Juvenile Law

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Both the Florida courts and the state legislature spent a busy year dealing with juvenile justice and child welfare issues. The Supreme Court of Florida ruled on two significant matters. The first involved the reach of the Florida Rules of Juvenile Procedure in criminal cases, and the second the application of due process hearing rights to mental health residential treatment placements of children who have been committed to the custody of the Department of Children and Family Services as dependents.

The lower appellate courts continued more than a decade long process of holding the trial courts strictly accountable for compliance with basic constitutional principles of the right to counsel and statutory compliance in juvenile delinquency settings. In addition, the intermediate appellate courts faced an eclectic body of issues involving both the dependency and termination of parental rights settings including, among other things, questions of the rules for returning children to their natural parents.

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The legislature was also particularly active in the child welfare field. It passed legislation putting in place a dramatic reformulation of the child welfare system. Seeking a new approach, the legislature placed responsibility for child welfare services on private for-profit entities that would contract with the Department of Children and Family Services.

II. JUVENILE DELINQUENCY

A. Adjudicatory Issues

In juvenile law survey articles dating back a decade, this author has discussed the trial court's failure to comply with the United States Supreme Court's 1967 ruling in *In re Gault*, providing that juveniles have a right to counsel in delinquency cases and if indigent, are entitled to an attorney paid for by the state. The *Florida Rules of Juvenile Procedure* and an extensive body of case law articulate the right to counsel and state the test for waiver of counsel. Yet, as recorded case law demonstrates, the trial courts continue to misapply the test for waiver of counsel. Thus, in *A.G. v. State*, a child waived counsel at a dispositional hearing in which the appellate court found that there was no determination that the child's waiver was knowing and voluntary as provided by the *Florida Rules of Juvenile Procedure*. Under Florida law, a juvenile has a constitutional right to the assistance of counsel at all critical stages of a delinquency proceeding. If there is a waiver, the court must determine if it was freely and intelligently made. In the case at bar, the court failed to advise the child of the nature of the rights he was waiving,

1. 387 U.S. 1 (1967).
3. FlA. R. JUV. P. 8.185; *see 1998 Survey, supra* note 2, at 185 (discussing related Florida cases); 1997 *Survey, supra* note 2, at 188 (addressing precisely the same topic).
4. 737 So. 2d 1244 (Fla. 5th Dist. Ct. App. 1999).
5. *Id.* at 1247; *see FlA. R. JUV. P. 8.185.
7. *Id.*
that he understood the consequences of waiving legal representation, and that the waiver was knowingly and intelligently made.8

Similarly in A.P. v. State,9 in a short opinion, the appellate court reversed a trial court decision for failure to properly advise the child as to the right to counsel.10 In that case, not only was there no written waiver of counsel as required by the Florida Rules of Juvenile Procedure,11 but the court found there was no thorough inquiry into the child’s comprehension of the offer of counsel, nor a finding of the child’s capacity to make the choice to waive counsel intelligently and understandingly as required under the Florida Rules of Juvenile Procedure.12 This constituted fundamental error.13

Sometimes, the trial court personnel cannot even seem to get the document signing procedure correct. In M.A.F. v. State,14 the waiver of counsel was signed by the child but the place designated for the parent was left blank.15 In that case as well, there was a “failure to perform the necessary colloquy” about the right to counsel and a question as to whether the waiver of counsel was freely and intelligently made.16 The appellate court thus reversed.17

In testing whether the waiver of counsel is knowing and intelligent, the courts include in the analysis an evaluation of the child’s prior exposure to the juvenile justice system and whether it would aid in the child’s comprehension of his or her rights. In T.S.D. v. State,18 the appellate court held that the State did not meet its burden of demonstrating that the waiver of counsel was knowing and intelligent and specifically found that there was no demonstration that the juvenile’s prior exposure to the juvenile court system would help in the comprehension of the right to counsel.19

In the author’s experience, the process of advising juveniles of their right to counsel in delinquency cases often takes place in a group setting where a number of children are before the court waiting for their cases to be

8. Id. at 1246. The plea colloquy was as follows: The judge asked, “Okay. [A.G.], the Department of Juvenile Justice has recommended a Level 6 commitment program for you. Would you like to have a lawyer now?” A. G. responded, ‘No, ma’am.’” Id.
9. 740 So. 2d 1241 (Fla. 5th Dist. Ct. App. 1999).
10. Id. at 1241.
12. A.P., 740 So. 2d at 1241; see Fla. R. Juv. P. 8.165(b)(2).
13. A.P., 740 So. 2d at 1241.
15. Id. at 535.
16. Id.
17. Id.
18. 741 So. 2d 1142 (Fla. 3d Dist. Ct. App. 1999).
19. Id. at 1143.
The issue of whether this is acceptable arose in *B.F. v. State*.\(^\text{20}\) The child appeared with his parents at an initial detention hearing, held as part of a group hearing.\(^\text{21}\) Some of the juveniles were present for arraignment hearings, while others were present for detention hearings, and the judge spoke to the entire group of youngsters explaining the nature of the hearing and informing them of various rights including the right to counsel.\(^\text{22}\) Subsequently, the child was called before the court and asked whether he heard the speech given when he first came in.\(^\text{23}\) On appeal from a plea, the child claimed the court failed to adequately explain the right to counsel and to determine the child knowingly and intelligently waived the right.\(^\text{24}\)

The appellate court reversed, finding that while the arraignment colloquy minimally informed the child that he had the right to counsel, the trial court failed to make an individualized inquiry into the child's comprehension of the right to counsel and the capacity to make a decision to waive counsel in an intelligent and understanding fashion.\(^\text{25}\) Recognizing that the generalized speech to a group of youngsters might not be enough, the appellate court ruled that testing the knowing and intelligent waiver of counsel requires several steps including informing the juvenile of the benefits that he would relinquish and the danger and disadvantages of representing himself, determining whether the youngster's choice was voluntarily and intelligently made, and determining whether there were any unusual circumstances which might preclude the youngster from exercising the right to represent himself.\(^\text{26}\)

Florida, like other states, provides for both waiver of a juvenile to adult court and certification as an adult.\(^\text{27}\) This subject has been discussed on a number of occasions in prior editions of this survey.\(^\text{28}\) In *State v. Brown*,\(^\text{29}\) the circuit court certified a minor as an adult, despite his being seventeen years of age at the time of the alleged offense.\(^\text{30}\) He had previously been adjudicated delinquent for possession of cocaine, which would have been a

\(^{\text{20}}\) 747 So. 2d 1061 (Fla. 5th Dist. Ct. App. 2000).

\(^{\text{21}}\) Id. at 1062.

\(^{\text{22}}\) Id.

\(^{\text{23}}\) Id. at 1063–64.

\(^{\text{24}}\) Id. at 1064.


\(^{\text{26}}\) Id. at 1065.

\(^{\text{27}}\) See FLA. STAT. § 985.226 (2000).


\(^{\text{29}}\) 745 So. 2d 1006 (Fla. 2d Dist. Ct. App. 1999).

\(^{\text{30}}\) Id. at 1006.
felony if committed as an adult.\textsuperscript{31} The appellate court held that certification as an adult did not end the jurisdiction of the juvenile court over the youngster's previous delinquent act.\textsuperscript{32} The adult criminal law statute provided certain exceptions to criminal court jurisdiction, those being: a person convicted of a felony whose civil rights and final authority had been restored, and a person who had committed a delinquent act but where the jurisdiction over the delinquent act had expired.\textsuperscript{33} However, in the case at bar, the child was a delinquent under the jurisdiction of the juvenile court for his prior delinquent act at the time he was charged with possession of a firearm.\textsuperscript{34} Thus, the appellate court reversed the trial court's dismissal of the State's information.\textsuperscript{35}

Another issue involving the interplay of juvenile and adult criminal court jurisdiction arose in \textit{Williams v. State}.\textsuperscript{36} In that case, a juvenile was charged as an adult for aggravated battery, an offense which qualified for direct filing in adult court.\textsuperscript{37} He was also charged with other offenses which could have been heard in adult court together with the battery.\textsuperscript{38} The question before the district court was whether, once the State entered a \textit{nolle prosequi}\textsuperscript{39} as to the battery offense, those other charges over which the adult court did not have any independent jurisdiction could still be heard in adult court.\textsuperscript{40} The appellate court answered in the negative.\textsuperscript{41} Commenting that the issue was not, in its technical sense, one of subject matter jurisdiction (because both juvenile and adult criminal courts are divisions of the circuit court in Florida) the appellate court explained that the Supreme Court of Florida, nonetheless, recognizes the exclusive jurisdiction of the juvenile court in the absence of a statutory exception.\textsuperscript{42}

\begin{thebibliography}{99}
\bibitem{31} \textit{Id.}
\bibitem{32} \textit{Id. at} 1007.
\bibitem{33} \textit{Fla. Stat.} § 790.23(2) (2000); \textit{see Brown}, 745 So. 2d at 1007.
\bibitem{34} \textit{Brown}, 745 So. 2d at 1007.
\bibitem{35} \textit{Id.}
\bibitem{36} 737 So. 2d 1141 ( Fla. 4th Dist. Ct. App. 1999).
\bibitem{37} \textit{Id. at} 1142.
\bibitem{38} \textit{Id.}
\bibitem{39} "A formal entry upon the record, by the plaintiff in a civil suit, or, more commonly, by the prosecuting attorney in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the defendants, or altogether." \textit{Black's Law Dictionary} 1048 (6th ed. 1990).
\bibitem{40} \textit{Williams}, 737 So. 2d at 1141.
\bibitem{41} \textit{Id. at} 1142.
\bibitem{42} \textit{Id. at} 1141.
\end{thebibliography}
The Florida Rules of Juvenile Procedure contain a ninety-day speedy trial rule. In juvenile cases, the time begins to run on the earlier of the date the child is taken into custody or the date a delinquency petition is filed. Should the hearing not commence within the ninety-day period the child can move to dismiss based upon violation of the speedy trial rule. The Supreme Court of Florida has held that the State may not refile charges against a juvenile after the speedy trial rule has expired. In D.A.J. v. State, the State filed the initial petition 103 days after the child’s arrest and thirteen days after the speedy trial period had run. Thus, the court should have granted the motion to dismiss. Furthermore, although the child failed to file a written motion for discharge, the court held that Rule 8.090 of the Florida Rules of Juvenile Procedure, which requires written motions dealing with the fifteen-day window of recapture, was irrelevant in this case because the State failed to file the initial petition within the speedy trial period. Therefore, the appeal could be heard and the reversal ensued.

A final case involved the issue of the application of the Florida Rules of Juvenile Procedure to a child who has been filed against in adult court. The question in State v. Olivo was whether the adult speedy trial rule or the juvenile speedy trial rule governs when the State directly files against a juvenile in the adult court. The supreme court held that the adult speedy trial rule governs.

B. Dispositional Issues

Probation, known until recently as “community control” in Florida, is one of the dispositional alternatives in chapter 985 of the Florida Statutes which has been recently described by one court as a “moderately complex statute [that] allows for many different dispositions.” It has been the

43. FLA. R. JUV. P. 8.090(a).
44. 8.090(a)(1)–(2).
45. 8.090(d).
47. 754 So. 2d 817 (Fla. 2d Dist. Ct. App. 2000).
48. Id. at 819.
49. Id.
50. Id.
51. Id.
52. 759 So. 2d 647 (Fla. 2000).
53. Id. at 649.
54. Id. at 650.
subject of substantial discussion in earlier surveys.\textsuperscript{56} In T.J. v. State,\textsuperscript{57} the issue was whether the trial court was obligated to actually enter an order citing the statutory requirement that community control end upon the child's eighteenth birthday.\textsuperscript{58} The appellate court held that it was receding from prior decisions which either held or suggested that the order must require a statement that the community control end at age nineteen.\textsuperscript{59} The court held that both the juvenile and the State are on legal notice of the content of chapter 39 regarding termination of community control at the child's nineteenth birthday and further that the form disposition order approved by the supreme court in 1987 did not contain the statutory language.\textsuperscript{60}

In an interesting opinion involving the application of the Miami Dade County ordinance relating to spray painting,\textsuperscript{61} the Third District Court of Appeal in State v. D.S.,\textsuperscript{62} recently held that sentencing a juvenile to time served in the detention center based upon a nolo contendere plea to possessing spray paint cans complied with the ordinance provision for punishment by a term in jail.\textsuperscript{63} Significantly, the court did not reach the issue of the validity of the requirement that the juvenile disposition conform to a plan for punishment contained in the ordinance as provided for in section 806.13(7) of the Florida Statutes.\textsuperscript{64} Raised, but not properly before the appellate court, was the constitutional validity of a statute that placed dispositional authority in the ordinance.\textsuperscript{65} In dicta, Chief Judge Schwartz commented that it might be inappropriate to suggest that the court resist a view of the law that interferes with the right and duty of the juvenile court to render appropriate dispositions concerning a particular child and situation before the court.\textsuperscript{66}


\textsuperscript{57} 743 So. 2d 1158 (Fla. 2d Dist. Ct. App. 1999).

\textsuperscript{58} Id. at 1159.


\textsuperscript{60} T.J., 743 So. 2d at 1160.

\textsuperscript{61} The Third District Court of Appeal previously upheld the constitutionality of the ordinance in D.P. D.P. v. State, 705 So. 2d 593 (Fla. 3d Dist. Ct. App. 1997); see Juvenile Law Issues, supra note 28, at 819, 838–39.

\textsuperscript{62} 760 So. 2d 957 (Fla. 3d Dist. Ct. App. 2000).

\textsuperscript{63} Id. at 958.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id. at 959.
III. DEPENDENCY

In recent years, the subject of grandparent visitation and custody rights has been before the United States Supreme Court, the Supreme Court of Florida, and Florida's intermediate appellate courts. As the discussion in this section of the article shows, parent and grandparent visitation issues arise within dependency proceedings. Therefore, an analysis of the recent appellate visitation decisions is germane to understanding their effect upon dependency proceedings.

In the Spring of 2000, in a plurality opinion, the United States Supreme Court decided Troxel v. Granville, a case involving the State of Washington's grandparent visitation statute. The Supreme Court held that it need not reach the constitutional question of whether the Due Process Clause of the Fourteenth Amendment requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. Because of the sweeping breadth and application of unlimited power under the Washington statute, the Supreme Court did not have to decide the narrower constitutional issue of whether harm need be proven to order grandparent visitation. It found that the expansive Washington visitation statute was an unconstitutional infringement on the parental right to make decisions concerning the care, custody, and control of children. Specifically, the Court held that under Washington law the burden of disproving the visitation was on the parents, and the Washington court gave no weight to the parents' assent to visitation before the filing of a petition. Concluding that what happened in Washington was a simple disagreement between the court and the parents concerning the child's best interest, such a decision constituted an unconstitutional infringement on the parents' basic decisionmaking rights.

In a series of cases beginning with Beagle v. Beagle, and presaging the United States Supreme Court opinion, the Supreme Court of Florida effectively rejected the entire Florida grandparent visitation statute on grounds that it violated the parents' right to privacy under Article I, section

67. 120 S. Ct. 2054 (2000).
68. Id. at 2057.
69. Id. at 2064.
70. Id.
71. Id. at 2065.
72. Troxel, 120 S. Ct. at 2062.
73. Id. at 2061.
74. 678 So. 2d 1271 (Fla. 1996) (holding that section 752.01(1)(a) of the Florida Statutes governing visitation in context of families was unconstitutional).
23 of the Florida Constitution.\textsuperscript{75} The court decided on the basis of the Florida Constitution what the United States Supreme Court did not reach under the United States Constitution, namely that family privacy precludes court ordered grandparent visitation unless a showing is made that somehow lack of visitation will harm the child.\textsuperscript{76}

Despite these decisions, grandparent visitation and custody continue to be issues in Florida’s dependency and termination of parental rights cases. Chapter 39 of the \textit{Florida Statutes} provides for grandparent visitation after a child has been adjudicated dependent, and terminates visitation after the child is returned to the physical custody of the other parent.\textsuperscript{77} In \textit{L.B. v. C.A.},\textsuperscript{78} the Fourth District Court of Appeal affirmed a trial court’s dismissal of the grandparents’ petition for visitation in a dependency proceeding because there were no allegations of harm and the child had been reunited with his mother.\textsuperscript{79}

In a second case, \textit{Powell v. Department of Children & Families},\textsuperscript{80} the appellate court affirmed a trial court’s denial of the grandparents’ application for unsupervised visitation with their dependent grandchildren.\textsuperscript{81} The trial court found a compelling reason not to allow the visitation in the home of the grandparents because the children’s father, who had been arrested for kidnapping and domestic battery, had free access to the grandparents’ home, and thus the grandparents could not assure the safety of the children.\textsuperscript{82}

Finally, grandparent intervention also arises in the context of adoption. Section 63.0425 of the \textit{Florida Statutes} requires that a grandparent be

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\item \textsuperscript{75} Saul v. Brunetti, 753 So. 2d 26 (Fla. 2000) (finding the grandparent visitation statute was unconstitutional in the context of deceased parent); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (ruling the grandparent visitation statute was unconstitutional in the context of out-of-wedlock child); see also Lonon v. Ferrell, 739 So. 2d 650 (Fla. 2d Dist. Ct. App. 1999) (holding that in face of mother’s objection, biological father’s parents have no right to visitation with child after biological father and mother divorce, mother remarries, and biological father consents to child’s adoption by stepfather).
\item \textsuperscript{76} Von Eiff, 720 So. 2d at 515. In the 2000 Legislative Session Senator Campbell unsuccessfully sought to amend the grandparent visitation statute, section 752.01 of the \textit{Florida Statutes}, to require a showing of present or threatened significant mental or physical harm as a result of the refusal to permit visitation. \textit{See} Fla. S. Res. 288 (Fla. 2000).
\item \textsuperscript{77} \textit{FLA. STAT.} § 39.509 (2000).
\item \textsuperscript{78} 738 So. 2d 425 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{79} \textit{Id.} at 427. In \textit{L.B.}, the court discussed section 39.4105 of the \textit{Florida Statutes}. \textit{Id.} This section has since been renumbered § 39.509. \textit{See} \textit{FLA. STAT.} § 39.509 (2000).
\item \textsuperscript{80} 764 So. 2d 632 (Fla. 1st Dist. Ct. App. 2000).
\item \textsuperscript{81} \textit{Id.} at 632.
\item \textsuperscript{82} \textit{Id.}.
\end{itemize}
provided with notice when the grandchild is placed for adoption if the child lived with the grandparent for at least six months. 83

Previous juvenile law surveys have discussed the issue of parents using a variety of procedures, including dependency proceedings, as tactical devices to oust spouses, former spouses, and putative parents from involvement with the child. 84 In L.J.R. v. T.T., 85 a natural father appealed a final judgment granting a petition for adoption filed by the child’s natural mother. 86 The judgment of adoption had terminated the father’s parental rights. 87 He was imprisoned at the time in Massachusetts. 88 The court recognized that a proceeding to terminate parental rights, while generally brought by the Department of Children and Family Services, might be brought pursuant to Florida law by any person with knowledge of the facts, which would include a parent. 89 However, the court concluded that the parent could not go straight to the adoption process without complying with the termination of parental rights provisions of Florida law. 90 Further, the natural mother could not circumvent the statutory restrictions on terminating the father’s parental rights while retaining her own by petitioning for adoption as a single birth parent. 91

A significant issue of parents’ custodial rights arose recently in the case of Department of Children & Families v. Benway. 92 The Department of Children and Families appealed an order requiring it to send a dependent child to live with his natural father in Vermont. 93 Vermont officials had disapproved of the placement, having been contacted by Florida state officials it would appear, pursuant to the Interstate Compact on the Placement of Children (“ICPC”). 94 Because Vermont disapproved of the placement, the Department of Children and Families appealed from the court order which held that the child should be placed with the father irrespective

83. FLA. STAT. § 63.0425(1) (2000); see In re X.Z.C., 747 So. 2d 1006 (Fla. 2d Dist. Ct. App. 1999) (holding that the “lived with” provision is unambiguous and only requires that the child live with the grandparent for at least six months and not that the child resides solely with the grandparents).
85. 739 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1999).
86. Id. at 1284.
87. Id.
88. Id.
89. Id. at 1285 (citing FLA. STAT. § 39.461(1) (1997)).
90. L.J.R., 739 So. 2d at 1287.
91. Id.
92. 745 So. 2d 437 (Fla. 5th Dist. Ct. App. 1999).
93. Id. at 438.
94. Id.; see FLA. STAT. § 409.401, Art. III (2000).
of Vermont's disapproval.\textsuperscript{95} The appellate court held that the ICPC is applicable to an out-of-state placement of a dependent child with a natural parent, even though the statute makes no reference to a placement by a state agency back with a natural parent.\textsuperscript{96} The statute does refer to the transfer of a child "for placement in foster care or as a preliminary to a possible adoption."\textsuperscript{97} The Florida court held, nonetheless, that the statute ought to be liberally construed.\textsuperscript{98} The Fifth District also relied upon other state court decisions and a law review article that suggest that the statute ought to be interpreted to include placement of a child with natural parents.\textsuperscript{99} The District Court of Appeal concluded that "[o]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately."\textsuperscript{100}

Left undecided, indeed not even discussed in the \textit{Benway} case, are the questions of family privacy and parental rights constitutionally protected under the United States Supreme Court decision in \textit{Stanley v. Illinois},\textsuperscript{101} and the series of Florida cases dealing with parental privacy beginning with \textit{Beagle v. Beagle}\.\textsuperscript{102} In a dependency proceeding, in the absence of a showing of harm, and it may well be that harm could have been shown in the \textit{Benway} case, there is no constitutional basis for keeping a child from a natural parent.\textsuperscript{103} To do otherwise is to deny the liberty and privacy based constitutional rights of natural parents recognized in these cases.\textsuperscript{104}

A second case, raising similar issues, is \textit{V.P. v. Department of Children \& Families}.\textsuperscript{105} In \textit{V.P.}, a non-custodial parent residing in Illinois sought to have the child, who was the subject of a dependency petition alleging abuse and neglect by the child's mother and stepfather, temporarily placed with him.\textsuperscript{106} Instead, the trial court placed the child with a non-relative.\textsuperscript{107} The

\begin{thebibliography}{99}
  \item \textsuperscript{95} \textit{Benway}, 745 So. 2d at 438.
  \item \textsuperscript{96} \textit{Id}.
  \item \textsuperscript{97} \textit{Id. (quoting FLA. STAT. \$ 409.401, Art. III(a) (1997)).}
  \item \textsuperscript{98} \textit{Id}.
  \item \textsuperscript{99} \textit{Id. at 439 (citing Kimberly M. Butler, CHILD WELFARE—Outside the Interstate Compact on the Placement of Children—Placement of a Child with a Natural Parent, 37 VILL. L. REV. 896 (1991)).}
  \item \textsuperscript{100} \textit{Benway}, 745 So. 2d at 439.
  \item \textsuperscript{101} 405 U.S. 645 (1972).
  \item \textsuperscript{102} 678 So. 2d 1271 (Fla. 1996).
  \item \textsuperscript{103} \textit{See id. at 1277}.
  \item \textsuperscript{104} \textit{See id. at 1275}.
  \item \textsuperscript{105} 746 So. 2d 590 (Fla. 5th Dist. Ct. App. 1999).
  \item \textsuperscript{106} \textit{Id. at 590}.
  \item \textsuperscript{107} \textit{Id}.
\end{thebibliography}
district court held that the trial court did not comply with chapter 39 provisions regarding temporary custody, noting that absent evidence and findings that the temporary custody would endanger the safety, well-being, and physical, mental, or emotional health of the child, the court should order temporary placement of the child with the natural parent.\(^{108}\)

A third issue of parental custody arose in *J.R.* v. *Department of Children & Families*.\(^{109}\) In *J.R.*, a mother and stepfather were charged with abusing their children.\(^{110}\) At the detention hearing the natural father requested custody of the minor children.\(^{111}\) The court made no finding of facts pursuant to chapter 39, but simply placed the children in shelter care.\(^{112}\) Section 39.508(8) of the *Florida Statutes* requires that when a child is removed from the custody of a parent, the court must determine whether there is a parent with whom the child is not residing who desires to assume custody of the child and that the child shall be placed with that parent “unless it finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.”\(^{113}\) In the *J.R.* case, the district court held that the lower court should at least have conducted a hearing to determine the father’s suitability under the statute.\(^{114}\)

These three cases demonstrate by their reference to the *Florida Statutes* that the failure to allow the parent to have custody of the child must be premised upon a showing of endangering the safety of the child. Although the appellate courts made no such reference, the statute and their holdings closely follow the Supreme Court decision in *Stanley v. Illinois*.\(^{115}\)

Concern for conditions in a Department of Children and Family assessment center by a trial judge in Broward County generated an appellate decision on the scope of the authority of the dependency court in *Department of Children & Family Services v. I.C.*\(^{116}\) The issue arose from a statutory court review of a dependency case in which the trial court learned that the juvenile before the court, as well as others with disabilities who had been rejected from various placements, were being brought to a particular assessment center facility where they stayed until late at night without what appeared to be appropriate placement supervision.\(^{117}\) The trial court ordered

\(^{108}\) *Id.*
\(^{109}\) 745 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1999).
\(^{110}\) *Id.* at 1059.
\(^{111}\) *Id.*
\(^{112}\) *Id.*
\(^{113}\) *Id.; FLA. STAT. § 39.508(8) (2000).*
\(^{114}\) *J.R.*, 745 So. 2d at 1059.
\(^{115}\) 405 U.S. 645 (1972).
\(^{116}\) 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999).
\(^{117}\) *Id.* at 402.
the agency to terminate the practice, as well as to produce the relevant records of all the children who had recently been placed at the center.\textsuperscript{118} The issue before the appellate court was one of division of responsibility between the executive branch and the courts, and the degree to which the juvenile court can act to protect children within its jurisdiction.\textsuperscript{119} The appellate court affirmed in part requiring the agency to produce the names of the children at the assessment center, but reversed the production of more extensive records and the entry of an injunction against the agency preventing children with disabilities in the judge's division from being held in the center.\textsuperscript{120}

Finally, and most significantly, in dicta the appellate court recognized the severity of the problem of "the horrendous number of abused and abandoned children, and the difficult caseloads of both the case workers and the courts in juvenile proceedings."\textsuperscript{121} The court then added:

What would help considerably is if each child could have a guardian \textit{ad litem} or attorney \textit{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.\textsuperscript{122}

Further discussion of the Florida legislature's very limited effort to fund a model program for the representation of children in dependency cases is discussed later in this article.

In making determinations of dependency, Florida appellate courts continue to apply and interpret the Supreme Court of Florida's 1991 decision in \textit{Padgett v. Department of Health & Rehabilitative Services},\textsuperscript{123} in which the court held that the prior termination of a parent's rights as to one child supports the severing of the parent's rights as to another child.\textsuperscript{124} In \textit{M.F. v.}

\begin{itemize}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at 404.
\item \textsuperscript{120} \textit{Id.} at 404–05.
\item \textsuperscript{121} \textit{I.C.}, 742 So. 2d at 406.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} 577 So. 2d 565 (Fla. 1991).
\end{itemize}
Department of Children & Families, a father appealed from an order adjudicating two minor children dependent following his conviction for attempted sexual battery on a stepdaughter. The appellate court recognized that the abuse of one child can provide a cause for termination of parental rights or adjudication of dependency as to a sibling if there is a substantial likelihood of future abuse and neglect of the sibling if that child were returned to the parent. The issue in M.F. was whether the copy of the father’s conviction for sexual abuse of a stepchild, as the only evidence presented to support an adjudication of dependency of the two siblings, was adequate. The court held it was. The appellate court relied upon professional literature showing that the act of sexual abuse itself provides evidence of likelihood of sexual abuse of other children. In so doing, however, the court distanced itself from the Fifth District Court of Appeal that required additional evidence of the likelihood that the parent would similarly abuse other children.

Services to children who have been removed from their homes as a result of a petition for dependency in Florida have been the subject of significant recent litigation. Two class action lawsuits challenging conditions in the Florida foster care system are currently pending in the federal courts. Ward v. Kearny is a challenge to conditions in foster care in Broward County. That case was filed on October 20, 1998 and conditionally certified as a class on March 17, 1999, with a settlement agreement signed by the parties on January 26, 2000. The federal court held a Rule 23 of the Federal Rules of Civil Procedure fairness hearing on

125. 742 So. 2d 490 (Fla. 2d Dist. Ct. App. 1999).
126. Id. at 491.
127. Id.
128. Id.
129. Id.
130. M.F., 742 So. 2d at 491.
132. Compl. at 1, Ward v. Feaver, (S.D. Fla., filed Oct. 20, 1998) (No. 98-7137-Civ.) (subsequently Kathleen Kearney, in her official capacity as Secretary of State, was substituted as the named defendant in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure).
133. Compl. at 1, Ward (No. 98-7137-Civ.).
May 31, 2000, and approved the settlement agreement. A second case, *Thirty-One Foster Children v. Bush*, filed on June 13, 2000, is also presently pending in the federal district court for the Southern District of Florida. That case challenges foster care throughout the state and makes multiple constitutional and statutory claims.

Another significant issue of out-of-home care in the dependency system came before the Supreme Court of Florida this past year in *M. W. v. Davis*. The issue in that case was whether, when a court orders a child to be placed in a residential facility for mental health treatment after the child has been committed to the local custody of the Department of Children and Families in a dependency proceeding, the child must have an evidentiary hearing prior to the court ordering the temporary placement in the residential mental health facility.

The supreme court analyzed whether the requirements of Florida’s civil commitment statute, known as the Baker Act, are incorporated into the laws regulating dependency proceedings. The court held that neither the requirements of chapter 39 nor the Florida Constitution mandates an evidentiary hearing that complies with the substantive and procedural requirements of the Baker Act prior to a dependent child being ordered by the court into a residential mental health facility. In making its constitutional ruling, the Supreme Court of Florida relied on *Parham v. J.R.*, the 1979 opinion in which the United States Supreme Court set out the constitutional due process procedural standards necessary when a child is committed by a parent voluntarily, or by a state agency when the child is in the custody of the state, into a state mental hospital. The *Parham* court, according to the Supreme Court of Florida, set three minimum due process standards to be met when a child is committed including an inquiry by a neutral fact finder, albeit not in a form of a judicial inquiry, an inquiry to probe the child’s background using available resources, and a periodic

137. Id.
138. Id. at 2–3.
139. 756 So. 2d 90 (Fla. 2000).
140. Id. at 92.
141. FLA. STAT. § 394.467 (2000).
142. M.W., 756 So. 2d at 92.
143. Id.
144. 442 U.S. 584 (1979).
145. Id.; see M.W., 756 So. 2d at 99.
review by a neutral fact finder. Thus, the Supreme Court of Florida held implicitly that a prior due process evidentiary hearing was not constitutionally required. The child argued alternatively that the Florida Statutes provided more rights than the minimum federal constitutional procedures. After detailed review of chapter 39, the court concluded that the legislature did not intend the Baker Act to apply to children who had been adjudicated dependent and placed in the temporary legal custody of the Department of Children and Family Services.

Finally, the court looked at the question of what procedures should apply before the court orders a dependent child to be placed in a residential psychiatric facility against the child’s wishes. Initially, the court recognized that chapter 39 provides that there shall be judicial and other procedures to assure due process for children in the form of fair hearings that recognize, protect, and enforce children’s constitutional and other legal rights. The court then expressed concern that while the procedures in the statute might be construed to require a precommitment hearing, the statute does not adequately address a number of significant issues including whether there ought to be an appointment of an attorney for the child before commitment, the type of hearing required, the standard of proof to apply, and whether the child should have the right to put on evidence before placement in the psychiatric facility. The decision to place a child in a psychiatric facility must be included in the case plan developed in the course of the dependency proceeding. However, the court also concluded that an order that approves the placement of a dependent child in a locked residential facility against that child’s wishes deprives a child of liberty and thus makes obligatory clear cut procedures to be followed by the dependency judge. Such procedures, the court opined, do not appear to exist in the Florida Rules of Juvenile Procedure.

Then, in forceful language, the court pointed to its concern that while the various parties and actors in the proceeding would be acting in the child’s best interest, nonetheless, the child might not perceive that anyone had his or her best interest at heart when the child was placed in a locked

146. M.W., 756 So. 2d at 99.
147. Id.
148. Id. at 100.
149. Id. at 105.
150. Id.
151. M.W., 756 So. 2d at 106 (citing FLA. STAT. § 39.001(1)(l) (2000)).
152. Id. at 106–07.
153. Id. at 107.
154. Id.
155. Id.
psychiatric facility against his or her wishes without an opportunity to be heard.\textsuperscript{156} The court stated, "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 a child believes that he or she is being listened to and that his or her opinion is respected and counts."\textsuperscript{157} The court rejected the ill-conceived argument of the Guardian Ad Litem Program of the Eleventh Judicial Circuit, which argued that the court ought not find that the Baker Act procedures should be incorporated into the statutes, because the dependency courts are so busy and lack time and resources to accomplish the procedures that were already statutorily required.\textsuperscript{158} The court explained that although dependency courts are busy this does not mean that the court could reject procedural rights of a child about to be placed in a residential treatment facility against his or her wishes simply because there are other hearings under chapter 39 and that additional hearings might somehow burden the court.\textsuperscript{159}

The court concluded that while the Baker Act did not apply, in the future there ought to be clear procedures prior to placement in a residential treatment facility, which should include a hearing in which the child has a meaningful opportunity to be heard.\textsuperscript{160} The court directed the Juvenile Court Rules Committee to submit to the court proposed rules that set forth procedures to be followed in a residential mental health situation.\textsuperscript{161}

Although children have no right to counsel in dependency proceedings in Florida, several years ago the Florida legislature made absolute the right to counsel to parents in dependency proceedings providing that, if indigent, parents are entitled to appointed counsel unless the indigent parent waives that right.\textsuperscript{162} The Florida Rules of Juvenile Procedure follow the statute and make explicit the procedure by which the court shall advise parents of the right to counsel and determine whether there is a waiver of counsel.\textsuperscript{163} In \textit{D.M. v. Department of Children \\& Family Services},\textsuperscript{164} the trial court blatantly failed to comply with these provisions and the appellate court reversed.\textsuperscript{165} Among the trial court's failings were advising the parent at the arraignment that she could either admit or deny the allegations in the petition

\textsuperscript{156} \textit{M.W.}, 756 So. 2d at 107-08.
\textsuperscript{157} \textit{Id.} at 108.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 109.
\textsuperscript{161} \textit{M.W.}, 756 So. 2d at 109.
\textsuperscript{162} \textit{See} \textit{FLA. STAT.} \textsection 39.013(9)(a) (2000).
\textsuperscript{163} \textit{See} \textit{FLA. R. JUV. P.} 8.320.
\textsuperscript{164} 750 So. 2d 128 (Fla. 2d Dist. Ct. App. 2000).
\textsuperscript{165} \textit{Id.} at 130.
and if she chose to deny them she would have the right to a lawyer.\textsuperscript{166} At the arraignment hearing, while determining that the mother was on medication, the trial court only briefly mentioned the right to counsel which failed to fulfill the duty to advise of the right to counsel and what the right entails.\textsuperscript{167} The trial court also failed to determine whether the mother's waiver was made knowingly, intelligently, and voluntarily.\textsuperscript{168} At the shelter and dispositional hearings, the problem was the court's failure to advise the mother of a right to counsel at all.\textsuperscript{169} The appellate court reversed.\textsuperscript{170}

Chapter 39 provides for termination of jurisdiction in a dependency case based upon the recommendation of the Department of Children and Family Services or the guardian ad litem or based upon any other relevant factors, once six months have passed since returning the child to the parents.\textsuperscript{171} In \textit{W.R. v. Department of Children \\& Families},\textsuperscript{172} despite the recommendations of the guardian ad litem and the Department, the court continued jurisdiction after six months had passed since the return of the child to her parents.\textsuperscript{173} In the \textit{W.R.} case, nothing appeared on the record to justify continued jurisdiction.\textsuperscript{174} The appellate court recognized that it was difficult to let go when one takes responsibility for a child's welfare.\textsuperscript{175} However, as the court put it, "our present legal system provides that under normal circumstances (as have come to pass in this case), parents have both the joy and the burden of raising their children without interference from the courts."\textsuperscript{176}

Finally, in an important case of first impression, the Third District Court of Appeal in \textit{M.C. v. Department of Children \\& Families},\textsuperscript{177} ruled that the Americans With Disabilities Act\textsuperscript{178} is inapplicable when used as a defense by the parent in proceedings under chapter 39 related to

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 129.
\item \textsuperscript{167} See \textit{id.}
\item \textsuperscript{168} \textit{Id.} at 130.
\item \textsuperscript{169} \textit{M.C.}, 750 So. 2d at 130.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Fla. Stat.} § 39.806 (2000).
\item \textsuperscript{172} 757 So. 2d 605 (Fla. 5th Dist. Ct. App. 2000).
\item \textsuperscript{173} \textit{Id.} at 606.
\item \textsuperscript{174} \textit{Id.} at 606-07.
\item \textsuperscript{175} \textit{Id.} at 607.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} 750 So. 2d 705 (Fla. 3d Dist. Ct. App. 2000).
\end{itemize}
dependency. In so doing, the court followed several other state courts which had rejected the argument.

**IV. TERMINATION OF PARENTAL RIGHTS**

The current provision of chapter 39 governing termination of parental rights contains nine separate grounds for termination including: 1) the voluntary execution of a written surrender; 2) abandonment of the child and the identity and location of parent is unknown despite a sixty-day diligent search; 3) the existence of conduct toward the child demonstrating continuing parental relationship threatens life, safety, well-being, or physical, mental, or emotional health of the child despite services being rendered; 4) the incarceration in a state or federal institution for a substantial period of time before the child will reach the age of eighteen or the parent is determined to be a violent career criminal; 5) the filing of a plan and the child continues to be abused, neglected, or abandoned wherein the failure to comply is for a period of twelve months or more after filing for dependency; 6) the parents are engaged in egregious conduct toward the child; 7) the parents have subjected the child to aggravated sexual abuse; 8) the parents have committed murder or voluntary manslaughter of another child or a felonious assault involving serious bodily injury to the child; or 9) the parental rights of the parent to a sibling have been terminated involuntarily. The law is clear that the court must address the statutory factors listed in section 39.806 of the *Florida Statutes*. Furthermore, the court at the termination hearing shall consider what the statute describes as the “manifest best interests of the child,” and in doing so shall consider eleven different factors. The court will then enter a written order with the findings of facts and conclusions of law. In A.C. v. *Department of Children & Families*, the appellate court was compelled

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179. *M.C.*, 750 So. 2d at 706 (discussing 42 U.S.C.A. § 12132 (West 1999)).
182. *See id.*
183. § 39.810.
184. § 39.809(5).
185. 751 So. 2d 667 (Fla. 2d Dist. Ct. App. 2000).
to reverse because the final judgment failed to address the statutory factors listed in the manifest best interests of the child section of the statute.  

Also in A.C., the court commented on a rather basic evidentiary proposition. The court held that in conducting an adjudicatory hearing in a termination case the trial court is required to abide by the rules of evidence in civil cases and thus must receive admissible evidence prior to entry of a final judgment terminating parental rights. The court is not permitted to consider inadmissible evidence in determining whether it shall terminate parental rights. 

Termination of parental rights may not occur where a prior dependency adjudication is deficient because a parent is not properly served with notice of an arraignment hearing at which a default adjudication of dependency was entered against the parent. In T.R.F. v. Department of Children & Families, the problem was whether the failure to make a diligent search as a predicate to determining that the parents' failure to appear at the arraignment hearing may result in a default determination of dependency and subsequent termination of parental rights. Chapter 39 provides that an affidavit of diligent search shall be filed where the parent's identity or residence is unknown. The court in T.R.F. explained that a diligent search involves checking with the offices of the Department of Children and Family Services that might have information about the parent, other state and federal agencies that might have information, utility and postal providers, or appropriate law enforcement agencies. 

The same problem arose in S.N.S. v. Department of Children & Families. An order terminating parental rights was reversed because the record contained no evidence that the mother was served with notice of the arraignment hearing at which a default adjudication of dependency was entered. In S.N.S., the trial court took into account the father's representations regarding the mother's knowledge of the hearing and the father's specific statement that the mother was aware of the hearing but was

186. Id. at 669 (citing FLA. STAT. § 39.467(3) (1997)).  
187. Id.  
188. Id.  
190. 741 So. 2d 1184 (Fla. 2d Dist. Ct. App. 1999).  
191. Id. at 1186.  
193. T.R.F., 741 So. 2d at 1186.  
194. 750 So. 2d 61 (Fla. 2d Dist. Ct. App. 1999).  
195. Id. at 62.
too embarrassed to attend. Such oral notice, if it existed at all, was insufficient to satisfy the Florida statute.

V. STATUTORY CHANGES

A. Dependency and Termination of Parental Rights

The Florida legislature has changed the name and purpose of the Department of Children and Family Services on a number of occasions over the past twenty years. This year is no different. The legislature has changed the philosophical approach of the Department by moving to privatization of the child welfare system through the use of profit making entities to carry out many of the responsibilities of the Department. The key component of the new approach involves authorizing the Department of Children and Family Services to contract for services with a lead agency in each county. The obligations of the lead agency shall include: directing and coordinating programs and services, including the provision of core services involving intake and eligibility, assessment, service planning, and case management; developing a service provider network that can develop services contained in client service plans; managing and monitoring provider contracts; developing and implementing effective bill payment mechanisms; providing or arranging for the provision of administrative services to support the service delivery scheme; employing department approved training and meeting department defined credentials and standards; providing for performance measurements in accordance with the department’s quality assurance program; developing and maintaining interagency collaboration; insuring that all federal and state reporting requirements are met; operating the consumer complaint and grievance process; and insuring that services are coordinated.

The theory for the change in approach is one of free enterprise competition described as a competitive procurement approach to services.

196. Id.
197. Id.
200. Id. at 315 (codified at FLA. STAT. § 20.19 (2000)).
201. Id.
The second significant change has been the transfer of responsibility to perform child protective investigations to the sheriffs of Pasco, Manatee, and now Broward County.\footnote{Id. § 3, 2000 Fla. Laws at 316–18 (codified at Fla. Stat. § 39.3065 (2000)).}

In an effort to clarify court jurisdiction when dependency proceedings and custody and/or divorce proceedings are pending at the same time, the legislature amended section 39.013 of the Florida Statutes to include a provision that when there are dissolution or other proceedings involving custody or visitation of a child pending at the same time as a dependency proceeding, the dependency proceeding shall take precedence.\footnote{Ch. 2000-139, § 16, 2000 Fla. Laws 306, 336 (codified at Fla. Stat. § 39.013 (2000)).}

The legislature passed a narrowly focused bill aimed at providing attorneys ad litem to children in dependency cases in Orange County on a test basis.\footnote{Id. § 88, 2000 Fla. Laws at 389 (codified at Fla. Stat. § 39.4086 (2000)).} The legislature determined that in light of the declaration of goals for dependent children contained in the statute, a pilot program for attorneys ad litem for dependent children who are in out-of-home care by court order was to be put in place so the children received competent representation.\footnote{Id. at 390 (codified at Fla. Stat. § 39.4086(2)(a) (2000)).} It set up the program in the Ninth Judicial Circuit, which encompasses Orlando.\footnote{Id. (codified at Fla. Stat. § 39.4086(2)(b) (2000)).} Under the provisions of the statute, the circuit court contracts with a private or public entity to establish the private program which would represent the rights of children taken into custody by the Department.\footnote{Ch. 2000-139, § 88, 2000 Fla. Laws 306, 390 (codified at Fla. Stat. § 39.4086(2)(b) (2000)).}

The Office of State Courts sets measurable outcomes for the program and the court designates an attorney to conduct administrative oversight of the program.\footnote{See D.B. v. State, 385 So. 2d 83, 91 (Fla. 1980); Brevard County v. Dep’t of Health & Rehab. Servs., 589 So. 2d 398, 400 (Fla. 5th Dist. Ct. App. 1991).}

The statute, while quite limited in scope geographically as well as in purpose, is significant because Florida does not provide for counsel to children in dependency cases.\footnote{See Childhood Abuse Prevention and Treatment Act of 1974 (“CAPTA”), 42 U.S.C.A. §§ 5101–5119 (West 1995 & Supp. 2000).} Furthermore, while Florida receives funds pursuant to federal legislation for child welfare purposes,\footnote{See infra notes 214 and 215.} the state of Florida does not provide guardians ad litem for children in all cases as required by the federal statute.\footnote{See supra notes 214 and 215.} Indeed, Florida has not reported to the
federal government on compliance and contact with the Guardian Ad Litem Program in Broward County demonstrates that children are provided with guardians ad litem in less than fifty percent of the cases. Furthermore, there is a body of case law in the State of Florida holding that children do not receive counsel in all cases and, despite the federal legislation, that they are not entitled to guardians ad litem.

B. Juvenile Delinquency

The legislature made several changes in the juvenile delinquency field including a well-deserved change in terminology from the term “community control” to “probation,” thus bringing Florida in line with most other states. The legislature also expanded the use of pretrial detention for juveniles again. It amended chapter 985 to provide for a period of up to seventy-two hours of prehearing detention for a child who is detained for failure to appear and who has previously willfully failed to appear after proper notice of the adjudicatory hearing on the same case regardless of the result of the risk assessment instrument. The legislature also provided for detention for up to seventy-two hours for willful failure to appear at two or more court hearings of any nature with seventy-two hour detention resulting.

In addition, the legislature extended the time for pretrial extension for good cause shown to an additional nine days when the child is charged with an offense which, if committed as an adult, would be a capital felony, life


214. Telephone Conversation with Jeanette Wagner and Melissa Solomon, Esq., Broward County Guardian Ad Litem Program. On November 9, 2000, the circuit court in Broward County had assigned 1341 cases to the local office of the guardian ad litem. Of that number, the office was able to assign 831 guardians or 62%.


216. See Ch. 2000-135, § 18, 2000 Fla. Laws 209, 232 (codified at Fla. STAT. § 985.03(43)).


219. Id. (codified at Fla. STAT. § 985.215(2)(j) (2000)).
felony, felony of the first degree, or felony of the second degree involving violence. 220

VI. CONCLUSION

The Supreme Court of Florida heard just a few cases involving children's issues, but rendered a major opinion establishing certain procedural due process rights for children who are in the child welfare system as dependents and who are to be placed in mental health residential facilities. Lower appellate courts ruled on diverse issues in both the delinquency and the child welfare fields upholding constitutional rights of children and strictly enforcing statutory protections for both children and their families.

The legislature put into effect a dramatic change in the focus of the child welfare system in Florida by authorizing the Department of Children and Family Services to contract with profit making entities to take over responsibility for major portions of the child welfare system.

220. Id. (codified at FLA. STAT. § 985.215(5)(f) (2000)).