fourteen, eighteen, and twenty-one-year olds. The responses of the fourteen-year olds could not be differentiated from those of the adult groups, according to any of the major standards of competency: evidence of choice; reasonable outcome or choice; reasonable decision making process; understanding the facts.\footnote{188}{Gary B. Melton, \textit{Toward Personhood for Adolescents: Autonomy and Privacy as Values on Public Policy}, 38 AM. PSYCHOL. 99 (Jan. 1983); see also Susan D. Hawkins, Note, \textit{Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes}, 64 FORDHAM L. REV. 2075 (1996) (arguing that minors should be accorded due process in contested medical treatment cases to protect their rights to informed consent, bodily integrity, self-determination, and privacy).}
\end{quote}

This empirical evidence indicates that:

\begin{quote}
[i]there seems to be ample basis for reversal of current presumptions in favor of a view of adolescents as autonomous persons possessed of independent interests regarding liberty and privacy. Ac-
cordingly, psychologists should actively involve minors in decision making about treatment and research, and policy-makers should begin their analyses of issues involving adolescents with respect for their autonomy and privacy. 189

In fact, both the American Psychiatric Association and the American Psychological Association now strongly support due process for adolescent minors facing psychiatric institutionalization, particularly when the minor is a ward of the state. Both associations have drafted or voted to endorse model commitment statutes or approved guidelines for minors facing commitment to psychiatric facilities that provide the youth substantial due process prior to commitment.190

In 1981, two years after Parham, the American Psychiatric Association approved a set of guidelines for the psychiatric hospitalization of minors. The guidelines, prepared by the Association’s Task Force on the Commitment of Minors, guarantee children over the age of sixteen the right to contest an involuntary admission to a psychiatric facility, the right to an involuntary commitment hearing, and the right to counsel at the involuntary commitment hearing.191 At the involuntary commitment hearing, the child through his appointed counsel has the right to cross examine witnesses favoring commitment and the right to present testimony and evidence in opposition to commitment and/or in favor of less structured alternatives.192

In addition to these protections, the party seeking to commit the child against his will has the burden of showing the court by clear and convincing evidence that: a) the child has a mental disorder; b) the child is in need of treatment or care available at the institution to which involuntary commitment is sought; and c) no less structured means are likely to be as effective in providing such treatment or care. If the court, after hearing the evidence presented, commits the child to a psychiatric program, the duration of the initial commitment cannot exceed forty-five days, with the next commitment for ninety days, and subsequent commitments of six months.

More recently, the American Psychological Association’s Division of Child, Youth, and Family Services endorsed guidelines that provide similar due process to youth facing psychiatric commitment.193 Both the guidelines by the American Psychological Association and the American Psychiatric

189. Melton, supra note 188, at 99.
192. Id.
Association apply even where the parent is seeking the youth’s commitment.  

VII. THERAPEUTIC JURISPRUDENCE

Commendably, the Supreme Court of Florida was able to see Michael’s perspective and understand how he felt when he was committed to a psychiatric institution without the opportunity to be heard by the court. Providing a minor due process in the context of mental health commitment enhances therapeutic and psychological benefits for the minor. A number of research studies have found that providing adversarial proceedings produces positive psychological benefits for children. Empirical research indicates that “having some control over the process (a form of control inherent in a truly adversarial system) is likely to enhance a child’s sense of perceived justice ... and perhaps decrease resistance to treatment if it ultimately is ordered.”

Indeed, significant clinical evidence exists showing a greater likelihood of the treatment succeeding when adolescents participate in the decision to begin treatment. Contemporary research on civil commitment hearings conducted by social psychologists and therapeutic, jurisprudence scholars strongly favors procedures that “increase patients perceptions of fairness, participation, and dignity, thereby increasing the likelihood that they will accept the outcome of the hearing, will view that outcome as being in their best interests, and will participate in the treatment process in ways that will bring about better treatment results.”

A research study found considerable benefits resulting from allowing adolescents to have judicial hearings prior to their commitment if they objected to hospitalization. The researchers reported hospital staff believed that giving adolescents a hearing if they objected to hospitalization was “helpful to children” for the following reasons:

195. See M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).
196. See Melton, supra note 37, at 139–41.
198. Bruce J. Winick, Therapeutic Jurisprudence and the Civil Commitment Hearing, 10 J. CONTEMP. LEGAL ISSUES 37, 60 (1999).
1. The procedure gave the child the opportunity to tell how he felt. He had the opportunity to express his objection.

2. The procedure crystallized the issue of the need for treatment. It made the child (and the family) confront the issue of whether or not the child really needed or wanted to be hospitalized.

3. It made the child feel that he had been treated fairly; if he objected, he would have an impartial hearing.

4. The procedure afforded the child some measure of control over his own destiny.

5. This procedure was a step in the patient’s involvement in planning for his own care.

6. The judge could only release the child if he did not need to be hospitalized.

As one commentator noted: “[p]rocedural due process does not immunize persons against deprivations of life, liberty, or property; it simply insists on a degree of fairness and humanity. . . . To that degree the capacity of children has nothing to do with their right to be treated fairly, decently, and humanely by their government. They are entitled to such treatment not because they are competent but because they are persons.” Indeed, “the ‘competency’ of the claimant bears little or no relationship to the issue of entitlement, primarily where the liberties involved are aimed not at maximizing free choice but at civilizing the process and instruments of state compulsion.”

VIII. CONCLUSION

The Children & Youth Law Clinic’s perspective as counsel for foster youth has given it a unique ability to see these proceedings from the eyes of the child. Many clients have expressed feeling “like pieces of furniture” when placed in psychiatric facilities without being seen or heard by the court. They have described feeling “shut up” and “shut out” when deprived

200. Id. at 384–85; see also In re Gault, 387 U.S. 1, 27 (1967) (observing that that the appearance as well as the actuality of fairness, impartiality and orderliness—in short the essentials of due process—may be a more impressive and therapeutic attitude so far as the juvenile is concerned).


202. Id.
of the chance to speak to the judge to contest their placement or to correct inaccurate information in the court record. Thus, it is important to view the issue through the eyes of the child who faces commitment.

As one former foster youth has written: "[f]oster care begins with the terror of suddenly losing family, friends, toys, clothes, siblings, relatives, neighborhood, and home. A child faces strange surroundings, strange people, the indignity of a medical strip search, and questions that aren’t nice." When a foster child is placed in a residential psychiatric facility, the child experiences the same feelings of loss, indignity, and dislocation. It is therefore essential that foster children be provided with meaningful due process procedures and protection by the juvenile court prior to, as well as during, their placement in psychiatric facilities.

Indeed:

The decisions in foster care often involve many, and sometimes conflicting, interests. The viewpoints of the children are, therefore, not sufficient alone but need to be seen as a necessary part of the considerations that determine the recommendations that are made. Such a practice can be beneficial in the long run since it is almost axiomatic that those who participate in making decisions are more concerned about making things work out . . . . Surely a field that stresses the self-determination of clients needs to take steps to avoid drowning out the voices of children.

Ultimately, it is hoped that the Supreme Court of Florida’s willingness to consider the feelings and perceptions of Michael and the psychological benefits of affording the child a hearing, and most important, Michael’s valiant struggle to have his voice heard, will inform the court’s consideration of a rule of procedure that provides dependent children a truly meaningful opportunity to be heard by affording them the right to notice, counsel, a pre-placement hearing, and the right to present and rebut evidence of the need for commitment in a psychiatric facility before the state can commit them to these facilities.


204. Festinger, supra note 1, at 296–97.
Providing Counsel to Children in Dependency Proceedings in Florida

Michael J. Dale*

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I. INTRODUCTION

Florida has a long and ignominious history of failing to provide protection and safety to children in its child welfare system. Years of investigations, newspaper articles, and lawsuits demonstrate the pervasiveness of the problem and the degree to which children are unprotected.¹ Large numbers

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of children are subject to abuse and neglect. Children often come into state care who should not be there, and then they remain for extended and unreasonable periods of time. Decision-making as to whether children should be given the opportunity to be adopted, placed in long-term care, including independent living, or sent home, are often delayed for inordinately long periods of time. Neither a coherent system for deciding which children should enter state care exists, nor do procedures that provide guidelines for what to do with the children once they enter the Florida child welfare system and come before the court. The lack of an efficient system of placement and supervision is exacerbated by the fact that the conditions into which children are placed are fundamentally unsafe. The irony is self-evident. During this entire process of removal from a home claimed to be unsafe and placed into a foster home or congregate care facility that may be even more unsafe, very few of Florida’s children receive any independent legal representation.


3. *Id.*


5. See discussion infra Part II. Conditions in child welfare systems in other states are also dramatically inadequate. See Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (1999) (finding that in 1995, 22 states and the District of Columbia were under court supervision for problems in care of foster children); National Center for Youth Law, Foster Care Reform Litigation, Docket 2000.

6. See discussion infra Part II.
For at least the past forty years, the major focus of the American response to child welfare problems has been the use of juvenile or family court to decide issues concerning removal of abused and neglected children from their homes, placement and care in the child welfare system, and then either returning them home or looking toward termination of parental rights and adoption. Given the system primarily involves the use of courts, and Florida’s history of failing to protect children in the system from harm, children in Florida’s dependency proceedings need maximum assistance to safeguard them. Of course, endemic problems in providing a workable and protective child welfare system is not limited to Florida. Problems exist nationwide. The National Center for Youth Law reported in its Foster Care Reform Litigation Docket 2000 that major litigation directed to foster care over the past ten years has been brought in at least thirty-two states. There have been a plethora of books and articles addressing the American child welfare system, both in popular and scholarly literature. Particularly prophetic is the description of the system by Professor Martin Guggenheim. Speaking with specific reference to the Adoption Assistance and Reform Act of 1980, Professor Guggenheim said:


When foster care is overused, when policymakers do not take into account the circumstances under which children are separated from their families, when the proposals to terminate parental rights of children in foster care are the only features of a comprehensive foster care reform that are assiduously enforced, one must ask whether the termination provisions are appropriate. Justice Fortas' well-worn commentary on the realities of the juvenile justice system in the 1960s is fully appropriate in this context; under the Adoption Assistance and Reform Act of 1980, children appear to receive "the worst of both worlds." They are placed in foster care too easily, without sufficient safeguards ensuring that they remain with their families whenever they could be safely kept at home. Then, once they enter foster care, the rules authorizing termination of parental rights—which were enacted based on the premise that foster care would be a last resort—are fully enforced.  

There have also been articles specifically addressing the problems in Florida. The child's innate vulnerability, combined with defects in the dependency system and external threats of harm, brew a dangerous concoction that can irreparably harm Florida's youth. Once a child acquires dependency status in Florida, jurisdiction over the child vests in both the judicial and executive branches. Although parental involvement in these dependency proceedings is central to the legitimacy of the proceedings, there are concerns that Florida's courts rely too heavily on the threat of termination of parental rights as a tool for retaining children in foster care. The following section explores these issues in more detail.

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12. Guggenheim, The Effect of Recent Trends, supra note 8, at 140.
15. Under Florida law abuse and neglect cases are referred to as dependency proceedings. See FLA. STAT. § 39 (2000). Section 39 contains two separate procedures dealing first with dependency proceedings and second with termination of parental rights proceedings. See §§ 39.501-.510, .521-.522, .801-.817. Other jurisdictions use other terms for dependency proceedings, such as abuse and neglect proceedings. See Besharov, supra note 7, § 241 (McKinney 1999). Other commentators have referred to the combination of dependency and termination proceedings as "child protection proceedings." See Mandelbaum, supra note 4, at 90 n.2. For simplicity purposes, this article refers to both dependency and termination proceedings in Florida generically as dependency proceedings.
matters can be significant, in many situations the courts and child welfare agencies are the primary decision makers in the determination of what is in the best interests of the child, which also makes conflicts of interest more common. 17 Even when there is no conflict, the court and the agencies are often unable to protect the children.

By statute in Florida, parents are now entitled to counsel at all stages of the dependency and termination of parental rights proceeding. 18 For the past decade, the Department of Children and Family Services ("Department"), Florida's child welfare agency, has been required to appear through counsel in dependency proceedings pursuant to an order of the Supreme Court of Florida. 19 On the other hand; children have no lawyer in dependency proceedings in Florida either by constitutional right or by statute. 20 Rather, the only form of representation they receive is on an ad hoc basis through a volunteer guardian ad litem system, and very little representation by attorneys. 21 Children have received representation in some form across the country for the past twenty-five years, 22 sometimes by a lawyer and other times through a guardian ad litem program, which was first instituted in 1974 through the federal Child Abuse Prevention and Treatment Act. 23 The problem in Florida, unlike other jurisdictions whose systems are discussed later in this article, is that the child has no entitlement to a lawyer and often does not even obtain the services of a volunteer guardian ad litem. The child needs an attorney, and the legislature should provide for one.

This article first describes the nature of the problem in terms of both inadequacies in the child welfare system and the failure of the current approach to protect children in Florida's courts. The article then analyzes the source of authority to protect children in dependency procedures, focusing on federal statutes and Florida state law. It then briefly surveys the variety of approaches to protecting children in child protection proceedings across the country. Finally, it proposes that independent representation of dependent children by a lawyer is a crucial factor in facilitating a rapid and safe outcome for children in abuse and neglect proceedings. It asserts that the

17. See Boyer, supra note 14, at 383.
20. See chapter 39 of the Florida Statutes and discussion infra pp. 782–84.
appointment of a guardian ad litem is an appropriate and worthwhile approach to protecting children. However, despite the presence of the guardian ad litem, appointment of counsel, both as a general proposition and specifically because of Florida's historic failure to protect its children in the dependency system, is essential to protecting children in the state's child welfare system.

II. STATEMENT OF THE PROBLEM

Although Florida statutory law recognizes the need for and appears to require that all children receive representation through a guardian ad litem during dependency proceedings,24 many children involved in abuse and neglect proceedings are not provided with representation of any kind. The urgent need for consistent and competent representation of children in dependency proceedings is demonstrated first by state reporting statistics, which show that 30,065 of the state's children were found to be victims of substantiated maltreatment during 1998,25 and that state court proceedings were undertaken for 14,980 of these victims.26 Parents were by far the most common perpetrators, contributing to 18,429 of 23,790, or seventy-seven percent, maltreatment cases.27 Close to 800 perpetrators were either foster parents, residential faculty staff, or child day care providers.28 The fact that fifty-four child deaths in Florida were attributed to maltreatment29 evidences the need for a voice to zealously advocate the child's interests in these proceedings. The trial and appellate courts have publicly expressed this concern for children in foster care.30

Second, there is substantial evidence that Florida's system is in a state of crisis. Indeed, both Governor Bush and the Secretary of the Department reported as much in a federal court hearing in January 1999.31 The very

24. § 39.402(8)(c)1., .807(2)(a), .822(1).
26. Id. § 4.8.
27. Id § 6.1.
28. Id. § 6.1
29. Id. § 5.1.
30. See discussion infra pp. 781–86.
31. I am here to tell you that this administration is committed to transforming our child welfare system across the board, not just foster care, but from the beginning to the very end to place children that abused and neglected to a much higher priority that has been in the past.
serious operational problems that create issues of dangerous conditions for children are compounded by Florida's planned dramatic revamping of its system. State legislation requires plans for privatizing the state's child welfare system, except for child protected intake and investigation, by 2003. Two recent federal court class action lawsuits in Florida, one in Broward County in which the governor and secretary appeared and one statewide, have highlighted the problems in foster care in the state. A third federal lawsuit, a decade old, raising issues about the mental and health

The legislature is a partner in this, and I intend to use the resources and the bully pulpit and the power that the executive branch has to make that partnership work.

We have a temporary problem that we are going to solve, we are going to work on. A lot of the problems that exist, sadly we don’t even have a baseline numbers to measure – how we measure progress.

We are so far behind. It is such a tragedy to see how the mismanagement combined with the lack of resources has developed this situation... 


Sir, no one is more cognizant than I of the situation in Broward County. When I see the style of this case, I see the real names of the children and the real faces of the children and what has occurred to those children.

So, I am aware of the crisis that truly faces Broward County and the entire state.

I have found that the department is, in fact, in a state of crisis.

Secretary Kearney, pp. 20–21, Transcript Motion for Preliminary Injunction Before the Honorable Federico A. Moreno, United States District Judge, January 11, 1999. Very recently, Department of Children and Families Secretary Kearney has said that the system has gotten much better. “I have witnessed tremendous improvement made possible by unprecedented funding increases championed by Governor Jeb Bush and the legislature.” Kathleen Kearney, Keeping Children in Loving Homes, MIAMI HERALD, Dec. 16, 2001, at 5L.


34. Foster care is defined as "care provided a child in a foster family or boarding home, group home, agency boarding home, child care institution, or any combination thereof." § 39.01(29).
needs of dependent children, was recently settled.\(^{35}\) The Broward County, Florida Grand Jury Interim Report of Spring 1998 also substantiates this problem. The Report expressed deep concerns that children in the District’s foster care system are exposed to continuous danger while under the Department’s care, stating:

> It is the opinion of your Grand Jury that the problems facing the Department are extensive and so systemic that the children in the custody of or under the protection of the Department are in peril. We also found that the problems in the child welfare system extend beyond the Department into the courts as well.\(^{36}\)

While acknowledging that the Department is equipped with some dedicated personnel, the investigation portrays deplorable conduct from the Department’s staff, ranging from poor handling of files, misrepresentations to the court, and even criminal behavior from persons associated with the Department.\(^{37}\) Children are placed with persons who have been the subject of previous allegations of abuse and in homes that are overcrowded and poorly supervised.\(^{38}\) As this article is being written, another grand jury investigation of the foster care system is on-going in Broward County.\(^{39}\) The Supreme Court of Florida has recognized that the dependency courts are overburdened, and that acceptable case loads are central to the appropriate functioning of the dependency court.\(^{40}\) It has said, “[a]s a result of the backlog inherent in termination cases, many children are left in legal limbo as their custody status is argued in the courts.”\(^{41}\) The intermediate appellate courts have also recognized the problems in the system. Recently, the Fourth District Court of Appeal, in a case involving allegations of conditions problems in a DCF assignment center, recognized the need for representation of the child.\(^{42}\) Commenting on the horrendous number of abused and aban-
doned children, and the difficult caseloads of both the case workers and the courts in juvenile proceedings, the court said:

What would help considerably is if each child could have a guardian ad litem or attorney ad litem who could be in contact with the child on a more regular basis and serve as the child's advocate. Parents are represented in these proceedings, but the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases. We commend the bar volunteer projects such as Lawyers for the Children of America, for their representation of dependent children.43

Regretfully, as this article demonstrates, the guardian ad litem program is unable to fully protect children for several reasons. First, in Florida, it is a voluntary system with the result that in many instances there is no guardian ad litem available to represent the child. Second, the state appellate courts, although expressing a recognition of the need for a guardian ad litem, have held that there is no absolute right to a guardian ad litem despite the fact that chapter 39 of the Florida Statutes appears to be absolute on its face,44 and despite the existence of the federal statute that requires appointment of a guardian ad litem.45 Third, the Florida dependency and termination statutes establish a complex set of procedures, which are quite time consuming and require a lawyer's intervention to move the proceeding on behalf of the child.46 Unfortunately, the Florida Statutes and Rules of Juvenile Procedure

43. Id. at 406.
44. In termination of parental rights cases, the statute is clearly absolute. Fla. Stat. § 39.807(2)(a) (2000). In dependency cases, section 39.822 is absolute, stating that "[a] guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect Judicial proceeding . . . ." (emphasis added). Section 39.402(8)(c)(1) provides that at the shelter hearing the court shall "[a]ppoint a guardian ad litem to represent the best interest of the child, unless the court finds that such representation is unnecessary." These two provisions ought not to be read as contradictory. Section 39.402 should be read solely as a limitation at the shelter housing stage. See Letter from Secretary Kathleen A. Kearney, Fla. Dep't of Children & Families, to Congressman E. Clay Shaw, Jr., (July 7, 2000).
45. CAPTA, 42 U.S.C. § 5101–5107; 45 C.F.R. § 1340.14(g); Letter from Carlis V. Williams, Southeast Regional Hub Director, Administration for Children & Families, U.S. Dep't of Health and Human Services, to Florida D.C.F. Secretary Kearney (Oct. 16, 2000).
46. See Davis v. Page, 442 F. Supp. 258, 263 (S.D. Fla. 1977). The need for counsel was recently rendered more urgent by the federal district court's opinion in Foster Children Bonnie L. v. Bush. The court dismissed the central claims in a statewide class action challenging conditions in foster care in Florida in part on grounds that there was an adequate state
specifically prohibit legal representation by the lay guardian ad litem. In light of these problems and the Florida courts' inconsistent but nonetheless deeply held concern about lack of guardians ad litem and the resulting adverse effect on children, it is appropriate to review the federal and state statutory sources of guardian ad litem representation of children in dependency proceedings, as well as Florida's compliance with the federal and state laws pertaining to guardians ad litem, to understand the shortcomings.

III. FEDERAL STATUTES APPLICABLE TO DEPENDENCY PROCEEDINGS

Over the past twenty-five years, the federal government has recognized the severe problems in the nation's child welfare system by enacting three major funding statutes that create complimentary requirements and incentives to improve state practices in child welfare proceedings. Florida receives money under these laws and is obligated to be in compliance with enumerated statutory duties.

The first and most significant federal statute for the purpose of this article, is the Childhood Abuse Prevention and Treatment Act of 1974 ("CAPTA"). This law profoundly influenced the nation's approach to representation of children in dependency proceedings. This statute requires guardian ad litem representation in dependency proceedings, creating a great need for legal services and its funding. CAPTA is a federal funding statute providing incentives to states for improving the operation of their child protective services. The Act requires the states to submit plans to the Secretary of Health and Human Services, indicating to which child welfare programs the states will apply their federal funds. Under the statute, states must implement procedures that require the appointment of guardians ad litem in all dependency cases. In every case involving an abused or neglected child resulting in a judicial proceeding, the state must provide the child with a guardian ad litem to represent them, in order to receive federal forum in which the children could obtain relief. The federal court abstained in light of "the ongoing jurisdiction and ability of plaintiffs to raise constitutional claims in dependency court." Foster Children Bonnie L. v. Bush, Case No. 00-2116-CIV-MORENO, at 24 (Dec. 4, 2001). The federal court never discussed who would raise these claims or how they would do it.

48. For discussion of the Act, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 28 (1997); Mandelbaum, supra note 4.
49. PETERS, supra note 48, at 28; see In re Gault, 387 U.S. 1 (1967).
51. § 5106a(c).
52. § 5106a(b)(6).
funds.\textsuperscript{53} CAPTA states that the guardian ad litem may be an attorney or a court appointed specialist.\textsuperscript{54} The guardian ad litem must "obtain first-hand, a clear understanding of the situation and needs of the child" and "make recommendations to the court concerning the best interests of the child."\textsuperscript{55} Florida receives funding under CAPTA and must provide guardians ad litem in dependency cases.\textsuperscript{56} Unfortunately, as the discussion in section IV.B of this article shows, children are not regularly represented by a guardian ad litem in dependency proceedings in Florida. To the contrary, guardians ad litem who are volunteers are appointed in less than fifty percent of the cases. The Florida courts have done nothing to enforce the right to a guardian ad litem, which is mandatory under CAPTA.

CAPTA also requires states to provide reports to the United States Department of Health and Human and Services, which include, among other items, "the number of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out of court contacts between such individuals and children."\textsuperscript{57} Despite this federal requirement, Florida's Department of Children and Family Services has not provided this information to the Secretary.\textsuperscript{58} The Department's explanation in its report to the Secretary for the 1998 reporting year is that the information is "not available" at this time, and that this data will be made available with the implementation of a new statewide information system in the year 2003.\textsuperscript{59} Recently, the Department of Health and Human Services asked Florida's Department of Children and Family Services to develop a corrective action plan, looking at the case of appointment of guardians ad litem.\textsuperscript{60} The state's failure to fully staff the guardian ad litem does not appear to be a recent development.\textsuperscript{61} Unfortunately, in Florida, the only means to ensure appointment of guardians ad litem pursuant to CAPTA is through action taken by the federal agency. There appears to be no in-

\begin{itemize}
\item \textsuperscript{53} § 5106(c).
\item \textsuperscript{54} § 5106a(b)(2)(A)(iv)(I)–(II) (1994).
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Fla. Stat. § 39.822 (2000). In 1999–2000, the State of Florida received approximately $1,000,000 in CAPTA funds.
\item \textsuperscript{58} See SUMMARY DATA COMPONENT SURVEY, supra note 25, § 4.9–10.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} See Letter from Carlis V. Williams, supra note 45.
\item \textsuperscript{61} See Daniella Levine, To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals, 64 FORDHAM L. REV. 2023, 2032 (1996) (reporting that only half of children alleged to be abused or neglected receive GAL representation.); Shaeffer, supra note 1, at 64 (citing to state statistics showing that during fiscal year 1990–91, 40% of new dependency cases went unrepresented.).
\end{itemize}
stance yet where a state lost funding as a result of a Department of Health and Human Resources finding of non-compliance with CAPTA. Litigation by private parties to enforce CAPTA is problematic at best. While there is no reported opinion directly on point, where parties litigated to enforce the CAPTA provisions regarding the provision that there be a guardian ad litem in each dependency case, a body of case law does suggest that the courts interpreted other provisions of the Act's requirements leniently, based upon an analysis that the provisions are vague and do not mandate very particularized procedures or protective steps to be taken.62

The second major federal statute is the Adoption Assistance and Child Welfare Act ("AACWA"),63 which was enacted in 1980 in response to criticisms of the system during the 1970s.64 The Act provides for incentives to the states to improve their foster care system by funding placements, protective services, and family preservation and reunification services. The state must submit a plan in this regard.65 The purpose of the plan was to establish standards for the foster care system including those aimed at reduction in the use of foster care.66 AACWA also encourages increased state court involvement by requiring the state courts to perform two functions. The courts must encourage and monitor families in need of services in addition to protecting the welfare of the child.67 The Act provides that courts shall ensure that child welfare agencies have made reasonable efforts to provide services to the family that may eliminate the need for termination of parental rights.68 Courts review the progress the welfare agencies make toward the permanent placement of the child and must implement procedural protections for parents involved in these proceedings.69 Efforts to enforce the AACWA through a private right of action have uniformly failed. The United States Supreme Court rejected the approach in Suter v. Artist M70 in 1990.71 Subsequent cases here fared no better,72 with the result that the


65. § 622(a).

66. § 625(a)(1).

67. § 622(b).


69. Id. at 5.


71. Id.
major remedy for violation of the Act is through federal governmental agency enforcement. The lack of an enforceable means to protect children under AACWA is particularly unfortunate due to the unintended result of the Act. Research suggests that while it is the child’s parents who have their parental rights terminated, the child experiences the negative effects considering that many children are not subsequently adopted. It should be noted that the Congress did amend the AACWA after Suter to allow some limited form of a private right of action. Unfortunately, the limited reinstatement of the private right of action does not affect the right to enforce guardian ad litem provisions in the CAPTA law.

Congress recently passed a third act, the Adoption and Safe Families Act of 1997 ("ASFA"), to address concerns about the effectiveness of AACWA. ASFA allows for greater discretion regarding the definition of statutorily required reasonable efforts of state based services and is more flexible in allowing states to remove children from dangerous homes. ASFA also attempts to speed up the dispositional stage and increase adoptions in certain situations involving extreme circumstances. Unfortunately, ASFA does not provide a process by which the federal government evaluates the judicial determination requirement so as to guarantee that reasonable efforts have been made by state agencies in performing their duties under this statute.


73. Margaret Beyer and Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 Fam. L.Q. 233 (1986); Guggenheim, supra note 8.

74. 42 U.S.C. § 1320a-10 (1994), Effect of failure to carry out State plan, provides: In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds implied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decision respecting such enforceability: Provided, however, that this section is not intended to alter the holding in Suter v. Artist M, that 671(a)(15) of this title is not enforceable in a private right of action.


Thus, each of the three federal statutes contains extremely important protections for the child. However, because none of the laws provides the child the ability to obtain affirmative relief to enforce rights through a private right of action in the courts, leaving only administrative remedies through the federal agencies that fund the states, the need to enforce the conceptual provisions of the laws in individual cases in the juvenile court becomes much more significant. Specifically, the lack of a private right of action under the federal statutes to enforce the right to a guardian ad litem as well as other protections means that a lawyer representing a child in the dependency proceeding becomes more important. However, as the following section demonstrates, there is no right to legal representation for a child in Florida, and the statutory and juvenile court rule provisions governing guardian ad litem representation are ill-defined and imprecise.

IV. DEPENDENCY REPRESENTATION IN FLORIDA

A. Federal and Florida Case Law Governing the Right to Counsel

The United States Supreme Court has never ruled on the question of whether a child has a right to counsel and, if indigent, counsel free of charge in a dependency or termination of parental rights proceeding. The Court held, in *In re Gault*, 78 that a child does have a right to counsel in a juvenile delinquency case premised on the proposition that children do have a protected liberty interest under the Fourteenth Amendment when their freedom is in jeopardy. 79 However, in *Lassiter v. Department of Social Services*, 80 the court held that parents do not have a right to counsel, as a matter of constitutional law, in a termination of parental rights proceeding. 81 The court did recognize that counsel should be evaluated on a case-by-case basis as a matter of fundamental fairness in termination of parental rights ("TPR") cases. 82 Despite rejecting an absolute right to counsel, the court said: "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in the parental termination proceedings, but in dependency and neglect proceedings as well." 83 Nonetheless, the combination of the two cases makes it difficult to be sure that the United States Supreme Court would ever hold that children have an

78. 387 U.S. 1 (1967).
79. *Id.* at 42.
81. *Id.* at 24–32.
82. *Id.* at 31–32.
83. *Id.* at 33–34.
absolute right to counsel in dependency cases. On the one hand, there is a clear deprivation of liberty when children are removed from their home and placed in state care. On the other hand, the court has held that the loss of a family member—in Lassiter it was the loss of a child permanently—is not a significant enough loss to require the right to counsel in all cases.

In the case In re D.B., the Supreme Court of Florida held that children do not have a right to counsel in dependency cases. The court acknowledged that a "guardian ad litem must be appointed in any child abuse judicial proceeding" under Florida Statutes, but in all other instances, the appointment of a guardian ad litem is left to the discretion of the trial court and should be made only when required under rule 8.3 of the Florida Rules of Juvenile Procedure. The interests of the child are considered "protected" when the interests of a parent who is a party are not adverse to the child's interests. However, children do have due process rights when the interests of the child may be adverse to the interests of the parent, as is commonly the situation in dependency proceedings. This has never been translated into a right to counsel by either the courts or the Florida Legislature.

86. Lassiter, 452 U.S. at 34.
87. 385 So. 2d at 83 (Fla. 1980).
88. Id. at 87; see also, Dept't of Health & Rehab. Servs. v. Kahn, 639 So. 2d 689, 690 (Fla. 5th Dist. Ct. App. 1994); Michael J. Dale, Role of the Lawyer in Dependency Cases, Chap. 10 in Florida Juvenile Law and Practice, § 10.6 (Fla. Bar Continuing Legal Educ. 1999) Florida has not expanded the Gault holding and limits the appointment of counsel for an indigent child to a delinquency proceeding that might result in detention. In re D.B., 385 So. 2d at 90. It is a fundamental error in Florida to both deny this right and fail to comply with FLA. R. JUV. P. 8.165. A.G. v. State, 737 So. 2d 1244, 1247 (Fla. 5th Dist. Ct. App. 1999); see also State v. Steinhaus, 216 So. 2d 214, 218 (Fla. 1968) (holding that where a waiver hearing does not "inexorably lead to a jail or detention home" that a juvenile is not constitutionally required to a right to counsel).
89. In re D.B., 385 So. 2d at 91.
90. Id.
91. Mistretta v. Mistretta, 566 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1990) (finding that wife’s interest in obtaining child support coincided with the best interests of the child, thus, the child’s representation was adequate).
92. Id.
93. For opinions following In re D.B, see In re Adoption of T.G.L., 606 So. 2d 730, 732 (Fla. 4th Dist. Ct. App. 1992).
The Supreme Court of Florida very recently held that the appointment of counsel is mandatory when a child objects to being placed into a residential treatment center after an adjudication of dependency. The court ruling in the form of amending the Florida Rules of Juvenile Procedure to provide for counsel in this limited setting arose from the court’s decision in M.W. v. Davis. In that case, it held that when a court ordered a dependant child in the temporary custody of the Department of Children to be placed into residential treatment, an evidentiary hearing that complied with Florida’s civil commitment statute, known as the Baker Act, was not required, but that certain due process hearing rights did apply. The court sent the matter to the Juvenile Court Rules Committee to prepare and submit proposed rules to cover the situation, which resulted in the order amending the juvenile court rules. In so doing, the court explicitly said that it was not addressing the issue of whether an attorney is constitutionally required when a child is being committed to a residential treatment center.

While children have no statutory right to counsel, including appointed counsel if indigent, in dependency proceedings in Florida, their parents do. For a number of years by statute, Florida had provided that parents were entitled to counsel only if their parental rights were to be terminated. Parents were not entitled to counsel in a dependency proceeding unless, and the Florida statutory scheme was rather odd in this respect, there was some indication that parental rights would be terminated. This statutory approach produced a body of appellate case law in which the appeals court judges routinely reversed trial court determinations of termination of parental rights where there had been no counsel to the parents at the dependency stage. This problem was ultimately resolved in 1998 when the Florida Legislature amended chapter 39 to provide for the right to counsel to parents at all stages of dependency proceedings in addition to all stages of termina-

95. 756 So. 2d 90 (Fla. 2000).
96. Id. at 109.
98. M.W., 756 So. 2d at 109.
101. § 39.807.
103. See J.J.S., 680 So. 2d at 548; White, 483 So. 2d at 861; Dale, supra note 97.
The result of the legislative change was to protect the interest of parents throughout the proceedings. That scheme and the Florida Rules of Juvenile Procedure which implement it “make elaborate provision for appointment of counsel and for procedures concerning waiver of counsel” by parents. Obviously, it did nothing to protect the interest of children.

Florida’s child welfare agency—the Department of Children and Family Services (formerly known as the Department of Health and Rehabilitative Services)—also appears by counsel. It must do so because of a series of Advisory Opinions issued by the supreme court in the late 1980s responding to the practice of then HRS nonlawyer counselors appearing in court. In the first opinion, Florida Bar In re Advisory Opinion HRS Nonlawyer Counselor, the Department of Health and Rehabilitative Services petitioned the Florida Bar Standing Committee on the Unlicensed Practice of Law for an opinion. The court addressed the issue of whether the preparation of documents by lay counselors and the presentation of non-contested dependency court cases by lay counselors, including the filing of the documents, presentation of the case, request for relief, and testimony of the counselors are the “unauthorized practice of law.” The Bar Standing Committee found that HRS counselors were engaged in the unauthorized practice of law by drafting pleadings, legally binding agreements, and representing others in court. The court held that the types of activities required by chapter 39 and this form of representation of children constituted the practice of law.

While the court agreed with the Committee that HRS counselors were engaged in the practice of law, the court did not find that such practice was the cause of the alleged harm or that enjoining it was the most effective solution. Thus, the court granted temporary authorization for HRS counselors to continue their activities pending the report of court appointed ad hoc committee. Most importantly, the Committee reported the problems in allowing lay counselors or guardians ad litem to perform such legal activities, finding that “HRS lay counselor mistakes and delays result in

104. Fla. Stat. § 39.807 (2000). The purpose of the appointment, according to the Supreme Court, is to “ensure that the final result is reliably correct.” J.B. v. Fla. Dep’t of Children. & Family Servs., 768 So. 2d 1060, 1068 (Fla. 2000).
106. 518 So. 2d 1270 (Fla. 1988).
107. Id.
108. Id.
109. Id. at 1271.
110. Id. at 1272.
111. Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor, 518 So. 2d at 1272.
112. Id.
public harm, due in part to a lack of adequate training and supervision in the proper procedures and legal ramifications of the dependency process."\textsuperscript{113} This opinion is significant because it recognizes the problems of nonlawyer and inadequate representation of children in dependency proceedings.

In a second opinion in 1989, \textit{Florida Bar In re Advisory Opinion HRS Nonlawyer Counselor},\textsuperscript{114} the court reviewed a report of the Supreme Court Committee on HRS Nonlawyer Counselors, which found that HRS, guardians ad litem, and others are unable to process cases within the statutory time limits for children in emergency care or foster homes.\textsuperscript{115} The Committee concluded that the problem of extensive delays was partially attributed to the insufficient involvement of lawyers in the juvenile process.\textsuperscript{116} The Committee suggested "a greater investment of time by lawyers in the system . . . to protect the important rights of the children and families whose lives come under the control of the system."\textsuperscript{117} The report further stated the Committee had knowledge of harm suffered by children through the current practice of allowing nonlawyer counselors to oversee dependency cases without legal representation.\textsuperscript{118}

The Committee concluded that, as the system was presently arranged, HRS counselors failed their clients in two ways.\textsuperscript{119} First, their experience and training prepared them for social work and not legal services; thus, they were not adequately equipped to perform legal services.\textsuperscript{120} Second, the time spent preparing for legal services takes away from time that would be best spent improving the case management aspect of their jobs.\textsuperscript{121} Due to the lack of legal background and large case loads, the Committee found that it was inappropriate for HRS counselors to handle dependency cases without legal representation.\textsuperscript{122}

The supreme court held that adequate legal representation on behalf of HRS is required at every stage of juvenile dependency hearings conducted pursuant to part III of chapter 39 of the \textit{Florida Statutes}.\textsuperscript{123} An attorney's presence is required in all court proceedings and supervision in the prepara-

\textsuperscript{113} Id.
\textsuperscript{114} 547 So. 2d 909 (Fla. 1989).
\textsuperscript{115} Id. at 910.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} \textit{Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor}, 547 So. 2d at 910.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} \textit{See id.}
\textsuperscript{123} Id. at 911.
tion of all legal documents. The court extended its holding to include all foster care proceedings, all child-in-need-of-services proceedings, and all termination of parental rights proceedings. Further, it held that HRS must end its practice of law by lay person counselors under these statutes and ordered the Juvenile Rule Committee of the Florida Bar to draft amendments to the present laws and submit to the court.

B. Florida’s Statutory Scheme Governing Representation of Children

The legislature’s purpose in enacting chapter 39 was “[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state’s care.” The chapter provides that the state’s judicial and other procedures must “assure due process through which children...and other interested parties are assured fair hearings...and the recognition, protection, and enforcement of their constitutional and other legal rights.” The dependency process comprises of a “complex body of substantive law and evidentiary rules,” as well as a “compendium of relevant sociological, psychological, and medical data.” The law provides for a detailed system of taking children into custody, arraignments, shelter hearings, mediation, injunctions to prevent abuse, adjudicatory hearings, dispositional hearings, periodic judicial reviews, and appeal.

124. Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d at 911.
125. Id.
126. Id.
127. FLA. STAT. § 39.001(1)(a) (2000). The legislature also enacted a set of goals for dependent children, a form of bill of rights, in 1999. The goals are virtually meaningless because the legislature explicitly made them unenforceable. § 39.4085.
128. § 39.001(1)(f).
130. Id. There are also detailed statutory provisions governing medical, psychiatric and psychological examinations and treatment of the child. § 39.407.
131. § 39.506.
132. § 39.401, .402(1), (2), (8)(a), (h), .01(65).
133. § 39.504.
134. § 39.507.
135. § 39.521.
136. § 39.701.
137. §§ 39.510, .815. The statute provides that any party affected by an order may appeal. By definition this includes both the child and guardian ad litem because each is a party in a dependency proceeding.
It includes "[a]n independent, trained advocate, when intervention is necessary and a skilled guardian or caregiver in a safe environment when alternative placement is necessary."\textsuperscript{138} The process is both complex and time consuming. One commentator has concluded that, with delays, it is possible that as many as sixteen court hearings may take place in a year.\textsuperscript{139} Additionally, the courts and other commentators have commented on the delays.\textsuperscript{140} It is also highly subjective.\textsuperscript{141} For these reasons—reduction in delays and dealing with the complexity and subjectivity of the process—among others, this article urges representation of children by counsel in dependency and termination of parental rights cases.

Courts are required by statute to appoint guardians ad litem\textsuperscript{142} at the earliest possible time in child abuse, abandonment, or neglect proceedings.\textsuperscript{143} The \textit{Florida Rules of Juvenile Procedure}, \textit{Florida Statutes}, and two orders of the Supreme Court of Florida codify the operation of guardian ad litem programs in the state.

The statutes enumerate a list of persons that can qualify as a guardian ad litem including:

\begin{quote}
[A] certified guardian ad litem program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.\textsuperscript{144}
\end{quote}

\textsuperscript{138.} § 39.001(3)(h).
\textsuperscript{142.} One court has described the court's power to appoint a guardian ad litem as "inherent." Simms v. Dep't of Health & Rehab. Servs., 641 So. 2d 957, 961 (Fla. 3d Dist. Ct. App. 1994). The \textit{Florida Statutes} call persons who act on behalf of a drug dependent newborn a "Guardian advocate." § 39.820(2); Amended Administrative Order, supra note 19.
\textsuperscript{143.} § 39.822(1); \textit{see} FLA. R. JUV. PROC. 8.170.
\textsuperscript{144.} § 39.820(1).
Parents who can afford to must reimburse the court for all or part of the cost of the guardian ad litem.\textsuperscript{145} Significantly, the \textit{Florida Rules of Juvenile Procedure} and \textit{Florida Statutes} consider guardians ad litem, and sometimes the local guardian ad litem program and the child as parties to the action who have standing to participate in the proceedings.\textsuperscript{146} This status as a party raises questions concerning the relationship among the court, the child, and the other parties. It has generated a substantial body of case law.\textsuperscript{147} Guardians ad litem are statutorily responsible to review dispositions, must be present at all important stages of the dependency proceeding, must submit written reports to the court,\textsuperscript{148} may waive the child's right to confidentiality,\textsuperscript{149} and may file appeals on behalf of the child.\textsuperscript{150} The report must include the wishes of the child and the recommendations of the guardian ad litem.\textsuperscript{151} These laws put the guardian in the position of a witness in the case. In the past, courts had even gone so far as to order the guardian ad litem to make unannounced visits to a parent's home.\textsuperscript{152} Recently, the Florida Legislature amended the statutory provision regarding the duties of the guardian ad litem, specifically to remove the section which had given the court authority to order a guardian ad litem to provide such services.\textsuperscript{153} However, the statute continues to provide that the guardian ad litem's duty is to "represent" the child.\textsuperscript{154} The \textit{Florida Rules of Juvenile Procedure} expressly forbid the practice of law by

\begin{itemize}
  \item \textsuperscript{145} § 39.822(2).
  \item \textsuperscript{146} § 39.01(51).
  \item \textsuperscript{147} \textit{See} Simms v. Dep't of Health & Rehab. Servs., 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994); \textit{In re} Adoption of T.G.L., 606 So. 2d 730 (Fla. 4th Dist. Ct. App. 1992); Dep't of Health & Rehab. Servs. v. Coskey, 599 So. 2d 153, 157 (Fla. 5th Dist. Ct. App. 1992); Brevard County v. Dep't of Health & Rehab. Servs., 589 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991); Brevard County v. Lanford, 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991); Marion County v. Johnson, 586 So. 2d 1163 (Fla. 5th Dist. Ct. App. 1991); Dep't of Health & Rehab. Servs. v. Cole, 574 So. 2d 160 (Fla. 5th Dist. Ct. App. 1990); \textit{In re} D.B., 385 So. 2d 83, 91 (Fla. 1980).
  \item \textsuperscript{148} FLA. STAT. § 39.822(3) (2000).
  \item \textsuperscript{149} Dep't of Health & Rehab. Servs. v. A.N., 604 So. 2d 11 (Fla. 3d Dist. Ct. App. 1992).
  \item \textsuperscript{150} § 39.815(1) (2000).
  \item \textsuperscript{151} FLA. R. JUV. PROC. 8.215(c)(1).
  \item \textsuperscript{152} Lewis v. Dep't of Health & Rehab. Servs., 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996).
  \item \textsuperscript{153} See § 39.807(2)(b); \textit{but see} Dep't of Health & Rehab. Servs. v. B.J.M. (Fla. 1995) (approving trial court order appointing legal services program in dependency case and empowering it to act in proceedings outside the dependency proceeding which resulted in the filing of damage action against the Department).
  \item \textsuperscript{154} § 39.807(2)(a).
\end{itemize}
lay guardians, although the guardian ad litem is authorized to file dependency petitions and petitions to terminate parental rights. The structure of the guardian ad litem role is thus internally inconsistent. The guardian is obligated at times to be confidante of the child, a witness, and an advocate. These roles can be entirely contradictory.

At the same time, the Supreme Court of Florida Amended the Administrative Order, governing the standards of operation of the guardian ad litem program, and Florida Rules of Juvenile Procedure, creates an inherent conflict for a lawyer who acts as a guardian ad litem. The supreme court Order and the rules provide on the one hand that the lawyer may not practice law, which seems to suggest somehow that a lawyer who is a guardian ad litem might practice law. However, the rules also provide for the appointment of the lawyer as an “attorney ad litem” who has different responsibilities. The attorney ad litem represents the child. It thus becomes unclear whether, given Florida’s statutory provisions that make the guardian ad litem a party, how the lawyer as a guardian ad litem can practice law given his or her party status. The federal statute, CAPTA, expressly provides that a guardian ad litem may be an attorney but does not create the conundrum found in the Florida law. Thus a conflict results having to do with the lawyer’s professional responsibility under the Rules of Professional Conduct. Arguably, when an attorney acts as a guardian ad litem, that attorney is not relieved of the responsibilities provided by the Rules of Professional Conduct. Yet if the lawyer as a guardian ad litem is a party who may testify among other things, an inherent conflict is raised.

Another prospective conflict, although one not recognized by the court, concerns the issue of separation of powers. “The guardian ad litem program is administered by the Office of the State Court Administrators under the supervision and control of the supreme court.” As such, although the

157. FLA. R. JUV. P. 8.215(f); Amended Administrative Order, supra note 19, at Preamble § (c)–(e).
158. FLA. R. JUV. P. 8.215(c).
160. See ANN. M. HARALAMBE, THE CHILD ADVOCATE 6 (1993); Ventrell, supra note 84, at 268; David R. Katner, Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 14 GEO. J. LEGAL ETHICS 103 (2000).
guardian ad litem is a separate and distinct party from DCF, the guardian ad litem remains, in essence, responsible to the supreme court. The Third District Court of Appeal dismissed this problem over a vigorous dissent by Chief Judge Schwartz.

Another problem is the lack of the assignment of a guardian ad litem in many cases. In addition to being required by federal law, the need for guardians ad litem for children in dependency proceedings has been recognized as necessary by dependency judges. One trial court judge "characterized the absence of an active guardian as fundamental and an impediment to her ability to conclude that the grounds for termination were established by clear and convincing evidence." However, the appellate court in this case held that this absence did not prevent the trial court from readjudicating children dependent based on specific allegations of abuse. This opinion represents part of a growing body of Florida case law in which the appeals courts have inexplicably accepted the failure to either appoint or continue in place a guardian ad litem in a dependency or termination of parental rights proceeding. In Vestal v. Vestal, the appeals court relied upon several prior cases in the Second and Fifth District Courts of Appeal to hold that the failure to appoint a guardian ad litem in a termination of parental rights case is not fundamental error. The problem with these opinions is they find an exception in the Florida law where none exists. The statute is absolute and mandatory on its face. Furthermore, the federal funding statute, CAPTA,
is also absolute, as this article demonstrates. The Florida courts have never commented upon the application of CAPTA to failure to provide or continue in place a guardian ad litem. Courts simply conclude using “no harm no foul” language, finding that while the statute may be mandatory on its face, the failure to provide a guardian ad litem is not fundamental error. Applying the same logic, if a parent did not have a lawyer in a termination of parental rights case, which is statutorily although not constitutionally mandated, would the court find that there is no fundamental error, or would the court say that the right is more significant for the parent than for the child and thus fundamental as to the parent but not as to the child.

Although there is no statutory right to counsel for children in dependency proceedings, occasionally a lawyer does represent a child in a dependency or termination of parental rights proceeding. This occurs on an ad hoc, irregular, and infrequent basis. The sources of representation are varied. First, the court appears to have authority where necessary to appoint an attorney ad litem to represent a child by virtue of language in the 1995 Supreme Court Administrative Order Relating to the Standards of Operation of Guardian Ad Litem Programs. The only language in chapter 39 referring to attorneys ad litem is in the bills of rights for children and in reference to a pilot attorney program in Orange and Osceola Counties. Thus, for example, a trial court does not have a duty to appoint counsel for a minor simply because a representative from the guardian ad litem program requests the appointment. The court may use its discretion to make an appointment, with “independent judgment after reviewing the need for the requested appointment.” In Davis v. Page, the federal Fifth Circuit Court of Appeals held...
Appeals held that the right to counsel in Florida dependency proceedings should be determined on a case-by-case basis. 178

Second, a number of the law schools in Florida, including Nova Southeastern University, the University of Miami, the University of Florida, and Florida State University, have clinical programs where students, as interns, represent some children in dependency proceedings. 179 In addition, a national nonprofit organization, Lawyers for Children America, Inc., represents children in Miami. Based upon a model introduced in Hartford, Connecticut in 1995, Lawyers for Children America, Inc. recruits volunteer lawyers from law firms and corporate legal departments to represent children in a multi-disciplinary approach in the dependency court. 180 Several legal aid programs also represent children in dependency proceedings. 181

Most recently, during the 2000 legislative session, the Florida Legislature enacted an attorney ad litem pilot program aimed at assigning lawyers to represent certain children in out-of-home care. 182 The statute provides that the Office of State Courts Administration establish an agency to provide representation. 183 The result has been the development of a program through Barry University School of Law in Orlando. 184 The statute, in the form of a demonstration project, is both limited in scope and unclear in approach. In fact, it appears that the largest sums appropriated by the legislature are being used to fund guardian ad litem programs in Orange and Osceola counties. 185 Of the $1.8 million appropriated, only $300,000 goes to lawyer representation.

178. Id. at 514.
181. Telephone Interview with David Bazerman, Legal Aid Society of Broward County (Dec. 1, 2001); Telephone Interview with Barbara Burch, Legal Aid Society of Palm Beach County (Mar. 28, 2001).
183. Id.
185. Id.
186. Id.
Even when attorneys represent children in abuse and neglect proceedings there are questions as to who pays for their services. When a lawyer is appointed as an attorney ad litem because of the failure of a previously appointed guardian ad litem to perform his or her duties, the Department of Children and Family Services is responsible for paying the attorney ad litem's fees. Further, the Department is not responsible for the operational costs of guardian ad litem programs, programs that "it did not create and over which it has no control."

The Florida Guardian Ad Litem Program, a member of National CASA, has twenty-one programs located in the twenty judicial circuits. The program functions in every county except Orange County where the Legal Aid Society serves as the guardian ad litem. The Florida Guardian Ad Litem Program operates under the auspices of the judicial branch. The mission of the program is to recruit, train, and supervise volunteers to advocate for the best interests of the children who are alleged to be abused, neglected, or abandoned, and who are involved in court proceedings. Each county's program may consist of different divisions within the program structure with coverage extending to domestic relations and other custody matters. For example, the Broward County Guardian Ad Litem Program of the Seventeenth Judicial Circuit has three divisions: Dependency, Family Law, and Criminal. The program literature explains that volunteers for these programs do not need to be attorneys because they are acting as advocates for these children, not legal counsel. For example, criminal court guardians ad litem are appointed when there are criminal proceedings in which a child may be asked to testify.

The Legal Aid Society of the Orange County Bar Association was founded thirty-eight years ago to help indigent individuals in the commu-

190. OFFICE OF STATE COURT ADM'R, FLA. GUARDIAN AD LITEM TRAINING MANUAL, Introduction & Overview, at 7 [hereinafter FLA. GUARDIAN AD LITEM TRAINING MANUAL].
191. Id.
192. See generally BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL.
193. FLA. GUARDIAN AD LITEM TRAINING MANUAL, supra note 190, Roles & Responsibilities of the Guardian Ad Litem Program, at 2.
194. Id.
nity. The Orange County Guardian Ad Litem Program is not part of the state nor a member of National CASA. This organization acts as attorneys for abused, neglected, or abandoned children. Orange County, Florida of the Ninth Judicial Circuit began and continues to provide pro bono attorney guardians ad litem in its volunteer program through Legal Aid Society.

In summary, the appellate opinions, ad hoc independent programs, and legislative pilot project all demonstrate that a child’s representative, whether by an attorney in addition to or as an alternative to a guardian ad litem, is recognized as a critical participant in facilitating the child’s best interests and advocating for the child in the context of a system that is unable to efficiently and safely care for children in its care. The following section, in brief survey fashion, demonstrates that, while other states uniformly recognize this need for children’s representation in dependency proceedings, their implementation of representation is quite diverse and eclectic with no single approach standing out as a most accepted model.

V. A SURVEY OF OTHER JURISDICTIONS

Statutory frameworks providing for child representation vary throughout the country, requiring or allowing discretionary appointment of an attorney, a Guardian Ad Litem, or a Court Appointed Special Advocate (CASA) volunteer. No two states or local jurisdictions within a state

195. Letter from Mary Ann Morgan, President of the Legal Aid Society of the Orange County Bar Ass’n; see also ORANGE COUNTY BAR ASS’N, INC., LEGAL AID SOCIETY, INFO. PACKET [hereinafter ORANGE COUNTY BAR ASS’N].

196. ORANGE COUNTY BAR ASS’N, supra note 189.

share the same system for representing children in dependency proceedings, although all have some form of representation. Thus, it is difficult to make generalizations about the different state or county models. However, it appears that all of the jurisdictions were influenced by a combination of the Supreme Court opinion in *In re Gault*, the passage of CAPTA, and the advent of the CASA movement. Although jurisdictions differ in their choice of terminology and practices, their approaches share several common traits. First, in 1996, at least thirty-eight states linked the role of the child representative to the "best interests" of the child, despite employing different labels for this concept. Second, there is no consensus as to what is meant by the "best interests" concept. Third, the models are greatly influenced by budgetary concerns. Essentially, there are two approaches or models, sometimes separate and sometimes mixed. They include representation by counsel or guardian ad litem, of which the CASA is one format or approach.

A. Guardian Ad Litem & CASA

Twenty-two states provide for a guardian ad litem. Twenty-three


199. PETERS, supra note 48, at 26.

200. Id. at 27-28.

201. Id. at 30.

202. Id. at 30-31.

203. Id. at 32.

204. PETERS, supra note 48, at 32.

states provide for a CASA, and eleven states provide for both. However, in most jurisdictions, there is little difference between the duties and powers of the guardian ad litem and CASA. Instead, the difference seems to be simply that of different organizational structures and recruiting pools rather than a true dichotomy of roles. In some jurisdictions, like Florida, a lawyer may act as a guardian ad litem but not practice law in that capacity.

In 1976, Judge David Soukup in Seattle, Washington, began using community volunteers trained in making decisions for abused and neglected children to recommend to the court what they felt would be in the best interest of the child. By 1977, the idea expanded and was encouraged by the National Council of Juvenile and Family Court Judges. The National Court Appointed Special Advocate Association was formed in 1982, and in 1990, the Victim of Child Abuse Act was passed by Congress. CASA is a national organization based in Seattle, Washington. This organization participates in the training, recruiting, and management of CASA volunteers. There are 800 local programs, 48,000 volunteers, 44 state organizations, 12 state administered programs, and 183,000 children being served. Although CASA volunteers go through extensive training, they do not require their volunteers to be attorneys. The role of a CASA volunteer is not to give legal representation for children but to investigate, report, and to recommend.

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207. These include: Arkansas, Colorado, Delaware, Illinois, Indiana, Kansas, Missouri, Nebraska, Oklahoma, Rhode Island, Tennessee. See supra notes 190–200.

208. In fact, in Florida the guardian ad litem program is a member of the National CASA Association. FLA. GUARDIAN AD LITEM TRAINING MANUAL, supra note 190, Introduction & Overview, at 7.

209. For a detailed discussion of the CASA approach see Adams, supra note 191. See also BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL, supra note 192, at 3; Daniella Levine, To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals, 64 FORDHAM L. REV. 2023, 2025 (1996).

210. Id.


212. NAT'L CASA ASS'N, 1999 STATE OF THE STATES 3 [hereinafter STATE OF THE STATES].

213. BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL, supra note 192, at 3.
to the court what would be in the best interests of the child in abuse and neglect cases.\textsuperscript{214}

The 1998 statistics on Child Abuse, Foster Care, Adoption, and CASA Report states that, in 1997, there were 2,943,829 children reported as abused and neglected.\textsuperscript{215} According to the 1997 Child Welfare League of America’s Stat Book, 520,000 children were in foster care between October 1, 1997 and March 31, 1998.\textsuperscript{216} The 1998 National CASA Association Annual Program Survey National Totals states that 183,339 children were represented by CASA volunteers.\textsuperscript{217} There are a total of 3331 United States. jurisdictions of which 906 have a CASA Program.\textsuperscript{218} Between 206,000 and 425,000 children in communities with CASA programs are not represented.\textsuperscript{219} This is often due to the lack of volunteer resources or CASAs not being appointed, a situation also present in Florida.

The Guardian Ad Litem Program is another organization, often voluntary in nature, that assigns individuals to specific cases to investigate, monitor, and make recommendations to the court for the best interests of the child in abuse and neglect cases.\textsuperscript{220} State Guardian Ad Litem Programs often are members of the National CASA Organization and recruit and train their volunteers employing the National CASA Organization Standards.\textsuperscript{221} Mandatory guardian ad litem appointments have existed in the United States since Colorado enacted the first such program in 1963.\textsuperscript{222} The programs are of varying formats. Some operate through a state or local office of court administration. There are also guardian ad litem programs administered by organizations such as a legal aid society.\textsuperscript{223} As noted earlier, Orange

\begin{footnotesize}
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\item \textsuperscript{214} Id.
\item \textsuperscript{217} 1998 Statistics on Child Abuse, supra note 215.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} FLORIDA GUARDIAN AD LITEM PROGRAM, Consumer Services, available at http://www.flabar.org/new/flabar/consumerservices/General/CallALaw/CAL1068.html (last visited Nov. 1999).
\item \textsuperscript{221} FLA. GUARDIAN AD LITEM TRAINING MANUAL, supra note 190, Introduction & Overview, at 7.
\item \textsuperscript{222} Brian G. Fraser, Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem, 13 CAL. W.L. REV. 16, 17 n.7 (1976).
\item \textsuperscript{223} See FLA. GUARDIAN AD LITEM TRAINING MANUAL, supra note 190; ORANGE COUNTY BAR ASS’N, supra note 195.
\end{itemize}
\end{footnotesize}
Florida has adopted the Legal Aid Society as its Guardian Ad Litem program structure. This program provides legal services to indigent persons and children in dependency or abuse and neglect cases. Here, guardians ad litem assist in recommending what is in the best interests of the child as well as advocating the legal rights of the child.

Many states have specific statutes mandating when a guardian ad litem or CASA should be appointed. A guardian ad litem is a specially trained volunteer appointed as an officer of the court to ensure that the best interests of the child are protected while the child is a ward of the court. In Florida, the guardian ad litem has five basic roles. They are investigator, reporter, protector, spokesperson, and monitor of services provided to the children. The guardian ad litem does not replace legal counsel or the social worker.

Guardian ad litem programs that are run under a state model often use volunteers from the community, individuals with varying backgrounds. CASA, as well as Guardian Ad Litem programs, can be state organizations under the judicial branch of government, as in Florida, state organizations under the executive branch, or private nonprofit organizations with no state funding. The structure can vary from state to state and county to county. An advantage of being a state agency is that the program will receive annual funding. A private not-for-profit organization must generate funding through fund-raising and grants. This affects the amount of money the program has to operate as well as the staff available for recruitment, training, and management. Some counties have community agencies that help fund CASA and Guardian Ad Litem Programs. Colorado receives funding from the National CASA Association and foundations. In Colorado, all CASA programs are private non-profit organizations or come under a non-profit umbrella organization. These programs do not get state funding. In Florida, Speak Up For Children, Voices for Children Foundation, Inc., and the

224. ORANGE COUNTY BAR ASS'N, supra note 195.

225. See FLA. GUARDIAN AD LITEM TRAINING MANUAL, supra note 190, Roles & Responsibilities of the Guardian Ad Litem, at 3 (listing the general roles of a guardian ad litem in Florida, including the responsibilities of a guardian ad litem in Orange, County).

226. See, e.g., NAT'L CASA ASS'N, supra note 211.

227. FLORIDA GUARDIAN AD LITEM PROGRAM, Consumer Services, supra note 220.

228. Id.

229. Id.

230. GA. CASA, INC., TRAINING MANUAL, What is CASA, at 3 (1999).

231. NAT'L CASA ASS'N, Strategic Plan, supra note 212.

232. Telephone Interview with Barbara Mattison of Colorado CASA (Oct. 28, 1999).

233. Id.

234. Telephone Interview with Barbara Mattison, supra note 232.
State of Florida provide funding to Guardian Ad Litem programs. Georgia receives funding from the state, National CASA Association, foundations, dues, and conference fees. The Legal Aid Society of Orange County, Florida is supported by various funding sources, including private donations, government grants, foundations, and general public support.

In Georgia, CASA is the only nonprofit organization of volunteer advocates for "deprived" children funded by the Office of Juvenile Justice & Delinquency Prevention. Georgia CASA has thirty programs in forty-three counties. In 1999, approximately 3522 children were served and over 19,000 children were in the legal custody of the state per month. On average, 197.6 incidents of child abuse and neglect are reported daily in Georgia. In fiscal year 1999, the year-end report total number of cases was 2057, with the number of children at 3522, and number of CASA volunteers at 1004. Georgia ranks as the fifth highest state in the nation in the number of children who have been abused and neglected.

The CASA volunteer, in Georgia, is a lay individual from the community who works with other service providers to act as an independent voice for an abused or neglected child. These volunteers do not act as attorneys, although they may assist attorneys who are representing the individual parties, including children. The training consists of forty hours, which include courtroom procedure, child advocacy techniques, neglect, physical abuse and sexual abuse training, early childhood development, and adolescent behavior. The volunteer's role is to advocate for a child from the beginning of the case until it is resolved, attend all legal proceedings, assess all of the facts in the case, and to make recommendations in the child's best interests. Volunteers must be twenty-one years of age. The potential volunteer is given a personal interview, which includes a screening for

236. NAT'L CASA ASS'N, Strategic Plan, supra note 212.
237. ORANGE COUNTY BAR ASS'N, supra note 195.
238. See GA. CASA, INC., supra note 230, History of CASA.
239. Id.
240. Id.
241. Id. at CASA Facts.
242. Id.
243. GA. CASA, INC., supra note 230, at 6.
244. Id. at CASA Facts.
245 Id. at What is CASA.
246. Id.
247. Id.
248. GA. CASA, INC., supra note 230, at What is CASA.
objectivity, competence, and commitment, and a fingerprint and background check is also conducted.\textsuperscript{249} No special or legal background is required to be a CASA.\textsuperscript{250} After training, each volunteer is sworn in by a juvenile court judge prior to the assignment of a first case.\textsuperscript{251} Each volunteer takes either one or two cases at a time, a significantly lighter caseload than the Department of Children and Families' caseload of thirty.

B. Counsel

Presently, twenty-four states have promulgated laws declaring that children in dependency hearings may have some form of appointed counsel.\textsuperscript{252} Five states only provide for counsel with no separate provision for a GAL or CASA.\textsuperscript{253} The states vary as to what is required of the attorney and the rights of the child. For example, Nebraska requires that the guardian ad litem be an attorney except in cases when there are special reasons why a particular lay person would be appropriate.\textsuperscript{254} In Virginia, all guardians ad litem are attorneys.\textsuperscript{255}

New York provides a system of counsel for children in its dependency system.\textsuperscript{256} The lawyer for the child in the New York system by statute is

\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at CASA Facts.
\textsuperscript{253} See, e.g., ALA. CODE § 26-14-11 (1996); COLO. REV. STAT. ANN. §§ 19-1-103 (West 2000), 19-3-602; MD. CODE ANN.CTS. & JUD. PROC. § 3-821, 3-834 (2000); W. VA. CODE § 49-6-2 (Michie 2000).
\textsuperscript{254} R.R.S. NEB. CODE § 43-272(3) (2000).
\textsuperscript{255} VA. CODE ANN. § 16.1-266 (Michie 2000).
\textsuperscript{256} Besharov, supra note 7, § 242; see also Sheri Bonstelle & Christine Schessler, Adjourning Justice: New York State's failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings 28 FORDHAM URBAN L.J. 1151 (2001) (discussing lack of attorney representation for parents in abuse and neglect cases).
known as a law guardian. Perhaps the best known law guardian program in New York, and certainly the oldest, is the Legal Aid Society of New York. The Legal Aid Society helps provide legal counsel to indigent persons within the community in a variety of settings, including criminal defense, domestic relations, civil, and juvenile matters. The Legal Aid Society represents ninety-percent of the children who appear before the Family Court in New York City in matters involving child abuse and neglect, juvenile delinquency, and children alleged to be persons in need of supervision. The Legal Aid Society acts as Law Guardians to more than 40,000 children and represents more than 38,000 families. The Legal Aid Society's policy is to co-advice and counsel their clients and then to advocate the clients' interests and wishes.

Illinois is one of the states that passed a statute that either requires or permits the appointment of independent counsel for children in a variety of judicial and administrative settings. Thus, children who are the subjects of proceedings under the Juvenile Court Act and the Mental Health Code must be represented by a guardian ad litem, and that guardian ad litem is represented by an attorney. The court must also appoint a guardian ad litem in each case involving a child not of the age of majority who is the subject of a proceeding under the state's Juvenile Court Act or Mental Health Code. The guardian ad litem shall represent the minor's best interests. It is the guardian ad litem's responsibility to form the required relationships and investigation necessary to represent the best interests of the child. The Juvenile Court Act provides that no hearing on any petition or motion filed under the Act may be commenced unless the minor who is the

257. Id.
259. ORANGE COUNTY BAR ASS'N, supra note 195.
261. Id.
262. Besharov, supra note 7, § 241.
263 705 ILL. COMP. STAT. 405/2-17(1), (2) (West 1999).
264. Id.
265. Id.
266. Id. at (1)(b).
267. See id. at (8).
subject of the proceeding is represented by counsel.268 When the court has appointed a guardian ad litem that is not an attorney at law, the court must appoint an attorney at law to represent the guardian ad litem.269 The court is also allowed to appoint a community volunteer, such as a court appointed special advocate or a person from CASA.270 Usually, these individuals are not legally trained.271

California’s approach is different. State statutes provide that in all cases in which an abuse and neglect petition has been filed, the probation officer or social worker who filed the petition shall serve as the guardian ad litem to the child, unless the court in its discretion appoints another adult guardian ad litem to represent the child’s interests.272 The statute clarifies that the guardian ad litem shall not be the attorney responsible for proving abuse or neglect.273 Unlike mandatory appointment of guardians ad litem, the appointment of legal counsel in California is discretionary.274 The courts may appoint counsel for the minor when it appears to the court that “the minor would benefit from the appointment of counsel.”275 Although California enumerates the responsibilities of the child’s counsel in dependency proceedings including interests “beyond the scope of the juvenile proceeding,”276 the statutes emphasize that the child’s attorney is “not required to assume the [duties] of a social worker and is not expected to provide nonlegal services to the child.”277

In the Colorado juvenile court, the attorney is formally called the guardian ad litem.278 Colorado Revised Statutes section 19-1-103 defines the guardian ad litem as a person appointed by a court to act in the best interests of a person.279 The child is not a client, and it is not the job of the guardian to parrot the request of the child. The unique role of the guardian ad litem is to represent the best interests of the child.280 Colorado recognizes that the

269. Id. at (4); Geraghty, supra note 268, at 291.
270 705 ILL. COMP. STAT. 405/2-17.1.
271 Id.
273. Id.
274. See § 317(c).
275. Id.
276 Id. § 317(e).
277. Id. § 326.
278. COLO. REV. STAT. ANN. § 19-1-103 (West 2000).
279. Id.
280. Id.
role of the attorney representing children is different then the attorney’s role in other court proceedings. As a result, the Colorado State Bar has adopted guardian ad litem standards. The guidelines require that an attorney participating in the Colorado guardian ad litem program is mandated to have a minimum of ten hours of specialized training or self education. Inexperienced attorneys appointed as guardian ad litem must complete eight hours of accredited training on the role of the guardian ad litem.

In most counties in Colorado, the guardian ad litem is appointed under a contract system. This is the case in most abuse and neglect cases. Through the contract system of appointing guardian ad litems, the attorney does not work for the government, a government agency, or institution, but as an independent attorney. The attorneys contract directly with the state judicial department or district court. The contract creates an ethical obligation to carry out a case similar to the obligation that is created when an attorney accepts money and creates a retainer agreement in the private bar. However, the major difference is that the agreement is not between the client (the party being represented) and the attorney, but between the court and the attorney. This model has been criticized because it sometimes creates a conflict of interest. The attorney often finds himself appearing before judges who sign his or her contracts. Critics believe that this makes the attorney obligated to the judge as well as the child. Another problem is the rates paid to attorneys who contract with the court system tends to be low. As a result, very few attorneys want to participate. In addition, because the contract rates are so low, many contracting attorneys contract for more cases than they can handle, causing the same attorneys to appear in court four to five days a week. This may lead to attorneys becoming overly familiar with the judges and other agencies involved. It is the duty

282. Id. at 1910.
283. Id.
284. Id.
285. Id. at 1909–10.
287. Id.
288. Id.
290. Walton, supra note 281, at 1907.
291. Id.
of the district court judges to monitor the guardian ad litem attorneys and preside over the dependency proceeding. This double-duty also creates a conflict of interest that is one of the concerns of critics of the Colorado system.

As this brief survey shows, there are two different approaches to the appointment of an attorney as counsel for a child. These approaches include the attorney for the child and a guardian ad litem who is an attorney. A survey of national standards for a child's attorney by the American Bar Association defines the attorney-appointed guardian ad litem in the following way: "a lawyer appointed as 'guardian ad litem' for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences." These standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates .... The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child."

VI. THE CASE FOR LEGAL REPRESENTATION

There are numerous organizations, books, articles, and professional publications that present strong public policy arguments for the use of attorneys in all proceedings in which juveniles are before the court in dependency and termination of parental rights cases. Foremost is the American Bar Association, which has introduced national standards for the representation of children, including representation in dependency proceed-
ings. The National Association of Counsel for Children (NACC) "believes that attorneys representing children and families should have a combination of knowledge, training, experience, and ability which allows them to effectively discharge their duties to their clients." NACC asserts that all parties should be represented by counsel, including children in abuse and neglect related proceedings. NACC is trying to encourage federal law to mandate that independent attorneys be appointed to represent the interests of children in such proceedings. NACC firmly believes that CASA volunteers are important to ensure families receive appropriate services and assistance, but children's attorneys remain uniquely qualified to provide a legal voice for the child. Therefore, CASA volunteers can work alongside children’s attorneys but cannot take the place of the children’s legal voice. On August 8, 1994, CASA summarized a Validation and Effectiveness Study on Legal Representation through Guardian Ad Litem, which identify the role of attorneys, guardians ad litem, and CASA. The report states that:

CASAs provides a different style of advocacy and perform many activities that attorneys do not . . . . CASAs tend to avoid the legal aspects of representation, and place greater emphasis on promoting cooperation among the parties. CASAs and attorneys prioritize their time differently, reflecting their areas of training and expertise —attorneys in legal representation and courtroom activities, CASAs in nonlegal and social service activities outside the courtroom.

Training, Accountability and Quality Control Findings . . . [stated that] [s]taff attorneys probably receive more training than CASAs; private attorneys less. CASA training, however, covers more top-


300. Id.

301. Id.

302. Id.

303. Id.

ics... [but] puts less emphasis on the child welfare system and courts (7.8%)... CASAs generally lacked information about immunity and liability issues.

The study expresses concern about CASAs' low level of courtroom activity. CASAs have less legal experience, and place less emphasis on attending hearings. In contested proceedings where there is a CASA but no lawyer, legal representation will be inadequate. A general recommendation from this study is to use the CASA training, caseloads, supervision and evaluation to model attorney Guardian Ad Litem programs.

In addition, many but not all, authors who have written on the subject have argued in favor of counsel for children. The work of Martin Guggenheim, Jean Koh Peter, and Anne Harralambe all support representation of children in dependency proceedings by lawyers. The core debate among scholars involves what role the lawyer should play as legal representative of the child—advocate for the child's express wishes or the child's best interests. Florida Statutes do not currently require counsel to children in Florida's dependency system in either form, and the statutory guardian ad litem mandate is not consistently followed. For reasons discussed throughout this article, Florida should follow the lead of other states that require legal representation of children in dependency proceedings and incorporate the independent counselor requirement in its dependency statu-

305. Id.
306. Id.
311. See generally Special Issue, Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 4 (1996); Mandelbaum, supra note 4, at 30-31; Katner, supra note 160.
tory provisions subject to variation based upon the child's capacity to direct the representation. 312

Conceptually, the appointment of counsel for all children in dependency proceedings makes sense for two major reasons. First, in light of the fact that the context in which decisions are made about children's life circumstances and services to be provided to them are made almost exclusively in a court setting, a lawyer for the child has the unique set of skills and authority to advocate and demonstrate the required right of the child to receive services. In the absence of counsel for the child, none of the other parties to the proceeding—the Department of Children and Family Services, the guardian ad litem, the attorney representing the Department, the parent and lawyer for the parent—is necessarily going to make motions to the court to order the provision of services, hold the other parties accountable to prove their assertions, and double check the collection of factual information to prove or disprove claims or defenses. The guardian ad litem is the person who most closely carries out these responsibilities. As the American Bar Association has explained, the guardian ad litem is also responsible in many jurisdictions to submit a report or testify as a back or expert witness. Such tasks are inconsistent with the function of the lawyer. 313

Second, the lawyer for the child is the only individual other than the guardian ad litem whose sole interest is protecting the child from harm. All the other parties have conflicts and have primary interests which are self- or inner-directed. The evidence of the Department of Children and Family Services' failure to provide safety is amply demonstrated by the long history and multiple reports of dangerous conditions in the child welfare system. Parents' position is often to obtain the return of the child even where there may be dramatic and dangerous shortcomings in the parent's ability to look after the child. The guardian ad litem is not always present, and where one is present, he or she is usually a volunteer, perhaps unsophisticated, and certainly without the ability or authority to make motions to the court and seek orders obligating the parties to comply with statutes and rules aimed at protecting the child.

Several arguments are often made against providing lawyers for children in dependency proceedings. The three major ones are disruption of the dependency court proceeding, advocating inappropriate goals for the child, and cost. The first complaint is that adding lawyers will further disrupt the


dependency court proceeding. Of course, as anyone who has been in the Florida dependency court knows, the proceedings are anything but efficient and formal. This issue was raised before the Supreme Court of Florida in *M.W. v. Davis* 314 in which the Court was asked to determine whether the hearing requirements under the Baker Act for Civil Commitment apply when the child has been in the legal custody of the Department of Children and Family Services and is in need of residential treatment. 315 The court recognized that the reality was that the system is overburdened. 316 The answer lies in part in providing enough judges to adequately hear the statutorily mandated dependency proceedings. 317

With regard to the second issue, the concern is that lawyers, unlike guardians ad litem and other representatives in the court, will seek to represent what the child wants as opposed to what the child needs with the result that somehow the outcome of the court proceeding will be antithetical to the best interest of the child. The argument goes something like this: the lawyer argues for a result that will be harmful to the child and will succeed with the result that the child will be harmed. The premise of this argument is that lawyers are obligated by the rules of professional conduct to advocate their client’s interest as opposed to their client’s best interest. Of course, this topic has been the subject of extended discussion in the professional literature. In fact, in December of 1995 a national conference on representing children in dependency proceedings took place at the Fordham University Law School dealing in major part with just this issue. 318 It would appear that it is rare that lawyers find themselves in positions that they represent interests of children which are opposed to what is best for children. The reality is that because most children represented in dependency proceedings are quite young, the issue does not arise. Although there does not appear to be clear national data evaluating the age of children in dependency proceedings, at least one commentator concluded that most children are under the age of eight when the proceeding begins and a high percentage are under the age of three. 319

In addition, the argument that somehow lawyers will represent clients whose wishes are antithetical to their best interests and will then somehow cause harmful results for their children is based upon an implausible prem-

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314. 756 So. 2d 90 (Fla. 2000).
315. *Id.* at 92.
316 *Id.* at 108.
317. See *Id.* at 108–09.
318. See generally Green, supra note 312.
319. See Guggenheim, *Counseling Counsel*, supra note 22, at 1495; Guggenheim, *Reconsidering the Need for Counsel*, supra note 308, at 327 n.129.
ise. The premise is that the lawyer, by representing the child’s professed interest as opposed to the child’s best interest, will somehow fool everyone else in the courtroom, with the result that the court will enter an order that will be antithetical to the child’s best interests. This defies reality. In addition, a lawyer is rarely placed in the position of representing the child’s interests that might differ from the child’s best interests.

A more important issue involves a lawyer or a guardian ad litem representing the child’s best interests. As the work of Professors Peters, Guggenheim, and Randi Mendelbaum demonstrate, there is a deep concern that by representing the child’s best interest, the lawyer may be representing positions that are based upon the lawyer’s or guardian ad litem’s own value structure or biases, which may in fact not be in the child’s best interest from the vantage point of the child, the parents, and the community. In summary, the concern about lawyers not protecting children’s best interests but instead representing the child’s professed interests is, as a practical matter, more of a scholarly debate than a widely documented problem. This author supports the pure advocate approach for several simple reasons: counsel has a duty to counsel clients against unwise decisions, the courts will not be fooled by poor judgment-based decisions, and, in the overwhelming number of cases, the lawyer will advocate the child’s best interests because they coincide with the child’s interests.

More significantly, a consensus has grown as to how lawyers should approach representation. According to Professor Guggenheim:

Until very recently, it may have greatly mattered what particular views the attorney assigned to represent a child happened to possess. As this Article will indicate, however, those days appear to be behind us as a growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and

322. Mandelbaum, supra note 4.
323. See Peters, supra note 48; Guggenheim, Paradigm, supra note 321; Guggenheim, The Making of Standards, supra note 321; Ventrell, supra note 84, at 269.
324. See also Katner, supra note 160 (discussing the ethical conflicts that arise when the lawyer acts as both guardian ad litem and lawyer).
beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.\textsuperscript{325}

Lawyers for Children America, Inc., based in Miami, has addressed the problem in the following way:

The attorney must be able to communicate effectively her role in the nature of the court proceedings in an age appropriate manner. The attorney must know how to listen to the wishes of her child client and to counsel a child about her various options. She must be able to balance her client's express wishes with what is in the child's best interest, and to help her client make informed decisions.\textsuperscript{326}

The third issue is one of cost. Regretfully, there is virtually no literature studying the cost of attorneys in the dependency and termination of parental rights proceeding.\textsuperscript{327} The questions are obvious. How much will it cost to operate an attorney program? How much does the guardian ad litem cost the state? What benefit will attorneys produce financially by causing children to either be made available for adoption or returned to natural parents in faster and more efficient ways?

An additional, more technical question is how expansive should the lawyer's role be. This question arises in the context of the dependency and termination of parental rights proceeding and beyond. Within the dependency setting, the lawyer ought to have the same range of responsibilities as any other lawyer acting on behalf of a client including filing writs and taking and defending appeals. Should the lawyer have the responsibility to commence independent actions arising from information the lawyer obtains during representation in the dependency proceedings, though? Two examples are damage actions\textsuperscript{328} and individual and class actions for declaratory and injunctive relief.\textsuperscript{329}

What, then, should the statute requiring counsel look like in Florida? Although the guardian ad litem provision is located in a separate "Part" of

\textsuperscript{325} Guggenheim, \textit{Reconsidering the Need for Counsel}, supra note 302, at 301; see also Guggenheim, \textit{Paradigm}, supra note 321, at 1399 (discussing the particular difficulties in establishing how to represent young children).

\textsuperscript{326} Stein, supra note 180, at 2.

\textsuperscript{327} Levine, supra note 307, at 2031.

\textsuperscript{328} Dep't of Health & Rehab. Servs. v. B.J.M., 656 So. 2d 906 (Fla. 1995).

Chapter Thirty-Nine, the dependency proceeding chapter is organized chronologically. Thus, because the dependent child should have immediate access to a lawyer who will independently represent him, this should be addressed where dependency proceeding begins in the *Florida Statutes*, following the petition provision, at a new number, 39.5011. It preferably should follow the current placement of the guardian ad litem provisions as “Part X,” and it should precede the guardian ad litem Part, which will be renumbered as “Part XI.” The proposed provision should read:

Appointment of attorney for abused, abandoned, or neglected child.—

(1) An attorney shall be appointed by the court at the earliest possible time to represent the child’s legal interests in any abuse, abandonment, or neglect judicial proceeding, whether criminal or civil.

(2) This requirement cannot be satisfied with the appointment of a guardian ad litem in s. 39.822.

(3) Attorneys representing children under this subsection should not assume responsibilities that are not consistent with those of an attorney for the child.

(4) If the court determines the child has the capacity to direct the representation, the lawyer has the same ethical duties as he would if he were representing an adult client as governed by the Florida Rules of Professional Conduct.\(^\text{330}\) If the child cannot direct the representation, the lawyer must decide what position or range of positions to present to the court.

(5) Duties and responsibilities of the child’s attorney:

a. The lawyer must explain his role to the client so that the child will be willing to communicate the information the attorney will need for adequate representation.

b. In situations where a reasonable likelihood exists that the child’s interests will conflict with another child or another client, the lawyer shall not provide joint representation.

VII. CONCLUSION

The need for attorney representation of children in the context of dependency proceedings is irrefutable. A dependent child may suffer irreparable harm while in the state’s care, and there is a need for efficient disposal of dependency cases so that children may quickly return to an appropriate caregiver. Florida courts have acknowledged the inherent vulnerability children face in its dependency system and problems within the system. The Florida Legislature has enacted provisions requiring the appointment of guardians ad litem to protect children in this context, but these provision are not consistently followed throughout the state. To make matters worse, often times, nonlawyer advocates are not capable of representing children in a legal setting. While CASA and similar programs are effective in promoting the child’s best interests, the reality is that children lack adequate and consistent representation. The dependent child’s fate and safety are decided by the court. Thus, the individual most qualified to advocate for the child and speak to the court is one with training, skill, and experience for the job—an attorney to represent the child in his or her legal capacity.
Children Should Be Seen AND Heard in Florida Custody Determinations

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I. INTRODUCTION

Have you ever felt like nobody?
Just a tiny spec of air.
When everyone's around you,
And you are just not there.\(^1\)

Divorce, that once unspoken condition considered the breakup of a family, now reflects a growing way of life for America's families. In 1998, "19.4 million adults nationwide were divorced, representing nine point eight percent of the population."\(^2\) Florida is no exception to this phenomenon. In Florida in 1990, over one million adults were registered as divorced, representing ten percent of the adult population.\(^3\) Accompanying this increasing divorce rate is an evolving generation of children growing up in single parent households. According to the Current Population Survey, in 1970 only twelve percent of children under eighteen years of age lived in single parent households.\(^4\) This number grew to twenty three percent in 1980, to twenty seven percent in 1990, and to thirty two percent in 1998.\(^5\) Today, these percentages equate to over twenty million American children under eighteen years old living in one parent households.\(^6\) The changing face of America's families and household situations creates new challenges not only for health care professionals, school planners, and childcare providers, but also for legislators and judicial officials. Specifically, legislators and judicial officials grapple with the problem of how to balance the feelings and desires of the children affected by divorce with the interests of society for stable, clear laws. Florida's courts and legislators expressly state that they place the "best interests" of the children as the primary focus in divorce issues.\(^7\) However, in reality, few actually consider the children's opinion when establishing these best interests.

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6. **Id.**
7. **See, e.g., Marshall v. Reams, 14 So. 95, 96 (Fla. 1893) (holding that the benefit and welfare of the child is the "pole star" by which courts are guided).**
Divorce impacts a child's life in a major way. From the child's perspective, the finality associated with custody proceedings provokes strong feelings of duress. As the opening poem of this article suggests, they watch their world collapse around them while nobody takes the time to ask their opinions. Custody decisions determine not only with whom the child will live, but also geographically where the child will reside, and under what conditions the child will be raised. Increasingly, "the laws of this nation recognize that children have a legitimate interest in the important decisions affecting their lives." Most states today, either through statutory mandate or through common law practice, acknowledge the benefit of listening to and including as a determinative factor, the children's preferences in custody decisions.

Florida, among the least progressive states on this issue, statutorily includes a child's preference as one of a multiplicity of suggested factors for courts to consider in custody determinations. As Part IV of this article

9. Canfield et al., supra note 1.
10. Wallace J. Mlynic, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996). "Judges determine where children will live, with whom they will live, how they will live, and what will be done to, by, or for them." Id.
12. See discussion infra Part II.
13. See discussion infra Part III.
14. FLA. STAT. § 61.13(3) (2000). The statute states:

(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
(b) The love, affection, and other emotional ties existing between the parents and the child.
(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
(e) The permanence, as a family unit, of the existing or proposed custodial home.
(f) The moral fitness of the parents.
(g) The mental and physical health of the parents.
(h) The home, school, and community record of the child;
shows, the broad spectrum of interpretation given to this statute by Florida’s courts and judges has created a chaotic environment for divorce litigation. Is this chaos in the best interests of the children?

Many of Florida’s cities and towns have developed plans to attract younger residents. These plans are working. The residents of Florida are getting younger. Younger residents desire modern approaches to their legal problems. As this article will show, requiring courts to consider children’s preferences in custody determinations will move Florida back into a leadership position, making the state more attractive to a younger population. Part II of the article explores the national trend, specifically identifying four categories of legal approaches taken by the fifty-one jurisdictions around the nation. Part III describes Florida’s current legislation; and Part IV explores the multiplicity of interpretations Florida’s courts have given to this legislation. Part V rounds out the analysis by evaluating judges’ responses to children’s expressions of preference. Taken together, the article (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference; (j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent; (k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to s. 741.30; (l) Evidence of domestic violence or child abuse; (m) Any other fact considered by the court to be relevant.

Id. 15. See discussion infra Part IV.

16. See, e.g., Sallie James, Shaping Their Images: Cities in Central and North Broward are Trying to Strike Balances as They Deal with Growth, Development, and Generally Younger Demographics, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1997, at 33 (discussing changing demographics “as young families move into neighborhoods once limited to seniors”); Madelaine Gonzalez, Posner’s Proposal on Condos Stirs Fear: Hallandale is Hoping To Lure Younger People, SUN-SENTINEL (Ft. Lauderdale), Oct. 22, 1996, at 1B (discussing city commissioner’s goal of attracting a younger population to Hallandale).

17. See Robert Sargent Jr., The Villages is Quietly Growing More Youthful; Despite What You See in Ads, The Community is Home to More and More People Who Aren’t Ready for Retirement Yet, ORLANDO SENTINEL TRIBUNE, Aug. 19, 1998, Lake Sentinel at 1 (noting that “[m]ore and more residents 30 to 40 years olds are buying or inheriting homes”); see also David K. Rogers, St. Petersburg Wears Younger Face, ST. PETERSBURG TIMES, May 2, 1995, at 3B (discussing the effects of the “influx of young families and vacationers of all ages”); Terry Sheridan, Deerfield Cove Area Attracting Younger Buyers, BROWARD DAILY BUS. REV., Sept. 24, 1997, at A2 (noting the trend since 1994 towards younger buyers).

18. Id.
clearly justifies the assertion that Florida should adopt legislation mandating consideration of children's preferences in child custody decisions.

II. THE NATIONAL TREND

The growing trend around the nation is acquiescence to children's wishes in custody determinations. Each year, an increasing number of states adopt legislation requiring courts to consider children's preferences. In 1977, there were sixteen states in which the affected children's preference was a mandatory consideration. This number grew to thirty-two jurisdictions in 1998. Today, thirty-four jurisdictions statutorily mandate that courts consider children's preferences in custody determinations. Among these thirty-four jurisdictions, twelve consider the child's preference as the

20. Id. at 443 (noting that states began to seriously consider statutory guarantees after the passage of the Uniform Marriage and Divorce Act in 1970).
21. Id. at 445. Among the sixteen states were: California, Connecticut, Georgia, Hawaii, Michigan, Minnesota, Nebraska, Ohio, and Texas. Id. at 444 n.60, 61.
key and controlling determining factor.24 Another twenty-two states statutorily mandate courts consider the child's preference along with other factors when making custody determinations.25 Of the seventeen remaining states, seven have permissive statutes suggesting that courts consider a child's preference in such determinations.26 Florida is among these seven states with permissive legislation.27 Only ten states make no mention of children's preferences in custody determinations in their statutes.28 In most states in these last two categories having no statutory mandate, however, courts are still giving weight to the wishes of the children.29 The remainder of this section will explore in more detail each of these described legislative groups.


29. See discussion infra Part III.
A. Mandatory Statutes Granting Controlling Weight to Child’s Preference

The most progressive preference statutes are those granting controlling weight to the children’s preference. These statutes require the courts to solicit a child’s preference before making a custody determination. Further, these statutes require that the child’s preference control the court’s decision. Twelve states currently grant controlling weight to a child’s preference in custody determinations. The most liberal of these, Pennsylvania, with no additional conditions, requires the court to consider the preference of the child in making an order for custody or partial custody. Similarly, the majority of the other states in this category mandate the courts’ consideration of the child’s preference subject to the additional condition of the child’s ability to reason intelligently. Some courts interpret the child’s ability to reason intelligently, strictly as an age restriction. Others evaluate the individual child’s reasoning ability. Still others evaluate the reasonableness of the individual child’s expressed wishes.

In Georgia, Maryland, Mississippi, New Mexico, and Texas, the child’s preference is a controlling factor if that child has reached a specified age. For example, the Mississippi Code states:

Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either

30. Nemecheck, supra note 19, at 446.
31. Id. at 445 n.68.
32. Id. at 446.
33. See supra note 24.
34. 23 PA. CODE § 5303(a)(1) (2000). “In making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child’s physical, intellectual and emotional well-being.” Id.
35. See CAL. FAM. CODE § 3042 (a) (West 2000). “If a child is of sufficient age and capacity to reason as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody.” Id. See also CONN. GEN. STAT. § 46b-57 (2000) (“giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference.”); HAW. REV. STAT. § 571-46(3) (2000). “If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child’s wishes as to custody shall be considered and be given due weight by the court.” Id. See also NEV. REV. STAT. § 42-364 (2) (2000). “[T]he court shall consider . . . (b) [t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age.” Id. See also NEV. REV. STAT. § 125.480(4) (2000). “The court shall consider . . . (a) [t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.” Id.
party is able to adequately provide for the care and maintenance of the children, and that it would be to the best interest and welfare of the children, then any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live. 37

Similarly, the Georgia code provides that at the age of fourteen, the child has the right to select with whom he or she desires to live. 38 Georgia code mandates that the child’s selection is always controlling unless the parent selected is deemed not fit to have custody. 39 In New Mexico, the court must consider the desires of a minor who is fourteen years of age or older. 40 In Texas, a child of ten years of age or older has the right to choose his/her guardian subject to court approval. 41 In Maryland, a child who is sixteen years or older has the right to file a petition to change custody. 42

The remaining five states in this category look to the child’s maturity and reasoning ability rather than age in deciding whether or not to give weight to the child’s preference. 43 In California, Connecticut, Hawaii, and Nevada, if the child is shown to have the capacity to form an intelligent preference as to where to live, the court must consider the child’s wishes. 44 In Nebraska, the final state in this category, the child’s wishes must only appear to be reasonable to require the court’s granting weight. 45

38. GA. CODE ANN. § 19-9-1(a)(3) (2000). “In all cases in which the child has reached the age of fourteen years, the child shall have the right to select the parent with whom he or she desires to live.” (emphasis added) Id.
39. Id.
40. N.M. STAT ANN. § 40-4-9 (Michie 2000). “If the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor.” (emphasis added) Id.
41. TEX. FAM. CODE ANN. § 153.008 (Vernon 2000). “If the child is twelve years of age or older, the child may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.” (emphasis added) Id. Texas reduced the age from twelve years to ten years of age in the 2000 legislative session.
42. MD. CODE ANN. § 9-103 (2000). “A child who is sixteen years old . . . may file a petition to change custody.” (emphasis added) Id.
43. These states include California, Connecticut, Hawaii, Nebraska, and Nevada. See CAL. FAM. CODE § 3042(a) (West 2000); CONN. GEN. STAT. § 46b-57 (2000); HAW. REV. STAT. § 571-46(3) (2000); NEB. REV. STAT. § 42-364(2)(b) (2000); NEV. REV. STAT. § 125.480(4) (2000).
44. See CAL. FAM. CODE § 3042 (a) (West 2000); CONN. GEN. STAT. § 46b-57 (2000); HAW. REV. STAT. § 571-46(3) (1999); NEV. REV. STAT. § 125.480(4) (2000).
45. NEB. REV. STAT. § 42-364(2) (2000). “The court shall consider . . . The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning.” Id.
B. Statutes Mandating Consideration

The second most progressive preference statutes mandate that the courts consider the child's preference in custody determinations. Although these statutes require that the court hear the child's preference, the judge retains nearly complete discretion as to its interpretation and utilization in the custody determination. Twenty-one states and the District of Columbia require their courts to consider the child's preference as one of several factors in a custody determination. Among these twenty-two jurisdictions, ten require their courts to consider the wishes of the child as to his or her custodian irrespective of other characteristics of the child such as age, maturity or intelligence.

Two of the remaining twelve states, Tennessee and Indiana, take the child's age into account in determining the weight to be accorded to the child's preference. In Indiana, the court is required to consider the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen years of age. In Tennessee, the court is required to consider the preference of any child twelve years of age or older; while still acknowledging that the court may consider the preference of younger children as well.

The remaining ten states in this category require courts to consider the preference of the child when the child is of sufficient age and capacity to form an intelligent decision. Recognizing that children mature at different

46. Nemecheck, supra note 19, at 452.
47. Id. at 454.
48. See supra note 25.
51. IND. CODE § 31-14-13-2(2), (3). "In determining the child's best interests... [the court shall consider... (3) if] the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age." (emphasis added) Id.
52. TENN. CODE ANN. § 36-6-106. "The court shall consider... (7) if] the reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request." (emphasis added) Id.
ages, these states give the courts the discretion to evaluate the child’s maturity and ability to intelligently state a preference.\textsuperscript{54}

C. Purely Discretionary Statutes

Unlike the mandatory language discussed for the previous two categories, several states use purely discretionary language in their preference statutes.\textsuperscript{55} These statutes suggest but do not require courts look to the child for a preference.\textsuperscript{56} Seven states give the court discretion as to whether or not to consider a child’s preference in a custody determination.\textsuperscript{57} The wording of these statutes use language such as “the court may consider” as exemplified in the South Dakota code:

\begin{quote}
In awarding the custody of a child the court shall be guided by consideration of what appears to be for the best interest of the child in respect to the child’s temporal and mental and moral welfare. If the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question.\textsuperscript{58}
\end{quote}

The trend in jurisdictions with purely discretionary statutes is for courts to give the child’s preference due consideration.\textsuperscript{59} For example, in \textit{Nazworth v. Nazworth}\textsuperscript{60} an Oklahoma appellate court held that a thirteen year old boy’s request to live with his father was required to be considered in determining whether to change the boy’s custody.\textsuperscript{61} In \textit{Connelly v. Connelly}\textsuperscript{62} a Louisiana appellate court held that the child’s preference is an appropriate factor to

\begin{footnotes}
\textsuperscript{54} Id.
\textsuperscript{55} Nemecheck, supra note 19, at 457.
\textsuperscript{56} Id.
\textsuperscript{57} See supra note 26.
\textsuperscript{58} S.D. Codified Laws § 25-4-45 (Michie 2000).
\textsuperscript{60} 931 P.2d 86, 88 (Okla. 4th Div. Ct. App. 1996).
\textsuperscript{61} Id. at 88. The court opinioned that “where the preference is explained by the child and good reasons for the preference are disclosed, the preference and supporting reasons will justify a change of custody.” Id. (citing Yates v. Yates, 702 P.2d 1252, 1254 (Wyo. 1985)).
\textsuperscript{62} 644 So. 2d 789, 789 (La. 1st Cir. Ct. App. 1994).
\end{footnotes}
consider in determining custody of the child. Similarly, in Hutchison v. Hutchinson the Supreme Court of Utah held that in making a custody determination, the trial court may consider the preference of the child as one of the factors. These courts all appear to be saying “listen to the children, it’s their lives that will be most affected.”

D. No Statutory Reference

The remaining ten states make no mention in their statutes of a child’s preference in custody determinations. However, even with no statutory guidelines, many of these states’ courts give due consideration to the child’s preference. For example, in Kenney v. Hickey, the Supreme Court of Rhode Island held that although the expressed preference of a minor child is not conclusive, such preference is competent and highly probative evidence. Similarly, in Wilcox-Elliott v. Wilcox, the Supreme Court of Wyoming held that a child’s unequivocal preference to live with a particular parent must be considered. In Hinkle v. Hinkle, the Supreme Court of North Carolina gave considerable weight to the wishes of a child of sufficient age to exercise discretion in choosing a custodian. The child reaches the age of discretion when he or she “is of an age and capacity to form an intelligent or rational view on the matter.” Further, in Bak v. Bak, a
Massachusetts appellate court held that the preference of a child is a factor to be considered in making child custody determinations. These holdings exemplify the proposition that absent express legislation, the lawmakers of this nation still believe in the importance of consideration of a child's preference in custody decisions.

III. FLORIDA LEGISLATION

Florida's custody statute gives the court sole discretion on whether or not to consider a child's preference in making a custody determination. Section 61.13 of the Florida Statutes provides guidelines for custody and support of children, visitation rights, and the power of the court in making related orders. Specifically, section three provides "[f]or purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests." Although the statute does suggest factors that may affect the child's welfare and interests, subsection three leaves the consideration of any and all of the factors completely to the discretion of the court. This discretion includes the child's preference factor.

In contrast to Florida's custody statute, a number of other Florida statutes do mandate the consideration of the child's preference when determining the child's best interests. The subjects of these statutes range from grandparental visitation rights to child-in-need of service cases to termi-

76. Id. at 631. The appellate court also gave consideration to the report of one of the family's service officers as to the child's wishes. Id.
77. FLA. STAT. § 61.13 (2000).
78. Id.
79. § 61.13(3).
80. Id.
81. Id.
82. "The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference." § 61.13(3)(i).
83. See FLA. STAT. § 752.01(2) (2000). "In determining the best interest of the minor child, the court shall consider . . . (2) the preference of the child if the child if the child is determined to be of sufficient maturity to express a preference." Id; see also FLA. STAT. § 984.20(3)(a)(9) (2000) (stating "[t]he predisposition study shall cover . . . (9) the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference"); FLA. STAT. § 39.810 (2000) (stating "[i]n a hearing on a petition for termination of parental rights, the court shall consider . . . (10) 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")
84. § 752.01.
nation of parental rights. For example, in a petition for termination of parental rights, the court is required to consider the reasonable preference and wishes of the child, if the court determines that the child is capable of expressing such a preference. Similarly, in actions for grandparent visitation, the court is required to consider the preference of the child if the child is mature enough to express a preference. In disposition hearings to determine custody of a child in need of service, the court is required to consider the reasonable preference of the child. These statutes, all covering topics relating to the child’s residence and visitation, represent a legislative intent to listen to the preference of the children.

Recent bills introduced in both the Florida Senate and House of Representatives further exemplify legislative intent to give weight to children’s wishes in various custody decisions. Examples include Florida Senate Bill 1176 and House Bill 447. These companion bills provided instruction for judges in domestic violence cases. Specifically, these bills provided for the prohibition of court awarded visitation rights to a parent who has been convicted of a capital felony or a first-degree felony that involved domestic violence. The bills provided that this prohibition on visitation could be overridden by an agreement to the visitation by a child over sixteen years of age. In other words, when the child stated a preference for visitation, this preference controlled the court’s decision. The numerous bills introduced into the Florida Senate and House of Representatives historically every year containing similar language, further demonstrate that many Florida legislators acknowledge the need to modify the Florida custody statute. It is just a matter of time before the assertion of this article, that children’s preferences should be considered in Florida custody decisions, will be added to Florida’s custody statute.

85. § 984.20.
86. § 39.810.
87. Id.
88. § 752.01(2)(c).
89. § 984.20. The statute regulates the procedure for determining custody of a child who has been removed from his or her residence and taken into custody of the court for reasons such as domestic violence. Id.
90. Id.
91. S. 1176, 1999 Leg., 104th Sess. (Fla. 1999) (dying in committee on fiscal policy for unrelated reasons).
93. S. 1176 at 1; H.R. 447 at 1.
94. Id.
95. Id.
IV. FLORIDA COURTS' INTERPRETATION OF THE LAW

A. Supreme Court of Florida

The highest court in Florida is the Supreme Court. The Supreme Court of Florida has the power to determine the interpretation of the state’s legislation for uniformity within the state’s lower courts. At its discretion, the Supreme Court of Florida reviews decisions of lower courts that expressly validate a state statute, construe a provision of the state or federal constitution, affect a class of constitutional or state officers, or directly conflict with a decision of another Florida court on the same question of law. The Supreme Court of Florida also reviews certain categories of judgments, decisions, and questions of law certified to it by the district courts of appeal and federal appellate courts. The Supreme Court of Florida has the constitutional authority to issue a number of writs including an extraordinary writ.

The Supreme Court of Florida led the nation in giving children the opportunity to express their custodial preferences. In 1887, in the unprecedented case of Williams v. Williams, the Supreme Court of Florida allowed three girls to remain with their father when they had all expressed a preference to do so, the father was able to give them a comfortable home and support, while the mother had no other means but alimony for support. A few years later, in Marshall v. Reams, the court established what was later to become a national standard for giving a child the right to express his/her preference when the child has reached the age of intelligent discretion. In Marshall, the child, Edward Reams, was over sixteen years old and desired to remain in the care of his uncle, F.F. Marshall, where he had resided since

97. Id.
98. Id.
99. "An extraordinary writ is an order commanding a person or entity to perform or to refrain from performing a particular act. They are by nature extraordinary and for that reason are not available as an alternative to the usual trial and appeal. Both by their historical development and by current judicial decisions, the writs are made available only in a narrow class of exceptional cases.” Id.
100. Nemecheck, supra note 19, at 442.
101. 2 So. 768 (Fla. 1887).
102. Id. at 773. The evidence in this case included letters from the teenage daughters expressing strong preference to living with the father. Id. at 770.
103. 14 So. 95 (Fla. 1893).
104. Nemecheck, supra note 19, at 443.
his mother's death. Henry Reams, Edward's father petitioned for custody of his out of wedlock son. The Supreme Court of Florida reversed the lower court decision and allowed Edward to remain with his uncle. The court in its precedent setting opinion held: "[w]here the child has reached the age of discretion it will often be allowed to make its own choice, although the person chosen is not one whom the court would voluntarily appoint."

Thereafter, throughout the next century, the Supreme Court of Florida continued to advocate the consideration of children's preference in custody cases. Even when the preferences of the minor children were split, the court is willing to split up the children to meet these preferences. For example, in *Epperson v. Epperson*, the three sons aged sixteen, twelve, and eight expressed a preference to live with their father, whereas the eighteen year old daughter wanted to remain with the mother. The court declared that when boys of sixteen and twelve years of age express a decided preference to remain with one parent, this preference should be accorded due weight and allowed the sons to reside with the father and the daughter to reside with the mother.

The Supreme Court of Florida also recognized the psychological affect of a refusal to consider a child's preference. For example, in *Eddy v. Staufer* the court held that a fifteen year old boy is at an age where he should have the ability to exercise reasonable discretion. The court opined: "[i]ndeed, the course of his life may be affected adversely by a

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106. *Id.*
107. *Id.* at 97.
108. *Id.* at 96 (quoting CHURCH, HABEUS CORPUS § 447).
109. See *Eddy v. Staufer*, 37 So. 2d 417, 418 (Fla. 1948) (holding that the desires of a fifteen year old boy should be given great weight); see also *Epperson v. Epperson*, 101 So. 2d 367 (Fla. 1958). The Epperson court held that when "normal and intelligent boys of the ages of 16 and 12 express a decided preference for the companionship of one parent over the other, we think their preference should be accorded due weight in settling the matter of custody." *Id.* at 370. See also *Gregory v. Gregory*, 313 So. 2d 735 (Fla. 1975). The court affirmed the trial judge's conclusion that "[w]e always listen to children of that age expressing views." *Id.* at 738.
110. See *Epperson*, 101 So. 2d at 368.
111. 101 So. 2d 367 (Fla. 1958).
112. *Id.* at 369.
113. *Id.* at 370. The court noted that "[t]he preference of the children is not absolutely controlling but it should be given considerable weight as between parents of relatively equal fitness." *Id.*
114. See *Eddy*, 37 So. 2d at 418.
115. 37 So. 2d 417 (Fla. 1948).
116. *Id.* at 418.
refusal of the Florida courts to consider his unquestioned preference.'" \[117\]

Continuing along those lines, in Gregory v. Gregory, \[118\] the Supreme Court of Florida disagreed with the district court's statement that the courts are not bound by a child's views because children sometimes don't know what is best for themselves. \[119\] In its opinion, the court pointed to the quality of the relationship between the father and son in this case for deciding what is the best for the son. \[120\]

Despite the historical expression supportive of children's preference over the first two-thirds of the past century, the Supreme Court of Florida has been silent on the subject in the past two decades, choosing to leave such decisions to the lower district courts of appeals. \[121\] This silence has had the detrimental affect of creating chaos in Florida's court system. With no strong direction from the highest court in the state, a diverse spectrum of interpretation of the law by the district courts has resulted. \[122\]

**B. Florida's District Courts of Appeal: Divided Interpretations**

In general, the Supreme Court of Florida does not hear the bulk of trial court decisions in Florida that are appealed. \[123\] Instead, they are reviewed by the District Courts of Appeal. \[124\] Prior to 1957, when the District Courts of Appeals were established in Florida, all appeals were heard solely by the Supreme Court of Florida. \[125\] The Florida Constitution now provides that the Legislature divide the State into appellate court districts with a District Court of Appeal serving each district. \[126\] Currently, there are five such

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117. *Id.*
118. 313 So. 2d at 735.
119. *Id.* at 738. The son candidly expressed his preference to be with his father and stated that if he would rather go to a juvenile home then live with his mother. *Id.*
120. *Id.* The court held that:
The pole star of the cases before us is based upon the simplest element of all—the united relationship of the father and son and the quality it possesses in this instance for the bet welfare of the son. Unfortunately, good parental association has no single word in our language, however, sub judice the fa-
ther and son have achieved it.
121. Research for this article failed to discover any Supreme Court of Florida opinions, in the past decade, expressing a stance with regard to child preference in custody decisions.
122. See discussion *infra* Parts IV.B.1., 5.
123. FLA.'S COURT SYSTEM, *supra* note 96.
124. *Id.*
125. *Id.*
126. *Id.*
The District Courts of Appeal have also been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.\(^\text{129}\)

As a general rule, decisions of the District Courts of Appeal represent the final appellate review of litigated cases.\(^\text{130}\) A person who is displeased with a district court’s express decision may ask for review in the Supreme Court of Florida or in the United States Supreme Court, but neither tribunal is required to accept the case for further review; the overwhelming number of requests are in fact denied.\(^\text{131}\)

In past history, all five of the district courts gave credence to a child’s preference in child custody modification proceedings.\(^\text{132}\) Further, they tended to uphold lower courts rulings.\(^\text{133}\) Over the past two decades, however, the courts have divided. Some Districts Courts reversing modifications granted by the lower courts and surprisingly giving little weight to the expressed preferences of the children involved, others giving some consideration, while still others remaining dedicated to listening to the preferences of the children.\(^\text{134}\)

\(^\text{127.} \) Id.
\(^\text{128.} \) FLA.'S COURT SYSTEM, supra note 96.
\(^\text{129.} \) Id.
\(^\text{130.} \) Id.
\(^\text{131.} \) Id.
\(^\text{132.} \) See Martin v. Martin, 215 So. 2d 80, 82 (Fla. 1st Dist. Ct. App. 1968) (allowing the children to remain with their father based on their admitted preference to do so); see also Udell v. Udell, 151 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1963) (holding that a judge should give weight to the expressed desires of a child); Goldstein v. Goldstein, 264 So. 2d 49, 52 (Fla. 3d Dist. Ct. App. 1972) (holding that the expressed desire of a child is entitled to weight).
\(^\text{133.} \) See Burley v. Burley, 438 So. 2d 1055, 1056 (Fla. 4th Dist. Ct. App. 1983) (holding that a minor child’s preference shall be given “such weight as the trial court determines appropriate”); see also Udell, 151 So. 2d at 864 (noting that the trial judge is in a more advantageous position than an appellate court to determine the problems in each divorce case).
\(^\text{134.} \) See discussion infra Parts IV.B.1., 5.
1. First District Court of Appeal of Florida: No Weight Given

The First District Court of Appeal of Florida gives very little weight to the expressed preferences of children in child custody cases.\textsuperscript{135} Further, in custody modification cases, this court advocates leaving the children wherever the original decree had placed custody.\textsuperscript{136} The First District requires the non-custodial parent, who seeks modification of an earlier custody award, to first prove a substantial change of circumstances and secondly prove that the welfare of the child would be promoted by the changed custody.\textsuperscript{137}

The First District requires that the non-custodial parent seeking to modify a prior award of custody carry an extraordinary burden.\textsuperscript{138} In Holmes \textit{v. Green}\textsuperscript{139} both children\textsuperscript{140} expressed a strong desire to have their primary residence changed;\textsuperscript{141} and the trial court had found that the welfare of the children would best be served by the transfer of their primary residence to their father.\textsuperscript{142} However, the First District Court of Appeal held that the evidence presented was insufficient\textsuperscript{143} and the trial court abused its discretion when it changed the primary residence of the two girls.\textsuperscript{144}

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\textsuperscript{135} See Zediker \textit{v. Zediker}, 444 So. 2d 1034, 1036 (Fla. 1st Dist. Ct. App. 1984) (holding that even if the children had all "evinced a clear and definite desire to live with their father and not with their mother, that preference would not alone be dispositive of the issue whether their best interests would be served by ordering a change in custody"); \textit{see also} Brown \textit{v. Brown}, 300 So. 2d 719, 726 (Fla. 1st Dist. Ct. App. 1974) (holding that allowing minor children to pick and choose the parent with whom they will reside is not in the best interest of the child.); \textit{see also} Holmes \textit{v. Green}, 649 So. 2d 302, 305 (Fla. 1st Dist. Ct. App. 1995) (citing Elkins \textit{v. Vander}, 433 So. 2d 125 (Fla. 3d Dist. Ct. App. 1983) which held "the law does not give children the unfettered discretion to choose the parent with whom they will live").

\textsuperscript{136} See Zediker, 444 So. 2d at 1038 (noting that the appellate court’s task is only to determine whether the trial judge’s discretion is supported in the record).

\textsuperscript{137} \textit{Id.} (quoting Stearns \textit{v. Szikney}, 386 So. 2d 592, 594 (Fla. 5th Dist. Ct. App. 1980)).

\textsuperscript{138} \textit{Id.} at 1036 (quoting McGregor \textit{v. McGregor}, 418 So. 2d 1073, 1074 (Fla. 5th Dist. Ct. App. 1982)).

\textsuperscript{139} 649 So. 2d 302 (Fla. 1st Dist. Ct. App. 1995).

\textsuperscript{140} The children were twelve year old twin daughters. \textit{Id.} at 303.

\textsuperscript{141} \textit{Id.} at 304.

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} The evidence presented demonstrated domestic violence and marital disharmony in the mother’s home and that the mother worked odd hours and weekends. \textit{Id.} at 303.

\textsuperscript{144} Holmes, 649 So. 2d at 304. "The evidence is insufficient to sustain the trial court’s order changing the primary residence of the parties’ children. Accordingly, that order is reversed." \textit{Id.} at 305.
The First District lacks confidence in children’s ability to make decisions about their residence. Although the court declared that if the child possesses sufficient maturity and understanding to make an intelligent choice, it will be considered, it did not accept that two twelve year old girls have this intelligence level. In Holmes, the court opined that even if the child is shown to possess the necessary traits to make the decision, this preference alone is not sufficient to sustain a change in primary residence.

The case of Brown v. Brown exemplifies the First District’s lack of confidence in children’s decision making ability. In Brown, the final judgment dissolving the marriage of the parties gave custody of the children to the mother; but included a clause allowing the children to live with their father if they chose without further order of the court. The First District found this clause to be in error, holding that allowing minor children to pick which parent they live with is not in the best interests of the children.

One case anomaly in the First District, upheld a change of custody. In Martin v. Martin, the First District held that the two-part test had been satisfied. In Martin, the father requested a permanent change in custody based on the children’s expressed preference to remain with the father and evidence of the poor condition of their mother’s home.

Notwithstanding the Martin opinion, the general opinion of the First District is summarized in this quotation from Holmes v. Green:

The law does not give children the unfettered discretion to choose the parent with whom they will live, ... or gratify the wishes of children at the expense of the rights of a parent ... Were it otherwise, the law would encourage manipulation by both children and

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145. See Brown, 300 So. 2d at 726. “Allowing minor children to pick and choose at their will the parent with whom they will reside only invites then to ‘play one parent against the other.’” Id.
146. Holmes, 649 So. 2d at 305.
147. Id. at 305.
148. 300 So. 2d at 719.
149. Id. at 720. The final judgment dissolving the marriage included the statement “[t]he wife shall have custody of the children of the parties ... with the court allowing ... [the children] to live with their father if this is their desire, without further order of this Court.” Id.
150. Id. at 726.
151. 215 So. 2d 80 (Fla. 1st Dist. Ct. App. 1968).
152. Id. at 82.
153. The children were eleven and thirteen years of age. Id. at 81.
154. The mother lived in Italy and had written the father requesting he take the children because of the poor conditions in her home. Id.
parents and foster a breakdown in discipline, neither of which is in
the best interests of the children.\textsuperscript{155}

2. Second District Court of Appeal of Florida: Change of Viewpoint

Over the years, Florida's Second District Court of Appeal changed its
position on the weight given to a child's preference in custody proceedings.
Historically, the Second District gave deference to the child's preference in
custody determinations.\textsuperscript{156} In the past decade, however, the Second District
has required the extraordinary burden test to be satisfied before upholding a
modification to a child custody decree.\textsuperscript{157}

In 1974, in an opinion combining the cases of \textit{Taylor v. Schilt}\textsuperscript{158} and
\textit{Gregory v. Gregory},\textsuperscript{159} the Second District considered the weight to be given
to children's preferences in custody litigation.\textsuperscript{160} In \textit{Taylor}, the second
district held that children old enough to have a well considered judgment,
who unanimously want to live with their mother, in whose home they find
love and good care, should be placed with their mother.\textsuperscript{161} Both parents in
\textit{Taylor} were found to be fit parents, and the children aged eleven to fifteen
years old testified that their mother's home was full of love and the father's
full of fear.\textsuperscript{162} Based upon the children's preferences and testimony, the
court allowed the change of custody, recognizing that the course of a child's
life might be adversely affected by the court's refusal to consider his/her

\begin{itemize}
\item \textsuperscript{155} \textit{Holmes}, 649 So. 2d at 305 (quoting Elkins v. Vanden Bosch, 433 So. 2d 1251, 1253 (Fla. 3d Dist. Ct. App. 1983)).
\item \textsuperscript{156} \textit{See} Taylor v. Schilt, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974) (noting that
"children old enough to have well considered judgment, who unanimously want to live with
their mother, in whose home they find love and good care, should be placed with their
mother"); \textit{see also} Udell v. Udell, 151 So. 2d 863, 864 (Fla. 2d Dist. Ct. App. 1963) (noting
that a "judge should and does give weight to the expressed desires of a child to be in
the custody of a particular parent").
\item \textsuperscript{157} \textit{See}, \textit{e.g.}, Gibbs v. Gibbs, 686 So. 2d 639 (Fla. 2d Dist. Ct. App. 1996) (two
consistent requirements to explain the extraordinary burden test).
\begin{itemize}
\item First, the party seeking to modify a custody decree must plead and es-
\textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\end{itemize}
\item \textsuperscript{158} 292 So. 2d 47 (Fla. 2d Dist. Ct. App. 1974).
\item \textsuperscript{159} 313 So. 2d 735 (Fla. 1975).
\item \textsuperscript{160} 292 So. 2d at 48.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
preference.\textsuperscript{163} Similarly, in \textit{Udell}, the court upheld a thirteen-year-old child’s preference to remain with her father.\textsuperscript{164} In \textit{Udell}, both the father and mother were found to be proper custodians of the child.\textsuperscript{165} Thus, preference of the child became the deciding factor.\textsuperscript{166}

In \textit{Eades v. Dorio},\textsuperscript{167} a case deciding custody between a father and the maternal grandparents, the Second District allowed the children to remain with the grandparents based on the expressed preferences of the children.\textsuperscript{168} Although the appellate court admitted that the rights of parents would not be disregarded to meet the wishes of a child, it further held that the court of appeals cannot overturn a decision by a chancellor who had the opportunity to observe the parties and witnesses and other intangibles.\textsuperscript{169}

In the past decade, however, the Second District Court of Appeal completely reversed its position, and has typically overturned modifications of child custody granted by lower courts.\textsuperscript{170} The Second District’s interpretation of the two-part extraordinary burden test outlined in \textit{Gibbs v. Gibbs}\textsuperscript{171} created a new requirement that there be some significant inadequacy of care provided by the custodial parent before a modification of custody would be considered.\textsuperscript{172} The difficulty in proving significant inadequacy of care provided by the custodial parent has led to a consistent overturning of modification decrees. The Second District Court of Appeal justified its deaf ear towards the child’s wishes in \textit{Chant} by stating that courts should not micro-manage a child’s custody.\textsuperscript{173} In contrast to this excuse made in \textit{Chant}, in

\begin{enumerate}
\item[163.] \textit{Id.} at 50.
\item[164.] 151 So. 2d 863, 865 (Fla. 2d Dist. Ct. App. 1963).
\item[165.] \textit{Id.} at 864.
\item[166.] \textit{Id.} The appellate court opined that the testimony before the court could have shown that it was better for the minor daughter to remain in the custody of either parent and therefore the lower court’s discretion would not be disturbed. \textit{Id}.
\item[167.] 113 So. 2d 232 (Fla. 2d Dist. Ct. App. 1959).
\item[168.] \textit{Id.} at 234. The children were eleven and thirteen, expressed a desire to live with the maternal grandparents and no desire to remain with the natural father. \textit{Id}.
\item[169.] \textit{Id}.
\item[170.] See \textit{Chant v. Chant}, 725 So. 2d 445, 448 (Fla. 2d Dist. Ct. App. 1999) (reversing lower court’s ruling with directions to reinstate the mother as the children’s primary residential parent); see also \textit{Gibbs}, 686 So. 2d at 645 (“reversing and remanding for entry of an order reinstating the mother as custodial parent”).
\item[171.] See \textit{Gibbs}, 686 So. 2d at 639.
\item[172.] See \textit{Chant}, 725 So. 2d at 447 (quoting \textit{Gibbs}, 686 So. 2d at 641. “This test involves more than a decision that the petitioning parent’s home would be ‘better’ for the child, and requires a determination that there is some significant inadequacy in the care provided by the custodial parent.”).
\item[173.] \textit{Chant}, 725 So. 2d at 448. “[T]he best interests test is not intended to allow the court to micromanage a child’s custody from the entry of the final judgment until the child becomes an adult.” \textit{Id}.
\end{enumerate}
Heatherington v. Heatherington, the court did micromanage the child’s custody by not allowing the child’s preference to be adhered to even when the child threatened to run away if made to live with the other parent. Observe how the court changes its reasoning based on the overriding desire not to listen to children’s preferences. This “new” Second District Court of Appeals apparently does not see the adverse impact it’s decision not to consider a child’s preference has on that child’s life.

3. Third District Court of Appeal of Florida: Confusion

Until the mid-1970s, the Third District Court of Appeal gave controlling weight to a child’s preference in child custody proceedings. During that time period, the Third District consistently held the belief that the custody of a minor child is a proper subject for judicial consideration at any time by the court that granted the divorce decree. In Goldstein v. Goldstein, the court stated that a child’s preference was entitled to great weight in cases where the child is mature enough to make a reasonable choice. Although both parents were found to be fit in Goldstein, the child’s preference and statements that he would leave home if his wishes were not adhered to was found to be detrimental enough to accord the modification of custody.

In Pollak v. Pollak, the Third District Court of Appeal upheld a chancellor’s determination of custody in accordance with each of the children’s expressed individual preferences even though it meant splitting up the children. Likewise, in Borden v. Borden, the fifteen year old son pre-

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175. Id. at 1314. The child commented that she might run away if forced to live with her father and the trial judge was concerned with this comment. Id. at 1313. The appellate court disregarded the trial judge’s discretion and reversed. Id. at 1314.
176. See Goldstein v. Goldstein, 264 So. 2d 49, 52 (Fla. 3d Dist. Ct. App. 1972) (holding that the desire of a mature child is entitled to weight); see also Pollak v. Pollak, 196 So. 2d 771, 772 (Fla. 3rd Dist. Ct. App. 1967) (holding that children’s preferences are to be given some weight); Borden v. Borden, 193 So. 2d 15, 16 (Fla. 3d Dist. Ct. App. 1966) (holding that the desires of a fifteen year old should be given great weight).
177. Goldstein, 264 So. 2d at 51 (quoting Frazier v. Frazier, 147 So. 464 (Fla.1933)).
179. Id. at 52.
180. Id. The child, Herbert Goldstein, was fourteen years of age and the trial court had found that there was a likelihood that the boy would leave home if required to remain with his mother. Id.
181. 196 So. 2d 771 (Fla. 3d Dist. Ct. App. 1967).
182. Id. at 772. In this case two of the sons preferred to be with their father, one son had no preference, and the daughter preferred to remain with their mother. Id. The court
ferred to live with the father, whereas the twelve year old daughter preferred not to make a choice. The Borden court held that the son's preference was sufficient to grant custody of both children to the father.

In 1975, a major departure in the consistent Third District Court of Appeal's opinions occurred. From that time forward, this court's diverse handling of children's preferences in custody proceedings has created major confusion in the district. The cause of this diversity appears to be the interpretation of the Third District's requirement that the parent seeking to reverse a custody order modification must establish its unreasonableness or an abuse of discretion. In one interpretation, Gaber v. Gaber, a child's preference was the key factor in modification of custody by the trial court. The Third District Court reversed the trial court's decision stating that "the child's wish is merely a factor to be considered ... [but] not a dispositive factor." Similarly, in Kitchens v. Kitchens, the court stated that it is not required to consider a child's preference in modification of custody proceedings. Most recently, in Perez v. Perez, the court held that the stated preference of a fifteen and eleven year old child, without more, was insufficient to sustain a change in primary residence. In contrast, in Walfish v. Walfish, the Third District stated that the trial court, in making a determination of custody, may properly consider the wishes of the child. In still another interpretation, Berlin v. Berlin, the court held that consideration of children's preferences was limited to those of a child mature enough to make a reasonable choice.

disregarded a policy proposed by the mother that the children all be awarded to one parent in favor of adhering to the children's individual preferences. Id.

184. Id. at 16.
185. Id.
186. Id.
187. 536 So. 2d 381 (Fla. 3d Dist. Ct. App. 1989).
188. Id. at 382.
189. Id. The dissent in this case argues that the trial court's decision should be upheld based on principles set forth in Goldstein, Epperson, and Purdon. Id.
190. 305 So. 2d 249(Fla. 3d Dist. Ct. App. 1975).
191. Id. at 250.
192. 767 So. 2d 513 (Fla. 3d Dist. Ct. App. 2000).
193. Id. at 519.
194. 383 So. 2d 274 (Fla. 3d Dist. Ct. App. 1980).
195. Id. at n.1. Note the contrast in the fourteen year old Gaber child's preferences not being accorded consideration and the eight and ten year old Walfish children's preferences being accorded consideration.
196. 386 So. 2d 577 (Fla. 3d Dist. Ct. App. 1980).
197. Id. at 579.
Factual similarities do not necessarily lead to similar opinions in the Third District Court of Appeal. For example, the court in Walfish held that despite the child’s preference to live with their father and the findings that the father was a fit parent, the failure to show that the mother was unfit prohibited the modification granted by the lower court. In a similar factual case, Elkins v. Vanden Bosch the court held that the stated preference of children to be in the custody of the father is not a material change of circumstance that will support a custody change. The inconsistency or vacillation of this court over similar facts and circumstances tends to give the impression of indecision over the subject matter.

4. Fourth District Court of Appeal of Florida: Quiet Consideration

In the handful of cases heard on the subject, the Fourth District Court of Appeal has considered the child’s preference as one of a number of equally considered factors in a custody determination. For example, in Burley v. Burley the Fourth District held that a change in preference by a minor child may be considered and “given such weight as the trial court determines appropriate.” The Fourth District supports the belief that the parent seeking a change in custody shoulders a heavy burden. Further, the Fourth District Court of Appeal gives general deference to the trial court’s decisions in such cases. Preference by one or more minor children as to which parent shall have custody is given as much weight as the trial court determines appropriate. In Brown v. Brown, the Fourth District Court of Appeals upheld the trial court’s determination of custody based on the minor children’s wishes. The lower court in Brown had placed the fourteen and sixteen year old children in the custody of their father based on the children electing to live with their father. Although only a few cases have been considered by the Fourth District in recent years, it’s quiet avocation of children’s rights to be heard in custody decisions follows the national trend admirably.

198. Walfish, 383 So. 2d at 276.
199. 433 So. 2d 1251 (Fla. 3d Dist. Ct. App. 1983).
200. Id. at 1252.
202. Id.
203. Id.
204. Id.
205. Id.
206. 409 So. 2d 1133 (Fla. 4th Dist. Ct. App. 1982).
207. Id.
208. Id. at 1035.
5. Fifth District Court of Appeal of Florida: The Advocate

The Fifth District Court of Appeal consistently advocates giving weight to the preferences of children in custody determinations. In Greene v. Kelly, the Fifth District Court of Appeal relied heavily on the national trend rather than the Florida trend to give greater deference to the child’s preference and opinion. Further in Greene, the Fifth District opinioned that the law recognizes a child’s preference, if the child is of sufficient maturity, as a factor in the determination of custody. This court equated a child now being able to realistically make a preference when she could not do so at the time of the original custody order as a change in circumstances sufficient to make a custody modification. In Greene, the thirteen year old daughter was awarded to the mother at the time of the dissolution of marriage, when the daughter was less than four years old. Ten years later, she requested a change in custody to live with her father. The Fifth District upheld the modification based on the daughter’s preference. In another case regarding grandparent visitation, Ward v. Dibble, the children, aged fifteen and sixteen, testified that they did not want to go on visitation with their grandmother. The court upheld the children’s wishes and denied the visitation with the grandmother. The consistency of the Fifth District in upholding the rights of children to be heard in Florida’s custody decisions should serve as a role model for the rest of the Florida court system.

V. JUDGES ARE NOT LISTENING

Although Florida statutes do not require a court to follow the expressed wishes of a child in a custody case, they do suggest the judge consider the child’s preferences as one factor. In Florida, the weight that judges actually give to a child’s preference varies greatly as illustrated in the previous

209. See, e.g., Greene v. Kelly, 712 So. 2d 1201 (Fla. 5th Dist. Ct. App. 1998). “A child’s preference is a consideration even in the determination of whether a change of circumstances has occurred.” Id. at 1202.
210. Id.
211. Id.
212. Id.
213. Greene, 712 So. 2d at 1202.
214. Id.
215. Id. at 1203.
216. 683 So. 2d 666 (Fla. 5th Dist. Ct. App. 1996).
217. Id. at 668.
218. Id. at 670.
discussion of Florida's courts.220 Judges typically base decisions on intuition and a common understanding of social norms as opposed to any systematic use of child development theory and research to inform such decisions.221

Studies of the attitudes of judges towards children's participation in custody proceedings indicate that the child's preference was typically not accorded significant weight.222 In fact, in one study 115 Indiana judges were asked to rank factors important to custody decisions, children's preferences regarding where they want to live was at the bottom of the list of factors.223 However, in Virginia, one survey of judges found that there was a clear correlation between the age of the child and the weight given her preference.224 Nearly ninety percent of the judges surveyed indicated that the preference of children aged fourteen and older was either dispositive or extremely important; whereas that of children aged below ten were discounted significantly.225

Indicative of judges' general disregard for the importance of listening to children in custody determinations is the small amount of time the judges typically spend with the children to evaluate their preferences. For example, a study of twenty-six judges in Michigan found that judges spent an average of only eighteen minutes with children who were the subject of custody battles.226 Another study indicated that fifteen minutes was the norm for judges in Colorado.227

Critics suggest that the brief judicial interviews are an inadequate means for ascertaining a child's real preference in a custody dispute.228 One major source of error is the judges' reluctance to ask direct questions of the child for fear of causing pain to the child.229 Judges instead infer preference from other questions asked of the child, leading to frequent error in the judge's inference.230

Although not a complete solution, a statutory mandate to consider children's preferences in custody determinations would at least remove a major part of the disorder created by the combination of the inconsistency in

220. See discussion supra Part IV.
221. Mlyniac, supra note 10, at 1889.
222. Scott, supra note 11, at 1043 n.22.
224. Scott, supra note 11, at 1050.
225. Id.
226. Mlyniac, supra note 10, at 1887.
227. Id. at n.86.
228. Scott, supra note 11, at 1055.
229. Id. at 1056.
230. Id.
the Florida courts and the tendency of the judges not to correctly interpret children’s wishes.

VI. RECOMMENDATION

The broad grant of discretion given judges by Florida’s custody statute does not always result in providing for the best interests of the child. The result includes indeterminate outcomes and difficult settlement negotiations.231 Explicit statutory guidance is required. Statutory guidance would enhance certainty and predictability in the decision making process. Statutory guidance would further eliminate the likelihood of misunderstanding facts and circumstances and allowing biases to interfere with decisions:232 Lending certainty to custody determinations through the use of an easily applied rule leads to an outcome in line with the legal objective: a custody decision that reflects the best interests of the child.233

Florida legislators have taken the first step with statutes mandating consideration of children’s preference in other related issues. It’s now time to align Florida’s custody statute with these other Florida statutes and with the statutes and case law of the rest of the nation. Understandably, it is expected that Florida judges will be opposed to such statutory mandates. For example, a Virginia study revealed that although in practice the judges were deferential towards the wishes of older children, many judges were opposed to limits on judicial discretion.234 Such opposition is outweighed by the benefit to Florida’s growing population of single-parent households.

VII. CONCLUSION

The parameters established by the United States Supreme Court’s jurisprudence demonstrate that the way to secure children’s rights is to empower them to exercise those rights as soon as they are able to do so.235 The Supreme Court of Florida in 1887 initiated the national trend towards listening to children’s wishes in custody determinations. It is now time for Florida to go back to its roots and re-institutionalize this policy; to follow the guidelines of the United States Supreme Court, and empower the children of Florida by statutorily mandating that they be seen and heard in Florida custody determinations.

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231. Kandel, supra note 8, at 338.
232. Id.
233. Scott, supra note 11, at 1063.
234. Id. at 1051.
235. Kandel, supra note 8, at 348.