Juvenile Law

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I. INTRODUCTION

After a two-year hiatus, the Florida Legislature resumed its tradition of regularly restructuring the *Florida Juvenile Code* in response to perceived problems, particularly in Florida’s juvenile justice system. The legislature’s

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primary focus during the 1996–97 session was on removing the delinquency part II of chapter 39 and rehousing it with its own title in the Florida Statutes. The second purpose was to reorganize the structure of the delinquency section of the juvenile code in a way that would be more logical. The result is a new chapter 985, which became effective on October 1, 1997. The new statute does not have its own title, but the format has been changed. The changes are discussed briefly in this survey. In addition, the legislature moved part IV of chapter 39, governing Families in Need of Services and Children in Need of Services, to chapter 984 and made several changes to it as well.

This past year, the appellate courts were particularly active in the delinquency area, both interpreting chapter 39, and holding the trial courts accountable for compliance with the 1993 and 1994 amendments to the Florida Juvenile Code. In light of the legislative changes made in the spring of 1997, it can be anticipated that the appellate courts will have to parse the new delinquency law as they have in the past. Interestingly, the courts of appeal were not as active as they have been in the past in the child welfare arena. The appellate caseload of dependency and termination of parental rights cases appears to have been lighter this year, resulting in fewer new interpretations.

II. DELINQUENCY

A. Detention Issues


community control or aftercare supervision to the list of children who could be securely detained.4

The Florida pretrial detention statute provides that the determination of whether a child will be detained securely is based upon the application of a risk assessment instrument ("RAI"), which in turn is premised upon the charge against the juvenile.5 If the child scores high enough, the child shall be securely detained.6 The statute also provides the court with limited discretion to detain a child in secure detention when the RAI scoring threshold would not otherwise be met.7 However, when the court chooses to override the RAI, it must state clear and convincing reasons in writing why it is making such a placement.8 As noted in previous surveys, the trial courts have not always correctly interpreted the detention requirements.9 In D.G.H. v. Gnat,10 the State Attorney sought to have the child detained securely by "aggravating" the RAI score arising from the underlying claim of battery against a school board employee on school grounds in the presence of other students.11 The First District Court of Appeal carefully analyzed the legislative history and background of the RAI and concluded that the trial court’s authority to order a child held in detention during the pendency of a delinquency case is limited to the statutory factors prescribed in the law.12 In essence, the trial court accepted a bootstrapping argument, which the appellate court rejected. The state claim was that because the battery was committed in the presence of other students on school grounds and there was a resulting disruption of school functions, the RAI computation could be increased.13 The appellate court held that all of the RAI points assigned to the child were attributable to the delinquent act for which he had been charged and no other reasons compatible with the statutory criteria were given that would justify a departure.14 Thus, the lower court had no statutory discretion to order a placement more restrictive than that indicated by the points scored in the RAI.15 The appellate court thus reversed.16

6. Id. § 39.042(2)(b)1 (recodified at § 985.213(2)(b)(1).
11. Id. at 211.
12. Id. at 213.
13. Id. at 211.
14. Id. at 213.
15. D.G.H., 682 So. 2d at 213.
A similar abuse of discretion occurred in *K.C. v. Taylor*, a case in which the child claimed he was illegally detained based upon a risk assessment scoring that justified placement only in nonsecure or home detention. The trial court had ordered him “placed in secure detention with the proviso that he could be released after 120 hours at the ‘counselor’s discretion.’” The Attorney General’s Office candidly admitted that the detention was illegal and further advised that the same procedure was often used by the trial courts in the second district. The Second District Court of Appeal held that use of the RAI is a legislative mandate and the courts must comply with it. The appellate court then added the following:

We sympathize with the trial court’s frustration that, absent clear and convincing reasons to depart from the placement required by the risk assessment instrument, the court had no choice but to release K.C. from secure detention, despite his record of a prior delinquency and his current charge of using a broken table leg to menace a teacher. Until the legislature empowers juvenile court judges with the measure of discretion afforded to criminal court judges to protect society from its dangerous elements, delinquent offenders will be released back into society despite a belief by the juvenile court judge that contrary action is warranted.

The appellate court’s frustration is evident and raises an important question of whether, and if so, to what degree, discretion in handling juvenile matters should be placed in the hands of the courts or the legislature. The appellate court expressed additional frustration, commenting that few petitions involving the legality of juvenile detention raise challenging legal questions. Most petitions are *pro forma* matters in which the trial court fails to comply with the statutory provisions of chapter 39. As this commentator has written in prior survey articles, and as the appellate court held in *K.C.*, “The processing of petitions of obvious merit such as this one consumes public resources of the public defender’s office,

16. *Id.* at 214.
17. 696 So. 2d 858 (Fla. 2d Dist. Ct. App. 1997).
18. *Id.* at 858.
19. *Id.*
20. *Id.* at 858–59.
21. *Id.* at 859.
23. *Id.*
24. *Id.*
the attorney general's office and this court—time which could be better spent on disputes that are honestly debatable.\textsuperscript{25}

In \textit{T.B. v. Wright},\textsuperscript{26} a juvenile petitioned for a writ of habeas corpus alleging that he could not be held in detention on a charge of burglary beyond twenty-one days without good cause.\textsuperscript{27} The trial court detained him, relying on his prior record and the perceived danger to the community. The appellate court found that this rationale did not comply with the Florida statute.\textsuperscript{28} The ground for extending detention is a delay resulting from a continuance granted by the court for cause on motion of the child, his or her counsel, or the state.\textsuperscript{29} Here, the detention extension was based upon the original grounds for detention which the appellate court rejected.\textsuperscript{30}

The Florida detention statute also governs post-adjudication and post-disposition detention.\textsuperscript{31} In \textit{T.M. v. State},\textsuperscript{32} a child appealed from the imposition of a five-day detention period in addition to other penalties permitted by law after he had been adjudicated delinquent for carrying a concealed firearm.\textsuperscript{33} Section 790.22(9)(a) of the \textit{Florida Statutes} provides that a five-day detention period shall be imposed on any juvenile who commits an offense that involves the use or possession of a firearm.\textsuperscript{34} The juvenile claimed that the statute violated equal protection because an adult who committed the same offense was not subject to the same mandatory incarceration period.\textsuperscript{35} The Third District Court of Appeal rejected the equal protection argument on both state and federal constitutional grounds.\textsuperscript{36} It held first that juveniles and adults are not similarly situated because "the state's interests in juvenile offenders is vastly different from its interests in adult offenders."\textsuperscript{37} The court also declared that the test for treating the two groups differently is whether there is a rational basis to do so.\textsuperscript{38} Finally, the court held that the government's objective bore a reasonable relationship to

\begin{itemize}
\item 25. Id.
\item 26. 679 So. 2d 82 (Fla. 4th Dist. Ct. App. 1996).
\item 27. Id. at 82.
\item 28. Id. at 83.
\item 29. See \textit{FLA. STAT.} § 39.044(5)(d) (1996).
\item 30. \textit{T.B.}, 679 So. 2d at 83.
\item 31. \textit{FLA. STAT.} § 39.044(10)(a)1 (1996) (recodified at § 985.215(10)(a)1 (1997)).
\item 32. 689 So. 2d 443 (Fla. 3d Dist. Ct. App. 1997).
\item 33. Id. at 444.
\item 34. \textit{FLA. STAT.} § 790.22(9)(a) (1995).
\item 35. \textit{T.M.}, 689 So. 2d at 444.
\item 36. Id.
\item 37. Id. at 445.
\item 38. Id.
\end{itemize}
the legitimate state objective of reducing the alarming and escalating number of firearms in the hands of juveniles. 39

B. Adjudicatory Issues

The question of whether charging two fifteen-year-old boys who engaged in consensual sex with two twelve-year-old girls with statutory rape violated the boys’ right to privacy under the Florida Constitution was before the Fifth District Court of Appeal in State v. J.A.S. 40 The appellate court upheld the constitutionality of section 800.04, which the State relied upon to charge the youths. 41 In so doing, the court did not rely upon the seminal opinion by the Supreme Court of Florida in T. W. v. State 42 which upheld the right to privacy for a minor seeking an abortion. 43 Rather, the court relied upon the Supreme Court of Florida’s opinion in B.B. v. State 44 and the legislature’s intent in enacting section 800.04. 45 The court concluded that sexual activity between minors is prohibited whether or not each of the participants believes he or she consented. 46 Further, the legislature viewed the problem of consensual sex as serious. 47 Therefore, the statute furthered a compelling state interest through the least intrusive means, the test set forth in T. W. 48 The problem remaining in the J.A.S. case was whether the penalty was appropriate. The court held that the trial court had the power to adjudicate a minor a felon if the situation justified it. 49 As a result, it vacated and remanded. 50 However, the court also certified the following question to the Supreme Court of Florida as one of great public importance:

WHETHER THE POTENTIAL PENALTY FOR VIOLATION OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR UNDER THE AGE OF SIXTEEN FURTHERS A COMPELLING

39. Id. at 445–46.
40. 686 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1997).
41. Id. at 1366.
42. 551 So. 2d 1186 (Fla. 1989).
43. Id. at 1188.
44. 659 So. 2d 256 (Fla. 1995).
45. J.A.S., 686 So. 2d at 1369.
46. Id. at 1368.
47. Id. at 1369.
48. T.W., 551 So. 2d at 1186.
49. J.A.S., 686 So. 2d at 1369.
50. Id. at 1366.
STATE INTEREST THROUGH THE LEAST INTRUSIVE MEANS.51

Juvenile curfew ordinances are a popular political response to the complicated problems of youth crime.52 In Cuva v. State,53 an ordinance in effect in Orlando generated an appellate opinion on a search and seizure question.54 An Orlando police officer stopped a juvenile because the appellant was in downtown Orlando after midnight and appeared to be under eighteen, thus in violation of the city’s curfew ordinance. The appellate court found that the ordinance allowed the police officers to do several things, including issuing a trespass warning or ordering the juvenile to leave downtown Orlando.55 According to the ordinance, “the officers could only detain... if there was probable cause to believe [the juvenile] was abandoned, neglected or a threat to himself.”56 The juvenile in the Cuva case met none of these criteria. Further, violation of the ordinance was neither a crime nor a noncriminal violation. There was no provision for the minor to be detained unless it appeared the minor was abandoned, neglected, or in danger.57 Thus, the ordinance gave the police no authority to detain the juvenile once he told them his age.58 The initial contact was consensual, and after the youngster answered the officer’s questions, the officer could not detain him absent an articulable suspicion that the youngster had committed, was committing, or was about to commit a crime.59 The appellate court therefore reversed.60

A child who is unable to assist in his or her defense at trial may be committed to the Department of Children and Families (“DCF”) for residential treatment in order to restore competency. In K.D. v. Department of Juvenile Justice,61 the child claimed, inter alia, that the commitment statute was unconstitutional because it did not require a psychiatrist to recommend commitment as provided under the adult involuntary

51. Id. at 1370.
52. See 1996 Survey, supra note 1, at 207–08.
53. 687 So. 2d 274 (Fla. 5th Dist. Ct. App. 1997).
54. Id. at 275.
55. Id. at 276.
56. Id.
57. Id.
58. Cuva, 687 So. 2d at 275.
59. Id. at 277.
60. Id. at 274.
61. 694 So. 2d 817 (Fla. 4th Dist. Ct. App. 1997).
commitment statute. The appellate court held that the comparable adult rule of criminal procedure dealing with incompetent defendants does not require the appointment of a psychiatrist or the court’s receipt of a psychiatric report in order to commit an adult defendant found to be incompetent to proceed. Thus, the juvenile offender and the adult criminal defendant are treated similarly for purposes of the determination of incompetency, and the court therefore affirmed the commitment.

A First Amendment student’s rights case was recently decided by the Third District Court of Appeal in *M.C. v. State*. A middle school student in Dade County was arrested as a result of disruptive activities, including an intentionally loud tirade and protest in the school’s office resulting from the arrest of her brother on the battery of a police officer. The juvenile was charged in a one count petition of delinquency for violation of the Florida statute governing disruption and interference with the operation of schools. She moved to dismiss the delinquency petition on the grounds that it was facially unconstitutional in violation of free speech, overbreadth, and vagueness. The district court upheld the statute in all respects. The court rejected the free speech claim relying both on state and federal constitutional case law. In *L.A.T. v. State*, the Third District Court of Appeal had reversed a juvenile’s adjudication of delinquency for disorderly conduct based upon the child’s screaming obscenities to police officers who were arresting the juvenile’s friend in a shopping center parking lot. The court distinguished the *M.C.* situation, finding that a school setting is entirely different from an open public setting. Furthermore, the court relied upon *Tinker v. Des Moines Independent Community School District*, which held that the key question was whether the forbidden conduct or expression “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” The court held that the Florida statute did

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62. *Id.* at 818; see also *Fla. Stat.* § 39.0517 (Supp. 1996) (recodified at § 985.223 (1997)).
64. *K.D.*, 694 So. 2d at 818.
65. 695 So. 2d 477 (Fla. 3d Dist. Ct. App. 1997).
67. *M.C.*, 695 So. 2d at 478.
68. *Id.* at 484.
69. *Id.* at 480–81.
70. 650 So. 2d 214 (Fla. 3d Dist. Ct. App. 1995).
71. *Id.* at 215–17.
72. *Id.* at 217.
74. *Id.* at 513.
not violate the First Amendment under *Tinker* because its intended purpose was to prevent only expression or conduct which materially disrupts or interferes with normal school functions or activities.\(^75\)

In *G.R.A. v. State*,\(^76\) a child appealed a disposition which, *inter alia*, placed the child on community control for one year after withholding adjudication.\(^77\) The appellate court held that the relevant statute specifies the dispositional powers of the trial court when it has jurisdiction over an adjudicated child under which circumstances the commitment may not exceed the maximum term of imprisonment which an adult could serve for the same offense.\(^78\) However, nothing in the statute covers a court’s dispositional powers when the adjudication is withheld. Despite this fact, the appellate court held that the trial court should not be allowed to impose a penalty harsher than that permitted for an adjudicated delinquent or an adult offender.\(^79\) Therefore, the court reduced the commitment to the time established for an adjudicated delinquent or adult.\(^80\)

In *P.W.G. v. State*,\(^81\) one of the issues on appeal was whether the court could enter an order of disposition placing a child in a high risk level facility specializing in treatment of adolescent sexual offenders based upon a report that included a judgment based upon the child’s prior uncharged criminal activity.\(^82\) The court of appeal stated that there was no due process violation in making that decision.\(^83\) The due process analysis contained in *In re Gault*\(^84\) dealt only with procedural due process.\(^85\) It did not address substantive due process rights.\(^86\) Because the purposes of the juvenile and adult criminal justice processes are different, the court held that it was constitutionally permissible for the trial court to impose whatever treatment plan it concluded was most likely to be effective for the particular child as long as it did “not pose a significant threat to the health or well-being of the child.”\(^87\)

\(^75\) M.C., 695 So. 2d at 481.
\(^76\) 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).
\(^77\) *Id.* at 1027.
\(^79\) *G.R.A.*, 688 So. 2d at 1028.
\(^80\) *Id.* at 1028–29.
\(^81\) 682 So. 2d 1203 (Fla. 1st Dist. Ct. App. 1996).
\(^82\) *Id.* at 1204.
\(^83\) *Id.* at 1206–08.
\(^84\) 387 U.S. 1 (1967).
\(^85\) *P.W.G.*, 682 So. 2d at 1207.
\(^86\) *Id.*
\(^87\) *Id.* at 1208.
C. Right to Counsel Issues

The right to counsel is a basic precept of the juvenile court system emanating from In re Gault. Florida provides for counsel by statute and under the Florida Rules of Juvenile Procedure. Rule 8.165 sets forth the obligation of the court to provide counsel and the grounds under which the child may waive counsel. Periodically, the trial courts either fail to appoint counsel or advise juveniles of the right to a lawyer. In N.R.L. v. State, an adjudicatory order was entered following the child's uncontested plea to grand theft. The child was not represented by counsel when he entered his plea, and the appellate court found that no thorough inquiry was made into the juvenile's desire to waive the right to counsel as required by Rule 8.165(b)(2) of the Florida Rules of Juvenile Procedure. The court reversed, finding that the child must be advised of the right to counsel, and, if he chooses to waive counsel, the court must determine whether the waiver was freely and intelligently made.

If a child indicates a desire to waive counsel, the court must ensure by "thorough inquiry" that the waiver is freely and intelligently made. In D.V.L. v. State, the Second District Court of Appeal analyzed the proposition that a plea be knowing and voluntary. In D.V.L., the trial court never determined that the plea was entered "voluntarily and with an understanding of the nature of the allegations," and the possible consequences of such plea, and that there is a factual basis for such plea. The appellate court found that the "plea colloquy was woefully inadequate," and thus reversed and remanded.

The right to a speedy trial, based upon rights secured by the Sixth Amendment in adult cases, also applies in juvenile delinquency cases.

88. Gault, 387 U.S. at 42.
89. FLA. STAT. § 39.041 (1995); FLA. R. JUV. P. 8.165.
90. FLA. R. JUV. P. 8.165.
92. 684 So. 2d 299 (Fla. 5th Dist. Ct. App. 1996).
93. Id. at 299.
94. Id.
95. Id. at 300.
97. 693 So. 2d 693 (Fla. 2d Dist. Ct. App. 1997).
98. Id. at 694.
99. Id.; FLA. R. JUV. P. 8.075.
100. D.V.L., 693 So. 2d at 694.
101. Id.
R.J.A. v. Foster, the Supreme Court of Florida upheld the right. Recently, in State v. T.W., the State appealed from an order granting a motion to dismiss a delinquency petition based upon a speedy trial violation claiming that the State could file outside the ninety-day speedy trial period based upon a fifteen-day "window of recapture period" provided by the Florida Rules of Juvenile Procedure. The court held that the rule does not allow the State to file a delinquency petition after the ninety day period has already expired. In the case at bar, the speedy trial period expired one day before the charges were filed against the child. Because the State was not entitled to file the charges against the child beyond the ninety day period, it could not avail itself of the recapture period.

In 1985, the United States Supreme Court decided a very important case regarding the constitutional rights of children in public schools. In New Jersey v. T.L.O., the Court established the standard for search and seizure by a school official, holding that it is one of reasonable suspicion as opposed to probable cause. In J.A.R. v. State, a child was adjudicated to have committed the offenses of possession of a firearm on school grounds, carrying a concealed weapon, and possession of a firearm by a minor. The child argued, inter alia, that the hand gun seized from his person on the first day of school by a deputy sheriff in the presence of an assistant principal should have been suppressed. When a teacher learned that the juvenile might have the weapon, the official called the school resource officer, who was a deputy sheriff assigned to the school. The deputy performed a pat-down and felt the holstered pistol in the boy's waist band. The significant issue was the involvement of the deputy sheriff, who as a police officer, generally needs to have probable cause to search, as opposed to the assistant principal, who needed merely reasonable suspicion to interrogate and search under T.L.O. The court held first that because the child was carrying a gun on his person in the classroom during the school day, either a school

103. 603 So. 2d 1167 (Fla. 1992); see also 1992 Survey, supra note 1, at 347.
104. Id. at 1171–72.
105. 679 So. 2d 69 (Fla. 4th Dist. Ct. App. 1996).
106. Id.; see FLA. R JUV. P. 8.090(j).
107. T.W., 679 So. 2d at 70.
108. Id.
109. Id.
111. Id. at 341.
112. 689 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1997).
113. Id. at 1243.
114. Id.
115. Id.
official or a police officer needed only have reasonable suspicion to conduct the inquiry because the inquiry was in the nature of a "Terry stop," referring to the Supreme Court decision in Terry v. Ohio.\textsuperscript{116} The court further held, in an apparent expansion of T.L.O., that as a general proposition, a school official who has reasonable suspicion that a student is carrying a dangerous weapon may request any police officer to perform a pat-down search and that the involvement of the police officer will not violate the student's Fourth Amendment right or require probable cause for such a search.\textsuperscript{117} The court's rationale was:

It would be foolhardy and dangerous to hold that a teacher or school administrator, who often is untrained in firearms, can search a child reasonably suspected of carrying a gun or other dangerous weapon at school only if the teacher or administrator does not involve the school's trained resource officer or some other police officer.\textsuperscript{118}

In addition, the court reasoned that courts have held that random suspicionless administrative searches have been approved because of the danger of students carrying such weapons.\textsuperscript{119}

In a second case, A.S. v. State,\textsuperscript{120} the Second District Court of Appeal applied the two-part T.L.O. standard: That the search is grounded in reasonable suspicion if it is justified at its inception, and that it is reasonably related in scope to the circumstances which justified the search in the first place.\textsuperscript{121} In A.S., the assistant principal saw a group of boys huddled together, one of the students with money in his hand, and the appellant fiddling in his pocket. The official could see no contraband, and thus the court held the search was not justified at its inception.\textsuperscript{122} The court also held that because the student was fiddling with his pockets, the search of his backpack and wallet was unreasonable as well.\textsuperscript{123}

\textsuperscript{116} Id. at 1244 (citing Terry v. Ohio, 392 U.S. 1 (1968) and relying upon New York case law cited in In re Gregory M., 627 N.E.2d 500, 502 (N.Y. 1993)).
\textsuperscript{117} J.A.R., 689 So. 2d at 1244.
\textsuperscript{118} Id.
\textsuperscript{119} Id. (citing State v. J.A., 679 So. 2d 316 (Fla. 3d Dist. Ct. App. 1996)).
\textsuperscript{120} 693 So. 2d 1095 (Fla. 2d Dist. Ct. App. 1997).
\textsuperscript{121} Id. at 1095 (citing New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985)).
\textsuperscript{122} Id. at 1096.
\textsuperscript{123} Id.
D. Dispositional Issues

The dispositional alternatives available in the Florida Juvenile Code include restitution, community control, and commitment to various facilities operated either directly or under contract by the Department of Juvenile Justice ("DJJ"). Although the suggestion has been made previously in this survey that the dispositional statute is not particularly complex, the appellate courts continue to rule primarily on rather mundane and repetitious issues of error by the trial courts. For example, section 39.052(4) of the Florida Statutes governs the procedures for disposition, and section 39.052(4)(e)1 specifically states:

If the court determines that the child should be adjudicated as having committed a delinquent act and should be committed to the department, such determination shall be in writing or on the record of the hearing. The determination shall include a specific finding of the reasons for the decision to adjudicate and to commit the child to the department.

In K.Y.L. and N.L. v. State, the trial court gave no reason for its commitment decision as to one child and, as to the other, the court erred by relying on the child’s lack of contrition or remorse to place the child. Lack of contrition or remorse is a constitutionally impermissible consideration in imposing sentence, as at least three earlier appellate court decisions have held. In J.M. v. State, the State conceded that the trial court erred in failing to make the requisite findings and the court reversed.

The same problem has arisen regularly with regard to the trial court’s obligation to enter a written order when it imposes an adult sentence, as opposed to a juvenile disposition, when the child has been tried as an

125. See 1996 Survey, supra note 1, at 197.
127. 685 So. 2d 1380 (Fla. 1st Dist Ct App. 1997).
128. Id., at 1381.
129. Id. (citing A.S. v. State, 667 So. 2d 994 (Fla. 3d Dist Ct App. 1996); Holton v. State, 573 So. 2d 284 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Hubler v. State, 458 So. 2d 350 (Fla. 1st Dist Ct App. 1984)).
130. 692 So. 2d 308 (Fla. 4th Dist Ct App. 1997).
131. Id. at 308; see also 1996 Survey, supra note 1, at 198–99; K.M.T. v. State, 695 So. 2d 1309, 1310 (Fla. 2d Dist Ct App. 1997); J.R.C. v. State, 696 So. 2d 822, 822 (Fla. 2d Dist Ct App. 1997) (holding that the court must specify its reasons in writing or on the record of the hearing).
Prior to October 1, 1994, the Florida Legislature required trial courts to make specific, detailed written findings justifying the imposition of the adult sentence. Now, the court need only make a written order of the decision to impose adult sanctions. In four reported decisions, Culliver v. State, McBride v. State, Ledbetter v. State, and Brown v. State, the courts of appeal reversed for failure to enter a written order as provided by the revised statute.

A relatively new form of disposition under Florida law is a fifteen day secure detention placement pending transfer to the Department of Juvenile Justice for commitment. In R.E.D. v. Gnat, the First District Court of Appeal was faced with the question of whether the fifteen day limitation applied to a juvenile who was going to be placed in a high or maximum risk facility operated by DJJ. The State argued that the fifteen day limitation on secure detention pending placement applied only to juveniles awaiting placement in lower to moderate risk residential programs, and that there was no limitation on those awaiting placement in a high risk program. The appellate court agreed and found that the more specific provision of the section controls, and because it placed no time limit on secure detention, the continued confinement was lawful.

In C.H. v. Makemson, a second case that interpreted the post-disposition secure detention statute, the question was how many days a child may be ordered into secure detention for violating the terms of home detention care with electronic monitoring while awaiting a moderate risk placement. The court ordered the child placed in secure detention for ten days. The child argued that the maximum placement was five days.
The court agreed with the child’s interpretation of the statute and granted the writ of habeas corpus.\textsuperscript{149}

When a child has been found to have committed a delinquent act and the court considers its disposition of the case, “the court [must] consider a pre–disposition report regarding the suitability of the child for disposition other than by adjudication and commitment to [DJJ].”\textsuperscript{150} The dispositional report results from a multidisciplinary assessment, if needed, and a “classification and placement process” with recommendations.\textsuperscript{151} Trial courts seem to have had difficulty interpreting their responsibilities in reviewing and evaluating the DJJ recommendation. For example, in \textit{R.D. v. State},\textsuperscript{152} the DJJ prepared a predisposition report recommending community control but the court rejected it.\textsuperscript{153} On appeal, the First District Court of Appeal found that the trial court rejected the recommendation and imposed a high risk commitment without first securing another recommendation from DJJ as to the restrictiveness level which the statute required.\textsuperscript{154} The court relied upon earlier opinions in \textit{S.R v. State},\textsuperscript{155} and \textit{K.Y.L. & N.L. v. State},\textsuperscript{156} of which held that the court must receive and consider a recommendation from the DJJ as to restrictiveness level before ordering a commitment.\textsuperscript{157} Apparently, the courts were interpreting the statute to require a second recommendation after the initial rejection.\textsuperscript{158}

In \textit{T.M.B. v. State},\textsuperscript{159} the trial court disregarded DJJ’s pre-disposition report recommendation and gave no reason for its decision.\textsuperscript{160} Because it failed to articulate its rationale, the appellate court reversed.\textsuperscript{161} Thus, the trial court’s departure from a DJJ recommendation is appealable.\textsuperscript{162}

Of course, the trial court does have the power to deviate from the DJJ’s recommended commitment level.\textsuperscript{163} Section 39.052(4)(e)3 of the \textit{Florida}

\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{FLA. STAT. § 39.052(4)(a) (Supp. 1996).}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} 22 Fla. L. Weekly D1235 (1st Dist. Ct. App. May 13, 1997).
\textsuperscript{153} \textit{Id.} at D1235.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} 683 So. 2d 576 (Fla. 1st Dist. Ct. App. 1996).
\textsuperscript{156} 685 So. 2d 1380 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{159} 689 So. 2d 1215 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{160} \textit{Id.} at 1216.
\textsuperscript{161} \textit{Id.}
\textsuperscript{163} \textit{See 1996 Survey, supra note 1, at 200.}
Statutes governs the process whereby the court may disagree with the DJJ placement recommendation. The statute provides:

The court shall commit the child to the department at the restrictiveness level identified or may order placement at a different restrictiveness level. The court shall state for the record the reasons which establish by a preponderance of the evidence why the court is disregarding the assessment of the child and the restrictiveness level recommended by the department. Any party may appeal the court’s findings resulting in a modified level of restrictiveness pursuant to this subparagraph.

The issue in *R.L.B. v. State* was whether the court could deviate from the recommended commitment level by placing the child at the high risk restrictiveness level when there was no high risk program available. The appellate court held that the trial court acted within its authority when it assigned the juvenile to the specific restrictiveness level. What the court cannot do, according to Florida case law, is choose a particular placement for the child. The First District Court of Appeal noted that the ultimate resolution lay in the legislature to provide an appropriate placement, but nonetheless, the statute gave the appellate court the power to set that level.

Finally, in *R.D.S. v. State*, a child appealed from a dispositional order disregarding DJJ’s minimum risk placement recommendation based upon the court’s observation of the child. The court found the child’s body language offensive to the court because it was disrespectful and contemptuous. The appellate court held that lack of contrition or remorse is not sufficient to overcome the burden placed upon the trial court when it disregards placement recommendations.

The extent to which a juvenile court can impose “moral” and “spiritual” training was before the First District Court of Appeal in *M.C.L. v.*

165. *Id.*
166. 693 So. 2d 130 (Fla. 1st Dist. Ct. App. 1997).
167. *Id.* at 131.
168. *Id.* at 131–32.
169. *Id.* at 131 (citing H.R.S. v. State, 616 So. 2d 91, 93 (Fla. 5th Dist. Ct. App. 1993)).
170. *Id.*
172. *Id.* at 1189.
173. *Id.*
The child challenged the order on both state and federal constitutional grounds. The court held that the imposition of moral training did not violate either the federal or Florida constitutional provisions relating to free exercise of religion, but that the spiritual training portion was unconstitutional. The court concluded that the moral training bore a relationship to the crime for which the juvenile had been adjudicated and reasonably related to future criminality. Finally, the First District Court of Appeal upheld the trial court's order that the mother participate with her child in fulfilling the court ordered sanction. The court held that the order as to the mother was within the dispositional power expressly granted to the court by statute.

Another dispositional alternative is community control, known in other jurisdictions as probation. The contours of this dispositional alternative continue to evade the grasp of the trial courts. Nine reported opinions by the courts of appeal are illustrative of the kinds of problems that arise. In J.S. v. State, the trial court, as a condition of community control, instructed the child to stay away from "negative peers." The Third District Court of Appeal reversed on the grounds that the description was too vague to be enforceable.

Section 39.054 of the Florida Statutes governs the placement on community control. Subpart 4 provides as follows:

Any commitment of a delinquent child to the Department of Juvenile Justice must be for an indeterminant period of time... but the time may not exceed the maximum term of imprisonment that an adult may serve for the same offense... [A] child may not be held under a commitment from a court pursuant to this section after becoming 21 years of age.

Thus, the statute clearly provides that commitment and community control shall be limited to the maximum adult sentence or to the date of the juvenile's nineteen birthday, whichever happens first.
In *C.P. v. State*, the court committed a child on a third degree felony, punishable by imprisonment not to exceed five years, to community control for an indeterminate period exceeding five years. The appellate court reversed and remanded with instructions to the lower court to clarify the order to place the child on community control for an indeterminate term not to exceed five years. In *M.S. v. State*, the State conceded sentencing error and the court remanded based upon the *C.P.* opinion. In *V.W. v. State*, the trial court placed the child on community control until the child's nineteenth birthday based upon an adjudication of a first degree misdemeanor. The maximum sentence for a first degree misdemeanor for an adult is one year in county jail or community control. In light of the disposition for more than the period an adult would face, the appellate court vacated the sentence and the case was remanded.

However, in *M.B. v. State*, after a child was found to have committed one count of battery, the court withheld adjudication and placed the child on community control under Department of Health and Rehabilitative Services supervision for an indeterminate period. The court of appeal held that because the child was not "adjudicated" for purposes of chapter 39, his case was governed by a separate section of the *Florida Statutes*: Section 39.053. Under this law, the restrictions relating to community control and comparisons to adult sanctions do not apply.

A more technical matter came before the court in *C.L. v. State*. Among the issues the child raised on appeal was the failure of the court to announce seventy-five hours of community service at the sentencing. The Fourth District Court of Appeal affirmed, finding that the conditions of

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185. 674 So. 2d 183 (Fla. 2d Dist. Ct. App. 1996).
186. *Id.* at 1184.
187. *Id.*
188. 695 So. 2d 891 (Fla. 2d Dist. Ct. App. 1997).
189. *Id.* at 891 (citing *C.P. v. State*, 674 So. 2d 183 (Fla. 2d Dist. Ct. App. 1996)).
190. 693 So. 2d 722 (Fla. 5th Dist. Ct. App. 1997).
191. *Id.* at 723.
192. *Id.*
194. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).
195. *Id.* at 1066.
197. *M.B.*, 693 So. 2d at 1067.
198. *Id.*
199. 693 So. 2d 713 (Fla. 4th Dist. Ct. App. 1997).
200. *Id.* at 715.
community control need not be orally pronounced at the sentencing.\textsuperscript{201} In another technical holding, \textit{J.K.N. v. State},\textsuperscript{202} a child appealed a final order of disposition that he violated the community control disposition by failing to attend school.\textsuperscript{203} The appellate court reversed, finding that the evidence at the violation hearing did not establish that anyone had instructed the child to attend school.\textsuperscript{204} Apparently, existence of an order alone did not suffice.

One of the common conditions of community control is regular school attendance with no unexcused absences. In a series of consolidated appeals in \textit{F.A.T. v. State},\textsuperscript{205} the juveniles claimed the affidavits alleging violation of community control were based upon "confidential and inadmissible computer-generated school attendance records impermissibly obtained and [employed] by the state attorney's office in violation of [Florida law]."\textsuperscript{206} Specifically at issue was section 228.093 of the \textit{Florida Statutes} which governs privacy of school records and the state constitutional right to privacy.\textsuperscript{207} The appellate court first found that the attendance records, consisting of records of absences and an absence and warning summary from the school system, were covered by the statute, and thus, not subject to public disclosure.\textsuperscript{208} The court then found that none of the statutory exceptions to nondisclosure applied.\textsuperscript{209} One of the exceptions to the disclosure rule involves using the records to determine the appropriate programs and services for juveniles and their families.\textsuperscript{210} Therefore, the use of such records is admissible in a dispositional hearing but not in any prior proceedings.\textsuperscript{211} The court held that a contempt proceeding is neither a dispositional nor a post-dispositional hearing.\textsuperscript{212} To the contrary, the act of indirect criminal contempt constitutes a delinquent act. The contempt proceeding, therefore, is not a post-dispositional proceeding.\textsuperscript{213} For that reason, the records were held inadmissible.\textsuperscript{214}

\begin{footnotesize}
\begin{enumerate}
\item Id. (citing A.B.C. v. State, 682 So. 2d 553 (Fla. 1996)).
\item 691 So. 2d 1169 (Fla. 1st Dist. Ct. App. 1997).
\item Id. at 1169.
\item Id.
\item 690 So. 2d 1347 (Fla. 1st Dist. Ct. App. 1997).
\item Id. at 1348.
\item Id. (citing Fla. Stat. § 220.093 (1995)).
\item Id. at 1349.
\item Id. at 1350.
\item Id. at 1350.
\item F.A.T, 690 So. 2d at 1350.
\item Id.
\item Id.
\item Id. at 1350B51.
\item Id.
\end{enumerate}
\end{footnotesize}
The appropriate application of Florida's restitution statute continues to create problems for the trial courts. The Supreme Court of Florida, in *J.O.S. v. State*, recently resolved one significant issue: Whether, in the absence of a plea agreement, restitution could be ordered in an amount greater than the maximum dollar figure defining the offense for which the child had been adjudicated. The Supreme Court of Florida answered the question in the affirmative.

The court first reiterated that damage must be caused by the charged offense before it would be subject to an order of restitution in a juvenile proceeding. Specifically, the damage must bear a significant relationship to the convicted offense. Next, the court compared the juvenile restitution situation to that of an adult criminal defendant and applied the same test it had previously applied to adults in *Hebert v. State*. In the adult case, the Supreme Court of Florida ruled that a trial court could order restitution that exceeded the amount defined by the maximum dollar value of the offense when a plea agreement expressly left the amount of restitution to the discretion of the trial court. The only difference between the *Hebert* case and the case at bar was the issue of whether discretion ought to be afforded in the absence of an express agreement leaving the amount of the restitution to the court's discretion. This question had been explicitly left undecided in *Hebert*. The court concluded in *J.O.S.* that so long as the amount of damage bore a substantial relationship to what would be the conviction if the child were an adult, the court could order restitution in an amount greater than the maximum dollar value defining the offense for which the child was adjudicated.

In *C.M. v. State*, the grandmother and legal guardian were ordered to pay restitution to the victim of the child's theft. The appellate court held that the order explicitly violated the Florida statute governing restitution.

216. 689 So. 2d 1061 (Fla. 1997).
217. Id. at 1062.
218. Id.
219. Id. at 1063 (citing Fla. Stat. § 775.089(1)(a) (Supp. 1994)).
220. Id. at 1064 (citing J.S.H. v. State, 472 So. 2d 737 (Fla. 1985)).
221. J.O.S., 689 So. 2d at 1064 (citing Herbert v. State, 614 So. 2d 493, 494 (Fla. 1993)).
222. Id.
223. Id.
224. Id.
225. Id. at 1065.
227. Id.
orders. Section 39.054(1)(f) of the Florida Statutes provides that a court imposing restitution at disposition has three alternatives: 1) ordering the child to make restitution in money; 2) ordering the child to make restitution in kind; or 3) ordering the child to make restitution through a promissory note, cosigned by the child’s parent or guardian, providing that the parent or guardian had failed to establish he or she had made a diligent effort to prevent the child from engaging in the delinquent acts. The court found that the trial court did not use any of these alternatives, but instead simply imposed direct liability upon the grandmother. The appellate court reversed.

Under Florida law, the parent can be ordered to pay a fee for the services rendered to the child by the Public Defender. In C.M. v. State, the trial court ordered the child’s guardian to pay $250 to the City of Jacksonville for services rendered to the child by the Public Defender. However, it was undisputed that the guardian, the child’s grandmother, was not afforded either notice of intent to seek such a fee from her or an opportunity to contest its amount. Therefore, the appellate court reversed.

Florida law also provides that when the court enters an order of restitution as part of community control, the amount may not exceed an amount the child could reasonably be expected to earn. In A.J. v. State, a fifteen-year-old pleaded guilty to aggravated battery, which resulted in a restitution order to the victim’s parents and a separate amount to the insurance company. Because there was no record of evidence of what the child could reasonably be expected to earn, and because the trial court made no such finding, there was no basis for the conclusion that the child could pay the amount ordered in restitution. The court of appeal therefore reversed.

228. Id. at 499.
230. C.M., 676 So. 2d at 499.
231. Id.
234. Id. at 499.
235. Id. at 498.
237. 677 So. 2d 935 (Fla. 4th Dist. Ct. App. 1996).
238. Id. at 936.
239. Id. at 938.
240. Id.
A case clearly demonstrating a waste of appellate resources is *T.S. v. State*. In that case, the trial court adjudicated two juveniles delinquent and ordered restitution in the amount of $11,874.75. The problem was that the court failed to clarify each child’s responsibility for the single restitution amount. Apparently, the trial court orally announced that the appellants were each responsible, jointly and severally, with another codefendant for $9,265.50. The two appellants were each also responsible, jointly and severally, for the remaining $2,609.25. The appellate court remanded to the trial court so that it could put the oral pronouncements in writing.

In *J.K. v. State*, a child who had entered a plea of guilty to burglary appealed from the amount of restitution for the loss of a cellular phone. The trial court ordered restitution in the amount of $690.25, constituting twenty-five cents for the cost of the phone and $690 for the victim’s remaining obligation on the contract. The appellate court reversed based upon its determination that the award over compensated the victim. The appellate court did recognize that a restoration award could take into account “consideration that the timing of repayment may cause the victim to suffer additional loss.” However, the facts here were that the award of $690.25 for the contract alone over compensated the victim for his loss. Had the victim been unable to use the telephone, he could have canceled the contract and been obligated to pay only $400. As the court said, “[r]estitution [does] not abandon the concept of mitigation of damages.”

A similar miscalculation of restitution took place in *B.D.A. v. State*. In that case, the dispositional order resulted from the child’s adjudication for having made false bomb reports to school officials necessitating evacuation of the school building. The restitution order included assessment for the salaries of school staff for each of the days involved. However, the teachers and staff continued to perform services and received their regular

242. *Id.* at 120.
243. *Id.*
244. *Id.*
245. *Id.*
246. 695 So. 2d 868 (Fla. 4th Dist. Ct. App. 1997).
247. *Id.* at 869.
248. *Id.*
249. *Id.* at 870.
250. *Id.*
251. *J.K.*, 695 So. 2d at 870.
252. 695 So. 2d 399 (Fla. 1st Dist. Ct. App. 1997).
253. *Id.* at 399.
254. *Id.*
salary. Thus, there was no damage or loss caused by the offense. The Florida statute does not provide for compelled restitution under these circumstances.

Finally, restitution orders must be made while the court has jurisdiction. In *M.C.L. v. State*, the trial court held a hearing on restitution after the child’s notice of appeal was filed. Therefore, the order imposing restitution was without effect for lack of jurisdiction despite the fact that the judge attempted to reserve jurisdiction to consider restitution. On the other hand, in *C.A. v. State*, the trial court reserved jurisdiction within sixty days of the sentence, as required by Florida law, having accepted a plea agreement in which the State reserved restitution and the trial court orally stated that it was reserving jurisdiction. While the written order did not conform to the trial court’s oral pronouncement, the appellate court held that the oral pronouncement prevailed over the written form. There had been no loss of jurisdiction similar to that which occurred in *M.C.L.*

E. Appeals

The issue of a right of appeal for a juvenile who is indigent, although not decided by the United States Supreme Court in *In re Gault*, is provided by statute in Florida. The counsel statute includes the appointment of the public defender for purposes of appeal for an indigent juvenile defendant. An important issue was before the First District Court of Appeal in *Z.F. v. State*. The question before the court was whether a child had a right to a public defender on appeal where the parents were not indigent and did not wish to appeal on the child’s behalf. The appellate court held that under section 27.52(2)(d) of the *Florida Statutes*, the court has the power to

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255. *Id.*
256. *Id.; see also Fl.A. Stat. § 39.054(1)(f) (Supp. 1996).*
257. 682 So. 2d 1209 (Fla. 1st Dist. Ct. App. 1996).
258. *Id.* at 1214.
260. 685 So. 2d 1036 (Fla. 3d Dist. Ct. App. 1997).
261. *Id.* at 1037. *See Fl.A. Stat. § 775.089 (1995).*
262. *C.A.*, 685 So. 2d at 1037.
263. *Id.*
264. *M.C.L.*, 682 So. 2d at 1209.
266. *See Fl.A. Stat. § 27.51 (Supp. 1996).*
267. 683 So. 2d 1084 (Fla. 5th Dist. Ct. App. 1996).
268. *Id.* at 1084.
appoint the Office of the Public Defender or a private attorney to represent a youth on appeal if the nonindigent parent or guardian will not employ counsel.\(^{269}\) However, in order to do so, the appeal must be necessary.\(^{270}\) The court established a test for determining necessary legal services.\(^{271}\) It concluded that when the parents are nonindigent, the court should obtain the opinions of the trial attorney and the parents as to whether an appeal would involve necessary legal services.\(^{272}\) Should the court have any doubts, it should remove the parents as the decision maker on the issue and appoint a guardian ad litem.\(^{273}\) Should the court determine that the appeal involves necessary legal services, an attorney should then be appointed.\(^{274}\) If the court, on the other hand, finds the case does not constitute necessary legal services, it should decline to appoint counsel.\(^{275}\)

F. Legislative and Rules Changes

For several years, the Juvenile Justice Advisory Board\(^{276}\) has been pressing the Florida Legislature to make changes in part II of chapter 39 dealing with juvenile delinquency by providing it with its own title and then reorganizing it.\(^{277}\) This year, the legislature responded by passing chapter 97-238.\(^{278}\) The resulting chapter 985 did not altogether accomplish the advisory board’s purpose because part II of chapter 39 has been moved, not to a new title, but to a new chapter within title XLVII which governs “criminal procedure and corrections.”\(^{279}\) The delinquency part of chapter 39 had been in title V which is entitled “Judicial Branch.”\(^{280}\) When the delinquency provisions were in the judicial branch section they followed

\(^{269}\) Id. at 1085.
\(^{270}\) Id.
\(^{271}\) Id.
\(^{272}\) Z.F., 683 So. 2d at 1085.
\(^{273}\) Id.
\(^{274}\) Id.
\(^{275}\) Id.
\(^{277}\) Telephone Interview with Timothy Center, Esq., Staff Member, Juvenile Justice Advisory Board (Sept. 10, 1997).
\(^{278}\) Chapter 97\$238 resulted from House Bill 1369 which originated within the Department of Juvenile Justice and was amended to include SB 2086, the Juvenile Justice Advisory Board’s technical rewrite of chapter 39. See 1997 Fla. Sess. Law Serv. ch. 97\$238 (West).
chapters governing the functions of the supreme court, circuit courts, county courts, and district courts of appeal. The delinquency provisions are now found in the criminal procedure and corrections sections after chapters relating to youthful offenders and victim assistance and crime in general. Placement of the delinquency provisions, as they are currently written under either title, makes little structural sense. The simplest approach would have been to take chapter 39 in its entirety and reproduce it as a single juvenile code with its own title.

The second purpose of the legislative move to chapter 985 was to reorganize the statute in a more comprehensible fashion. Whether the new format is more logical remains to be seen. It may be that some unintended substantive changes in the law resulted from the change. But at the very least, practitioners and appellate courts will have to cross-reference case law from the old chapter 39 to the new chapter 985 provisions. Finally, the new law does contain some substantive changes which were attached to the law by the legislature late in the session, although the intent of the Juvenile Justice Advisory Board had been to make no changes in the law except to replace and reorganize it.

For example, as part of its change from chapter 39 to chapter 985, the legislature amended the law regarding detention of children charged with domestic violence by providing that the court shall make written findings that form the basis for holding the child in detention. The law had provided that a child could be held in secure detention for up to forty-eight hours prior to a hearing under certain circumstances. The legislature amended the statute to provide that the child could continue to be held in secure detention if the court made specific written findings that it was...
necessary to protect the victim from further injury, but that under no circumstances might the child be held in secure detention beyond the time limits set forth in section 39.044.\textsuperscript{288} The second and more significant change in the detention criteria provides that a child who is alleged to have violated the conditions of community control or aftercare supervision may be detained, but that detainment must be in what Florida Statutes refer to as a "consequence unit."\textsuperscript{289}

It can be expected that the Florida Rules of Juvenile Procedure will be amended to reflect the transfer of the delinquency section of chapter 39 to chapter 985 as well as the substantive changes. In the fall of 1996, the Supreme Court of Florida made several changes to the Florida Rules of Juvenile Procedure in two significant respects. First, the discovery rules, both in adult felony cases and in juvenile cases, were changed to limit the use of depositions. There are now three categories of witnesses subject to deposition. In category A, the individual is subject to deposition under the former rules.\textsuperscript{290} Category B witnesses are subject to deposition upon leave of court upon a showing of good cause, and, absent a showing that a Category C witness has been improperly designated, such witness cannot be deposed.\textsuperscript{291} Category A witnesses are eye witnesses, alibi and rebuttal witnesses, those present when a recorded or unrecorded statement was made, investigating officers, witnesses known by the prosecutors that have material information to negate guilt, child hearsay witnesses, and experts who have not provided a written report or curriculum vitae but are going to testify.\textsuperscript{292}

In addition, the limitation on the use of depositions in juvenile cases will now be the same as that in adult cases wherein depositions are restricted in cases in which only a misdemeanor or traffic offense has been alleged.\textsuperscript{293}

In separate amendments to the Florida Rules of Juvenile Procedure, also in the fall of 1996, the Supreme Court of Florida authorized substantial redrafting of the procedures when a child is believed to be incompetent or

\textsuperscript{288} Section 39.044 was recodified at section 985.215 and provides that a child may not be held in secure detention for more than 21 days unless an adjudicatory hearing has been commenced by the court. See Fla. Stat. § 985.215(5)(b) (1997).

\textsuperscript{289} Section 985.231(1)(a)1.c. (1997) provides that: "[a] consequence unit is a secure facility specifically designated by the department for children who are taken into custody . . . for violating community control or aftercare, or who have been found by the court to have violated the conditions of community control or aftercare." Fla. Stat. § 985.231(1)(c. (1997).

\textsuperscript{290} See In re Amendment to Fla. Rule of Criminal Procedure 3.220(h) and Fla. Rule of Juvenile Procedure 8.060(d), 681 So. 2d 666, 684 (Fla. 1996).

\textsuperscript{291} Id. at 684.

\textsuperscript{292} Id. at 682.

\textsuperscript{293} Id. at 685; see also Fla. R. Juv. P. 8.060(d)(2)(f).
insane at the time of the adjudicatory hearing. The court also authorized a change in the procedure for post-dispositional hearings on revocation of community control.

### III. CHILDREN IN NEED OF SERVICES AND FAMILIES IN NEED OF SERVICES

The legislature also moved part IV of chapter 39 entitled "Children in Need of Services and Families in Need of Services" ("CINS/FINS") to chapter 984, also within the title governing "Criminal Procedure and Corrections." This change was also supported by the Juvenile Justice Advisory Board. Part of the justification appears to be that the CINS/FINS section of the law should be placed within the corrections title because DJJ is responsible for the juvenile justice continuum which includes Children in Need of Services. That public policy justification is contrary to the view of the federal government and other public policy analysts that children in need of services legislation should not be part of a juvenile delinquency continuum.

The legislature also made substantive changes in the CINS/FINS statute. The law now provides that children adjudicated in need of services may be placed for up to ninety days in a staff secure facility. A child found in direct or indirect contempt of court as in need of services who has run away from staff secure facilities on at least two occasions may be

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295. Id. at 767B68; see also FLA. R. JUV. P. 8.120.
296. FLA. STAT. § 984.04 (1997).
298. See id. Prior to 1994, the Department of Health and Rehabilitative Services (HRS) had the sole responsibility for implementing the provisions of Chapter 39. However, the 1994 legislature eliminated HRS authority to administer certain juvenile justice programs by creating the Department of Juvenile Justice (DJJ) [Ch. 94]B209, Laws of Florida]. As a result of this change, DJJ is now responsible for the juvenile justice continuum which includes delinquent children, CINS, and FINS HRS's successor, the Department of Children and Family Services, continues to be responsible for the child welfare system, including dependency, foster care, and termination of parental rights. Id.
300. See generally FLA. STAT. § 97.280 (1997).
301. FLA. STAT. § 39.4421 (1997) (recodified at § 984.225 (1997)).
placed in a physically secure facility. The child's parent, guardian, or legal custodian may now file a Child in Need of Services Petition. Finally, in addition to other sanctions for contempt of court, the court may direct the Department of Highway Safety and Motor Vehicles to withhold issuance of or suspend a child's driver license or driving privilege for up to one year for a first offense and up to two years for a second offense of contempt of court as a CINS.  

IV. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. Dependency Issues

Evidentiary issues tend to be generic in nature and, as such, are beyond the scope of this survey. However, occasionally an evidentiary issue relates specifically to the child welfare area. Such was the case in M.B. v. Department of Health & Rehabilitative Services. In M.B., the trial court concluded that the child was dependent based upon the finding that the father had sexually abused her, and the mother was negligent in failing to protect the child from the abuse. The basis for the lower court's finding was prior hearsay statements which the child later recanted at trial. The court examined the Florida Evidence Code and determined that once the child recanted the identification at her father's trial, her earlier unsworn statement became a prior inconsistent statement which was then inadmissible as substantive evidence at the dependency proceeding.

The Supreme Court of Florida reversed. The court held that the admission and subsequent consideration of the child's statements as substantive evidence by the fact finder did not require that the child's testimony at trial be consistent with the out of court statements. The court found no consistency requirement in the statute which dealt with the

303. See FLA. STAT. § 39.436 (renumbered as 984.15).
307. Id.
308. Id. at 1 (citing Williams v. State, 560 So. 2d 1304, 1306 (Fla. 1st Dist. Ct. App. 1990); Jaggers v. State, 536 So. 2d 321, 325 (Fla. 2d Dist. Ct. App. 1988)).
310. Id. at S297.
admission into evidence of out of court statements of a child crime victim. The court explained that the purpose of the law was to deal with problems inherent in a child victim’s live appearance and testimony at trial and to provide an additional way of presenting a child’s evidence to the trier of fact. The court added that the trial court must also satisfy the stringent reliability safeguards established in the law. Also, the court held that its 1995 decision in State v. Green, in which it held that a prior statement of a child directly conflicting with the victim’s trial testimony standing alone may not sustain a criminal conviction, is distinguishable. The court distinguished Green both on the facts relating to the particular child’s testimony and because Green involved a criminal conviction whereas M.B. involved a dependency proceeding in which the child’s welfare and not criminal culpability was at issue.

Interest of K.D., is a short opinion worthy of comment because it clarifies proper appellate practice in dependency cases. In K.D., the appellate court explained the appropriate method of review when an order as part of a dependency proceeding requires the return of the child to the custody of the parent. Further, the court explained that when a child is declared dependent and thereafter returned to the custody of the parent, the trial court retains jurisdiction until the child reaches eighteen years of age unless jurisdiction is otherwise relinquished by the court. This is then a nonfinal order which may be challenged by writ of certiorari and not by appeal.

The question of what parties may intervene in dependency proceedings was before the Fourth District Court of Appeal in J.L. v. G.M. A writ of certiorari was brought to review two orders of the trial court which allowed the nonparty maternal grandmother, aunt, and uncle to intervene in an ongoing dependency proceeding. The court relied upon Rule 8.210(a) of the Florida Rules of Juvenile Procedure and the Supreme Court of Florida’s

313. Id. at S298.
314. 667 So. 2d 756 (Fla. 1995).
316. Id. at S296.
318. Id. at 39.
319. Id.
320. Id.
321. Id.
322. 687 So. 2d 977 (Fla. 4th Dist. Ct. App. 1997).
323. Id. at 977.
opinion in Beagle v. Beagle,\textsuperscript{324} to remand the case.\textsuperscript{325} The \textit{Rules of Juvenile Procedure} define parties as “the petitioner, the child, the parent(s), the department [of Children and Family Services], and the guardian ad litem, when appointed.”\textsuperscript{326} The Beagle case establishes Florida’s strong public policy against unwarranted interference with the parenting decisions of an intact family.\textsuperscript{327} The court in \textit{J.L.} remanded to determine whether the relatives could be granted nonparty participant status pursuant to Rule 8.210(b) of the \textit{Florida Rules of Juvenile Procedure}.\textsuperscript{328}

An important issue of custody in the context of dependency proceedings arose recently in Roberts v. Florida Department of Children & Families.\textsuperscript{329} In that case, the natural father of a six-year-old who had been adjudicated dependent as to the mother sought release of the child from the custody of DCF by writ of habeas corpus.\textsuperscript{330} The father had been in prison at the time of the proceeding against the mother and the dependency petition against him had been dismissed.\textsuperscript{331} When the father sought return of the children, the DCF denied him custody.\textsuperscript{332} Chief Judge Schwartz granted the writ of habeas corpus and ordered transfer of custody to the child.\textsuperscript{333} The court found that there was no evidence that the return would endanger the safety or well-being of the child which is required under the Florida statute.\textsuperscript{334} The court concluded that the DCF lacked authority to make an

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{324} 678 So. 2d 1271 (Fla. 1996).
\item \textsuperscript{325} \textit{J.L.}, 687 So. 2d at 977-78.
\item \textsuperscript{326} \textit{id.} at 977.
\item \textsuperscript{327} \textit{Beagle}, 678 So. 2d at 1271. The issue in \textit{Beagle} was the ability of grandparents to enforce visitation rights against an intact family unit in which the parents rejected the visitation. \textit{id.} at 1272.
\item \textsuperscript{328} \textit{J.L.}, 687 So. 2d at 978.
\item \textsuperscript{329} 687 So. 2d 51 (Fla. 3d Dist. Ct. App. 1997).
\item \textsuperscript{330} \textit{id.} at 51.
\item \textsuperscript{331} \textit{id.}
\item \textsuperscript{332} \textit{id.}
\item \textsuperscript{333} \textit{id.} at 52.
\item \textsuperscript{334} Section 39.41(1) of the \textit{Florida Statutes} provides:

When any child is adjudicated by a court to be dependent, and the court finds that removal of the child from the custody of a parent is necessary, the court shall first determine whether there is a parent with whom the child was not residing at the time the events or conditions arose that brought the child within the jurisdiction of the court who desires to assume custody of the child and, if such parent requests custody, the court \textit{shall place the child with the parent unless it finds that such placement would endanger the safety and well-being of the child. FlA. STAT. § 39.41(1) (1995) (emphasis added).}
\end{enumerate}
\end{footnotesize}
independent judicial determination of the best interests of the child.\textsuperscript{335} The statute, according to the court, represents the legislative policy, and the court is bound by the statute.\textsuperscript{336}

B. \textit{Right to Counsel Issues}

Florida’s dependency statute does not provide an absolute right to counsel for indigent parents in dependency proceedings.\textsuperscript{337} This legislative failure continues to create problems for the appellate courts. This author has argued in previous surveys in favor of a statute providing free counsel to indigent parents in all dependency proceedings as occurs in other states.\textsuperscript{338}

The issue came up again in \textit{J.S.S. v. Department of Health and Rehabilitative Services}.\textsuperscript{339} A father who was denied counsel brought an appeal which was treated as a petition for writ of certiorari challenging the failure to appoint counsel.\textsuperscript{340} The appellate court found that the procedure utilized by the trial court in determining whether to appoint counsel constituted a departure from the essential requirements of law and thus granted the petition.\textsuperscript{341} The appellate court’s findings and application of law are probative of need for outright appointment of counsel. First, the trial court had explained why it had no authority to appoint counsel unless there was going to be a termination of parental rights proceeding or a pending criminal proceeding (a clear misunderstanding of the law).\textsuperscript{342} But in denying the request, the trial court also explained that it had been at a judicial conference where it learned that “a couple of judges” had been brought before the judicial qualifications commission because the judges had been appointing counsel in dependency proceedings.\textsuperscript{343} The trial court explained that “[judges are] getting a lot of maybe rightful pressure from taxpayers and
other powers that be." The appellate court explained that the appointment of counsel under Florida law takes place when parents are threatened with permanent loss of custody or when criminal charges may arise from the proceedings. However, in all other proceedings, a case by case determination of factors contained in the Potvin decision are to be used to determine the parents' right to appointment of counsel. The Potvin factors are: "(i) the potential length of parent child separation, (ii) the degree of parental restrictions on visitation, (iii) the presence or absence of parental consent, (iv) the presence or absence of disputed facts, and (v) the complexity of the proceeding in terms of witnesses and documents." The Potvin test is fact specific and, arguably, mitigates in favor of the appointment of counsel to indigent parents. However, the statement by the trial court about the "pressure" being applied does not augur well for indigent parents who, once there is no appointment of counsel for unstated political reasons, are usually not in a position to appeal the denial of counsel. The legislature should set an absolute rule providing counsel to all indigent parents in dependency cases.

The issue of taxation of costs in dependency cases recently came before the First District Court of Appeal in W.S.M. Jr. v. Department of Health & Rehabilitative Services. After successfully having a petition for dependency dismissed, a father filed a motion to tax costs against the Department of Health and Rehabilitative Services ("HRS"). The motion was denied, and the father appealed. Florida law provides in general that in civil cases a party recovering judgment shall recover all the legal costs and charges. It is irrelevant that the party against whom costs are taxed is a state agency. Several appellate courts have held that the civil taxation statute applies to juvenile proceedings. The general rule is that parties are

344. J.S.S., 680 So. 2d at 549 The trial court added: I've been told that I better start following the statute because I, by not following the statute, lose my judicial immunity and I become a subject of a taxpayer's suit for the dollars that I am appointing attorneys on that do not meet the requirements of the statute, and I got to send marry one daughter and send put another son through college, and I really don't want to lose my judicial immunity. Id.
345. Id. (citing In the Interest of D.F., 622 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1993)).
346. Id. (citing In the Interest of D.-., 385 So. 2d 83 (Fla. 1980)).
347. Potvin v. Keller, 313 So. 2d 703, 706 (Fla. 1975) (citation omitted).
349. Id. at 247.
350. See generally FLA. STAT. § 57.041 (1995); Florida –ar v. Davis, 419 So. 2d 325, 328 (Fla. 1982).
351. W.S.M. Jr., 692 So. 2d at 247 (citations omitted).
entitled to collect costs in legal proceedings and in equitable proceedings in the discretion of the court. HRS argued that because the proceedings were in equity, the court should use discretion and depart from the general rule of payment. The court rejected this argument. To deny court costs because of HRS's statutory mandate to prosecute dependency cases would mean denying the costs across the board in dependency cases. In addition, other courts had already rejected this approach. The costs recoverable do not include court fees or witness fees for certain witness, specifically any party to the petition, any parent or legal custodian, or child named in a summons. On the other hand, other witnesses shall be paid the witness fee fixed by law. With this exception, the court held that the father was entitled to fees.

The court's determination as to whether a person is indigent is also important because it may obligate the parent to find an attorney. In Beveridge v. Mardis, the trial court, after a cursory examination of the mother's financial situation, concluded that she was not entitled to appointed counsel. She proceeded pro se and her parental rights were subsequently terminated despite her ongoing request for an attorney, and the fact that she could not afford one. The appellate court held that the lower court should have continued the matter until a more thorough investigation of her claim of indigency and inability to secure counsel could have been conducted. Further, the court failed to obtain a waiver of counsel as provided by the Florida Rules of Juvenile Procedure.

C. Termination of Parental Rights

Issues of mental illness create difficult problems in termination of parental rights cases. This was true in P.A. v. Department of Health &
Rehabilitative Services. The trial court had terminated parental rights based upon the mother’s chronic bipolar mental disease. However, the unrebuted evidence was that the mother had substantially met the four goals of a performance plan. There was no clear and convincing evidence that she failed to substantially comply with it. Further, no clear and convincing evidence of past abuse, neglect, or abandonment had been presented. Other courts in Florida have analyzed the issue of chronic mental illness as a basis for the termination of parental rights; they have found that it can be the basis, but only where the parent fails to comply with the performance agreement and where there was prior abuse, neglect, or abandonment. The appellate court in P.A. held that the DCF cannot simply rely upon the parents’ mental status to terminate parental rights. Where the parent and department enter into a case plan, the DCF must make reasonable efforts to unify the family; this includes assisting the parent to receive the services needed to become a capable parent including mental health services. The appellate court therefore reversed, but added that termination could occur if the parent failed to comply with a new case plan despite reasonable efforts by the DCF, or if reunification would threaten the children’s well-being irrespective of the provision of services.

A second case dealing with the difficult issue of mental health services and compliance with case plans is S.Q. v. Department of Health & Rehabilitative Services. The Department moved to terminate parental rights based upon the claim that the mother failed to obtain timely psychiatric treatment or counseling for schizophrenia as required by the permanent placement plan. The appellate court rearticulated the Florida test that termination of parental rights is governed by section 39.467(2)(a)–(k) which sets forth eleven factors. The law provides that

366. 685 So. 2d 92 (Fla. 4th Dist. Ct. App. 1997).
367. Id. at 92.
368. Id.
369. Id. at 92–93.
371. P.A., 685 So. 2d at 92.
372. Id. at 93 (citing FLA. STAT. § 39.464(1)(e) (1995)).
373. Id.
374. 687 So. 2d 319 (Fla. 1st Dist. Ct. App. 1997).
375. Id. at 323.
376. Id. See T.C. v. Department of Health & Rehabilitative Services, 681 So. 2d 893, 893 (Fla. 4th Dist. Ct. App. 1996) (discussing at note 1 the issue of whether the trial court must address in its order each of the factors enumerated in section 39.4612, since renumbered at section 39.469(3)).
“[w]hen a petition to terminate parental rights is predicated upon allegations of abuse, neglect, or abandonment, a performance agreement or permanent placement plan must be offered [and a parent who fails to] . . . ‘substantially comply’ with the agreement or plan [may then have parental rights terminated].”377 Parental rights may be terminated so long as failure to comply with the performance agreement provisions is not the sole basis for permanently terminating the rights.378 In the S.Q. case, the trial court incorrectly terminated parental rights based upon the claimed failure of the mother to comply with recommendations for mental health treatment and counseling.379 Indeed, none of the psychological tests and evaluations the mother went through under the performance plan actually recommended mental health treatment and counseling.380 Thus, she had no obligation to undergo them. In addition, the court found that the order terminating parental rights did not find the factors under the statute proven by clear and convincing evidence.381 The court therefore reversed.382

D. Legislative and Rules Changes

The legislature amended the provisions of chapter 39 dealing with termination when a parent is incarcerated in a state or federal correction institution. The law now provides for the circumstance when the parent is expected to be incarcerated for a substantial portion of the period of time before the child will attain the age of eighteen years.383

In the dependency area, the Supreme Court of Florida authorized changes in the Florida Rules of Juvenile Procedure to match case law determinations over the past few years.384 Specifically, the new rules expand and make precise the procedure for diligent searches and service of pleadings and papers in dependency proceedings385 and also change the procedures for shelter hearings and orders.386 Finally, the new rules track case law with regard to final judgments terminating parental rights as well as denying termination of parental rights.387

377. S.Q., 687 So. 2d at 323–24 (citation omitted).
378. Id. at 324.
379. Id.
380. Id. at 325.
381. Id.
382. S.Q., 687 So. 2d at 325.
385. Id. at 769–71.
386. Id. at 772–73.
387. Id. at 776.
V. CONCLUSION

The Florida Legislature made extensive structural changes to the Florida Juvenile Code in the Juvenile Delinquency and Families in Need of Services/Child in Need of Services areas this year. The legislative changes not only move the delinquency and status offense provisions to a new location in the Florida Statutes but renumber the provisions. These changes may result in the additional expenditure of time and money. To what extent these structural changes will generate new appellate opinions remains to be seen.

In the meantime, the appellate courts continued a process that has been going on for sometime—routine correction of basic errors by the trial courts. However, on occasion the courts, including the Supreme Court of Florida, have clarified significant issues including evidentiary matters as was the case in M.B. v. Department of Health & Rehabilitative Services. 388

388. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).