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Juvenile Law

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I. INTRODUCTION

In the early spring of 1990, the state legislature dramatically changed the juvenile delinquency provisions of The Florida Children's Code. The legislature also made changes, albeit more modest ones, in the child welfare section of the Code. Florida's revenue shortfall, which became apparent in the summer of 1990, produced an equally

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dramatic reduction in appropriations of state funds central to the success of these two amendments to the Code. The changes in Chapter 39 only have been in effect for a year and the appellate courts are now starting to interpret them. There is some evidence from these opinions that the failure to provide programs and services to complement the new juvenile delinquency and the child welfare laws is not lost on the appellate courts. At the same time, they continue to admonish the trial courts to pay attention to seemingly rudimentary statutory obligations such as compliance with the Chapter 39 provisions concerning the length of secure detention for alleged delinquents and articulation of grounds for dependency findings.

As in past years, nearly all of the appellate decisions come from the district courts of appeal. Some are pro forma opinions, but others involve significant issues. In addition, this year the Florida Supreme Court decided an extremely important case, Padgett v. HRS, which cleared up a major conflict among the district courts of appeal concerning the definition and application of prospective neglect.

This article will review the case law in both the child welfare and juvenile justice areas of juvenile law since October, 1990. Appellate decisions lacking significant issues will not be discussed. This survey is again divided into two sections: juvenile delinquency and dependency.

4. The statute was enacted effective October 1, 1990.
5. See Interest of M.C., 567 So. 2d 1038 (Fla. 4th Dist. Ct. App. 1990) (writ of habeas corpus will issue where juvenile is confined for more than statutory five-day maximum while awaiting placement in commitment program).
6. 577 So. 2d 565 (Fla. 1991).
8. Chapter 39 of the Florida statutes is divided into six sections. The provisions relevant to the discussion here are Part II, governing juvenile delinquency, Part III, governing dependency, and Part VI, governing termination of parental rights. Part VI of Chapter 39 governs families in need of services and children in need of services. Although the law was passed three years ago, research discloses no reported opinions since that time on that section of the law.
II. JUVENILE DELINQUENCY

A. Issues of Right to Counsel and Confessions

The United States Supreme Court ruled in 1966 in *Miranda v. Arizona*\(^9\) that persons apprehended by police officers are entitled to certain warnings with regard to constitutionally protected rights and, in 1967, in *In re Gault*\(^10\) that juveniles have the right to counsel in delinquency proceedings. By statute, Florida has specified that a child is entitled to representation by legal counsel at all stages of a delinquency proceeding.\(^11\) Two cases decided in the district courts of appeal this past year involve application of *Miranda* standards in the context of waiver of counsel and confessions by children.

The more significant of the two cases is *W.M. v. State*.\(^12\) In a *per curiam* decision with a vigorous dissent by Judge Farmer, the Fourth District affirmed the delinquency adjudication of the child over his contention that the trial court committed error by denying a motion to suppress a statement the child gave to the police. The confession was made by a ten-year-old boy with an IQ of sixty-nine or seventy who had a learning disability and was placed in a special education program. He had no prior record with the police and was held in police custody for approximately six hours prior to confessing to a series of burglaries.

The majority explained that it had difficulty with the concept that a ten-year-old could ever understand, in the sense that an adult could, the consequences of waiving his constitutional rights to both silence and counsel and thereafter give a confession.\(^13\) However, the majority did not substitute its own conclusions for those of the trial court, which had made substantial findings of fact.\(^14\) With all of the factual information

\(^10\) 387 U.S. 1 (1967).
\(^12\) 585 So. 2d 979 (Fla. 4th Dist. Ct. App. 1991).
\(^13\) *Id.*
\(^14\) The appeals court described the trial court's findings in the following manner. The police originally went to the child's home where they spoke with the grandmother. They asked to take the child to the police station and asked if the grandmother wanted to go. She declined. The child was advised of his constitutional rights in the police car by officers who were described as experienced in dealing with juveniles. The
from below, the appellate court concluded it was not free, under the applicable legal standards, to substitute its own conclusions for those of the trial court. First, it noted that a confession is not involuntary merely because the individual making it is a juvenile. Second, the appellate court reasoned that the trial court must resolve the conflicts of facts and make a decision based upon the totality of the circumstances which includes the child's age, intelligence, education, experience and ability to comprehend the meaning and effect of his statement. Both of these propositions are correct statements of the law. Then, without explanation, the majority decided that it could not overturn the “thoroughly reasoned” decision of the trial court. Although never stated, it appears the majority was refusing to conclude that the factual determinations by the trial court were clearly erroneous. The dissent, on the other hand, would have done so. The dissent noted, for example, that the facts showed one of the officers testified that he, the police had told the grandmother the youngster would not be arrested that day. They took him to the station and then advised him again of his rights without handcuffing him. The youngster never asked for a lawyer. He was taken into the detective's office where he was given a Coke and some candy. He was interviewed by one officer for approximately a half hour with a second officer present. One of the officers had previously investigated a shop lifting charge involving the child and had advised the youngster of his rights at that time. The child then went with the detectives to the area where the homes were allegedly broken into by the youngster. The child pointed out where the burglaries were committed. After he was read his rights, the youngster confessed to having committed the burglaries and was taken back to the station and ultimately released to his home. He was arrested the next day. On the way to the station, his rights were again read to him and the child pointed out locations of other burglaries. Then another detective spoke with the youngster on the second day and the child was given his rights again. He said he understood, and they then talked further about the burglary. The child never signed a waiver of rights card nor was any tape recording or tape recording of any kind made of any of the interviews. Witnesses were then called at the suppression hearing including the youngster's specific learning disability (SLD) teacher, the child's guardian/grandmother who suffered from high blood pressure and heart problems, the principal of the child's school, the officers and the youngster. The child testified that the officers threatened to hang the child by his neck if he did not show them the houses involved in the burglary and that he was frightened. The police denied making the statement, although one officer could not remember. Id. at 981-82.

15. Id. at 983 (citing T.B. v. State, 306 So. 2d 183, 185 (Fla. 2d Dist. Ct. App. 1975) and Gallegos v. Colorado, 370 U.S. 49 (1962)).
16. Id.
17. Id. (for example, the trial court chose to believe the police officers who testified that they did not threaten the child by hanging him by his neck if he refused to confess).
officer, could not remember making a threatening statement to hang the boy by his neck, as alleged by the child, rather than denying the statement was made. There was no explanation by the trial court why it chose to believe the police officers rather than the child.

The dissent would have held, in the alternative, that under Fare v. Michael C.\textsuperscript{18} and Arizona v. Fulminante,\textsuperscript{19} whether rights are knowingly and voluntarily waived, based upon the totality of the circumstances, is a legal question which the appeals court can answer. According to Judge Farmer, these cases allow him to add together the factual information to determine as a matter of law whether the waiver was voluntary. He would have concluded that even though there was no single objective factor which suggested voluntariness, given that the burden was on the state, the waiver was involuntary.

The dissent may have the better of the argument both legally and factually. Both sides are correct in saying that the United States Supreme Court has unequivocally held in determining whether a waiver is voluntary, that the court must decide whether the child understood based upon the totality of the circumstances. However, that is a question of law. Thus, the majority should have reviewed the trial court's decision based upon the totality of circumstances test. Had it done so, it would have found no facts that demonstrated the child understood what a lawyer does, how he might go about obtaining a lawyer, that if he were indigent he understood what a public defender would do, that a public defender is also a lawyer, or that he had the mental acuity to read and comprehend. To the extent there was any evidence showing that the child understood, it involved the police officers' conclusory evaluation. But even there they did not comment on the child's understanding.

The second case, Z.F.B. v. State,\textsuperscript{20} contains a more narrow holding. The Third District Court of Appeal, in a per curiam opinion with a dissent by Chief Judge Schwartz, upheld the voluntariness of a child's confession after being advised of his Miranda rights. In Z.F.B., the youngster was suspected of being involved in a series of burglaries. The police went to the child's home and asked permission from his mother to speak with him. The mother, who was terminally ill, gave permission for the officers to talk with the boy outside her presence, also advising the police that the child had a legal guardian. Before questioning him,

\begin{itemize}
\item[18.] 442 U.S. 707 (1979).
\item[20.] 573 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1991).
\end{itemize}
the officers advised the boy of his *Miranda* rights.\(^{21}\) The officers obtained a statement from him in the home, but the statement was suppressed by the trial court because of possible coercion when the police officers offered to help the youngster.\(^{22}\) The child was then taken to the police station where he was given written *Miranda* warnings. The youngster then asked for a lawyer. While the child was in a holding cell, the police officers telephoned the individual whom the mother indicated was the child’s legal guardian. That person arrived at the police station, spoke with the child, and told an officer that the child wanted to talk. It turned out this person was not the child’s legal guardian. The child again was given the written *Miranda* form which he read and signed. He then gave a statement admitting participation in the crimes. The trial court denied the child’s motion to suppress the confession. The appellate court upheld the trial court by finding sufficient evidence of the child’s ability to comprehend the meaning of the *Miranda* warnings and to waive his rights and also that the waiver was knowingly and voluntarily made.\(^{23}\) Judge Schwartz, in dissent, disagreed with the majority’s conclusion that the child instituted contact with the police after the request for the lawyer.\(^{24}\) In his view, unless the child himself initiated further communication, the police could not reinstitute the interrogation.\(^{25}\)

A separate counsel-related issue that, oddly, continues to create problems, concerns application of the Florida Supreme Court rule requiring written consent by a child to employment of a certified law student intern as a defense lawyer in a delinquency proceeding.\(^{26}\) Such a document must be filed and brought to the attention of the trial judge.\(^{27}\) In the case of *Interest of J.H.*,\(^{28}\) the issue was whether the child intelligently waived the right to have counsel present at certain relevant hearings by executing an acknowledgement that a certified law

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21. *Id.* at 1032.
22. *Id.*
23. *Id.*
24. *Id.* at 1033 (Schwartz, J., dissenting).
25. *Z.F.B.*, 573 So. 2d at 1033 (citing Minnick v. Mississippi, 111 S. Ct. 486 (1990)).
26. *See also* 1989 *Survey*, *supra* note 11, at 863; 1990 *Survey*, *supra* note 7, at 1179-80 (discussing earlier cases).
student would represent him. The court found problems with the written form and the procedure. First, the document did not state that the child had the right to have a supervising attorney personally present even when required by the trial judge who determines the extent of the intern's participation. Second, the child was not advised of the right to assistance of a supervising attorney at the time she entered her plea. Thus, according to the court, the child could not intelligently waive the right to be represented by a lawyer.

B. Detention Issues

Florida's approach to the use of secure detention to hold children taken into custody has fluctuated over the past decade. With the passage of the Juvenile Justice Reform Act of 1990, the grounds for holding a child in secure detention have been narrowed somewhat to moderately limit the grounds for initially holding a child.

However, the 1990 amendments made no change in the part of the statute which provides that a child may only be held in detention for twenty-one days unless an adjudicatory hearing has started. Over the last three years, the appellate courts have regularly granted writs of habeas corpus based upon the trial courts' violation of this rule. The appellate courts' anger continued unabated most recently in B.G. v. Fryer. That case involved a series of four petitions claiming that children had been held beyond twenty-one days prior to adjudicatory hearings. The defense raised by the Attorney General on behalf of the

29. Id. at 163.
30. Id. (citing RULES REGULATING THE FLORIDA BAR Rule 11-1.2(a)) (governing the Law School Civil and Criminal Practice Program).
31. Id.
33. See FLA. STAT. § 39.044(5)(b) (Supp. 1990). It provides that "[n]o child shall be held in secure, or nonsecure, or home detention under a special detention order for more than 21 days unless an adjudicatory hearing for the case has been commenced by the court."
34. See 1990 Survey, supra note 7, at 1171-72.
35. 570 So. 2d 430 (Fla. 4th Dist. Ct. App. 1990) (the individual respondent in so many of these cases, Ron Fryer, is the superintendent of the Broward County Regional Juvenile Detention Center).
36. Id. at 431.
respondent judge in each case was that there was "good cause" to continue the child in detention. Good cause, according to the Attorney General, was the court's thorough review of several documents including the child's arrest report, a criminal information file, detention screening form and an HRS computer printout showing the child's prior involvement in the court system. The Fourth District Court of Appeals rejected this argument as merely parroting the law. Citing a lack of any competent evidence to support the conclusory claims of incomplete investigation or unavailability of unidentified witnesses, the appellate court granted the writs. The language of the court's decision in B.G. demonstrates once again its frustration with the trial bench. The appellate court described the trial court as having "clearly and consistently misconstrued" the relevant portions of the Florida Juvenile Justice Act and that to fail to grant the writ would constitute an "evisceration" of the state's detention limitations statute.

The court's anger may have peaked in P.H. v. Fryer. In that case, also involving a writ of habeas corpus in which the child was held in excess of twenty-one days, the state sought by motion to extend secure detention on good cause grounds asserting that it was unable to locate a witness. The appellate court found that the state did not show that the victim or any witnesses were actually unavailable and, therefore, there was no good cause to extend the time of the child in secure detention. The appellate court then granted the writ of habeas corpus. It also relied upon the earlier holding in E.W. v. Brown, to the effect that the good cause requirement for an extension beyond twenty-one days is not related to the original basis for detaining the child, but relates to the explanation for the delay in commencement of the adjudicatory hearing. Finally, and perhaps most significantly, Judge Letts, concurring in P.H., noted the following:

As a spate of decisions (in excess of 40) from this court over the last year will confirm, Judge Lawrence L. Korda does not like the statutory provisions on juvenile detention. Neither do I. However, as Gertrude Stein might put it, 'the law is the law, is the law.'

37. Id. at 432.
40. 559 So. 2d 712 (Fla. 1st Dist. Ct. App. 1990); see also 1990 Survey, supra note 7, at 1173 (discussing E.W.).
Surely, of all people, judges must have respect for it.  

A separate issue concerning pre-trial secure detention was raised in *W.N. v. Fryer.* In that case, a child sought relief on the grounds that the court continued his placement in secure detention in violation of the 1990 amendment of Chapter 39 prescribing grounds for placement in secure detention. The youngster had failed to appear in court and was later taken into custody pursuant to "a court pick up order." When he appeared in court the next day, the judge continued him in secure detention although no new evidence was presented other than the fact he had been arrested on the court order for failure to appear at a prior hearing. Chapter 39.037 of the Florida Statutes provides that a child may be taken into custody for failure to appear at a court hearing after proper notification. However, under these circumstances, the child may not be detained unless he meets the criteria of chapter 39.044. That statutory section contains two provisions, one providing for initial detention and the second for continued detention. If it is determined that a child will be continued in detention then the provisions of chapter 39.044(2) apply. In the instant case, the trial court made no finding at the detention hearing that the child met the provisions for continued detention, which contain standards that are narrower than those for initial detention. Thus, the appellate court granted the writ.

The appellate courts have labored over a number of years to define how and under what circumstances a child before the juvenile court may be held in contempt and incarcerated. In two cases decided in the mid 1980s, *A.O. v. State* and *R.M.P. v. Jones,* the supreme court held that the trial court had no power to find contempt under Chapter 39, but retained inherent authority to punish a child for contempt including placement in secure detention for a reasonable period of time.

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41. *P.H.,* 570 So. 2d at 1098 (Letts, J., specially concurring).
42. 572 So. 2d 24 (Fla. 4th Dist. Ct. App. 1990).
43. *Id.* at 25.
44. *Id.* (citing FLA. STAT. § 39.037-.044 (Supp. 1990)).
45. *Id.* at 25 n.1 (citing Fla. Stat. § 39.044(d)(4) (Supp. 1990). The initial decision is made by HRS intake personnel when the child is brought to the detention center. The continued detention decision is made by the court at a detention hearing.
46. *Id.* at 25-26.
47. 456 So. 2d 1173 (Fla. 1984).
48. 419 So. 2d 618 (Fla. 1982).
49. *A.O.,* 456 So. 2d at 1175; *R.M.P.,* 456 So. 2d at 620 (holding that the authority existed outside Chapter 39).
In 1990, in *T.D.L. v. Chinault* 50 the Second District Court of Appeals held that under the 1988 statute a child could not be placed in secure detention, but with appropriate findings could be punished by incarceration in county jail. 51

As part of its 1990 changes to the Florida Juvenile Justice Act, the legislature added a new section 52 which set forth procedural rules for representation by counsel, and notice and an opportunity to be heard and confront witnesses when a child is subject to contempt of court. 53 If the procedures are complied with, it would appear a child could then be held in secure detention. In *A.A. v. Rolle*, 54 a child sought a writ of habeas corpus on the ground that he could not be held in the local juvenile detention center for contempt under the 1990 law. The child argued that chapter 39.042 defines detention criteria in such a way that punishment was eliminated as a grounds for incarceration. 55

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50. 570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990).
51. *Id.* at 1336; see also 1990 Survey, supra note 7, at 1186.
53. *See* FLA. STAT. § 39.044(10) (Supp. 1990) which provides:

   (10) Any child placed into detention for contempt of court shall be represented by legal counsel as provided in s. 30.041. The following due process rights must be provided during all stages of any proceeding under this chapter:

   (a) The right to have the charges against the child in writing served a reasonable time before the hearing.

   (b) The right to a hearing before a court.

   (c) The right to an explanation of the nature and consequences of the proceeding.

   (d) The right to confront witnesses.

   (e) The right to present witnesses.

   (f) The right to have a transcript or record of the proceedings.

   (g) The right to appeal to an appropriate court.

   A child shall not be placed in a jail or other facility intended for the detention of adults pursuant to this subsection.

55. *Id.* at 283; see FLA. STAT. § 39.042 (Supp. 1990) which provides:

   (1) All determinations and court orders regarding the use of secure, non secure, or home detention shall be based primarily upon findings that the child:

   (a) Presents a substantial risk of not appearing at a subsequent hearing;

   (b) Presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior;

   (c) Presents a history of committing a serious property offense prior to adjudication, disposition, or placement; or
The appellate court upheld the trial court's contempt power. It reconciled the definitional language of chapter 39.042 with chapter 39.044(10), explaining that the detention criteria which prohibit punishment apply only to a child who is alleged to have committed a delinquent act. Because a child held in contempt has not committed a delinquent act, the detention criteria do not apply. Reading the provisions in pari materia, the court held the child could be securely detained.

The dangers of inappropriate use of contempt in a delinquency case were made evident in a Fourth District Court of Appeal case, Interest of R.A. This was a per curiam denial of a petition for writ of habeas corpus with an extensive dissent by Judge Glickstein. Apparently, the trial judge ordered the child into secure detention for ninety days based upon contempt but where the child would be moved to a residential program where the child would "burn off," to use the trial court's words, the ninety days of contempt after placement. However, because there was no space in the residential program, the trial court ordered secure detention until the child could be placed. Judge Glickstein was not concerned with whether the court had the authority to hold the child in contempt, but with two other issues. First, the trial court was obligated to comply with proper procedures to find contempt. In Judge Glickstein's view, the record was incomplete in this regard. Second, the intent of the legislature was not to allow a child to remain in secure detention because of contempt as an alternative to placement in an HRS program.

(d) Requests protection from imminent bodily harm.

56. *Id.* at 283-84.

57. The court distinguished the *T.D.L. v. Chinault* case on grounds that it was no longer good law because of the 1990 legislative changes which state that a juvenile detention center may be used as a sanction for contempt and that the new section 39.044(10) provides that "[a] child shall not be placed in a jail or other facility intended for the detention of adults pursuant to the subsection." *Id.* at 284 n.4.


59. *Id.*

60. *Id.* at 808.

61. Failure to comply with due process procedural rights in juvenile contempt proceedings is common nationwide. United States General Accounting Office Report to Congressional Committees (Non-criminal Juvenile Detention Has Been Reduced But Better Monitoring is Needed in Court) (April 19, 1991). See also Gary Crippen, *Valid Court Order Exception: Yes or No?* (1990) (arguing against the use of contempt on public policy grounds).

62. *575 So. 2d* at 807.
C. Adjudicatory Issues

The procedural device known as *nolle prosequi* or *nol pros*\(^\text{63}\) has recently been held to apply in juvenile delinquency cases in the same manner as in adult criminal cases. Relying on two earlier adult cases,\(^\text{64}\) the Fifth District Court of Appeals held that the decision to file the *nol pros* rests in the sole discretion of the prosecutor. Permission of the trial court is not necessary. In *State v. M.J.B.*, the prosecution asked for a trial continuance. When the request was denied, the prosecution announced that it would *nol pros* the case.\(^\text{65}\) The defense attorney asked that the case be dismissed for failure to present evidence and the court granted the motion. When the state re-filed the petition and the child moved to dismiss alleging double jeopardy, the trial court dismissed and the state appealed.\(^\text{66}\) As the appellate court put it, “even though the practice of entertaining a *nolle prosequi* in re-filing the petition after a continuance has been denied may seem underhanded, the state has the discretion to act in this manner.”\(^\text{67}\)

Although Florida’s Rules of Juvenile Procedure contain detailed discovery provisions, issues in this area continue to appear in appellate decisions.\(^\text{68}\) In *Z.B. v. State*,\(^\text{69}\) a child appealed an adjudication of delinquency for two counts of battery on a school official. The discovery issue involved the trial court’s order excluding a defense witness from testifying. Holding that the trial court failed to conduct an adequate inquiry as defined in the Florida Supreme Court case of *Richardson v.*

\(\text{\textsuperscript{63}}\) *Nolle prosequi* is defined as a formal entry on the record by the prosecuting officer in a criminal case in which he or she declares that he or she will not prosecute the case. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 568-69 (1985) (suggesting that unbridled discretion in the prosecutor to *nol pros* has resulted in legislation or rules of court in a number of jurisdictions the purpose of which is to restrain the use of the power. The most common method is to require the prosecutor to explain the reasons for so doing in writing).

\(\text{\textsuperscript{64}}\) *See* State v. Padron, 506 So. 2d 462 (Fla. 2d Dist. Ct. App. 1987); State v. Kahmke, 468 So. 2d 284 (Fla. 1st Dist. Ct. App. 1985).

\(\text{\textsuperscript{65}}\) 576 So. 2d 966 (Fla. 5th Dist. Ct. App. 1991).

\(\text{\textsuperscript{66}}\) *Id.*

\(\text{\textsuperscript{67}}\) *Id.* at 967 (both the majority and concurrence suggested that if there was other alleged misconduct or if the purpose had been to harass or gain some other unfair advantage against the accused then it might be possible for the trial court judge to dismiss the re-filed charges).

\(\text{\textsuperscript{68}}\) *See* FLA. R. JUV. P. 8.060 (newly renumbered in 1991 from FLA. R. JUV. P. 8.070).

\(\text{\textsuperscript{69}}\) 576 So. 2d 1356 (Fla. 3d Dist. Ct. App. 1991).
State, the appellate court reversed the adjudication and remanded for a new trial. The court found that the child had been guilty of a discovery violation in not advising the state of the identity of a defense witness until the day of trial. However, the trial court failed to find out what the witness was prepared to testify about, and then made no inquiry or finding as to whether the discovery violation resulted in prejudice to the state. This, according to the appellate court, was reversible error. Furthermore, the trial court had imposed the extreme sanction of exclusion without exploring other remedies such as a recess or deposition and whether those alternatives would have cured the prejudice. This also was reversible error.

Under Florida law, a delinquency petition must be filed within forty-five days of the time the child is taken into custody, the juvenile law analogue to arrest. Interpreting the forty-five day rule has been an ongoing matter in the appellate courts. In B.T. v. State, the First District Court of Appeals faced the question of whether it was proper for the court to allow the state to file a second amended petition outside the statutory forty-five day time frame. The amended petition changed a sexual battery charge from one involving lack of consent to one involving lack of intelligent voluntary consent. The prosecution changed the charge when it was determined that the twenty-two year old mentally handicapped cousin, who was the victim of the alleged sexual battery, was not able to give legal consent. The appellate court suggested that under the facts there was no harm to the child because he was aware that the state would have to prove either that the victim had not agreed to the battery or that the consent was not intelligent, knowing, and voluntary. Further, counsel admitted knowledge and notice of the original arrest report which said that the victim was mentally disabled.

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70. 246 So. 2d 771 (Fla. 1971) (known as a Richardson inquiry).
71. Z.B., 576 So. 2d at 1356.
72. Id. at 1357.
73. Id.
75. See 1990 Survey, supra note 7, at 1173-76 (discussing other cases on this subject).
78. Id.; B.T., 573 So. 2d at 103-04.
Thus, there was no claim of surprise. However, because of an apparent conflict among the districts on the issue of what magnitude of change is necessary to constitute the filing of a new petition, as opposed to an amendment to the original, the court certified the question as one of great public importance to the Florida Supreme Court.

In a second case State v. F.T.H., the state appealed from an order dismissing a delinquency petition for failure to comply with the forty-five day speedy trial rule. The trial court had ruled that the child was taken into custody when a police officer approached the youngster, told him he matched the description of the robbery suspect, asked him his name, address and phone number, and then took his photograph. The juvenile and the police officer then went their separate ways and no arrest was made at that time. The appellate court disagreed with the trial court’s conclusion that the youngster had been taken into custody at that point. Holding that taking a child into custody under Chapter 39 was akin to arrest of an adult, the court ruled that the encounter rose to the level of a temporary detention but was not equivalent to arrest. Thus, the child was not taken into custody. The court further ruled that physical control as defined in Florida Statute section 39.01(51) does not include police encounters or temporary investigatory detention. This conclusion is without citation.

A third case is V.C.F. v. State. In that case, the child appealed from a judgment of the circuit court which withheld an adjudication of...
delinquency and placement on community control, claiming the trial court incorrectly denied a motion to dismiss because the state failed to file within forty-five days of the youngster’s arrest in the state of Kansas. The appellate court concluded that because the State of Florida filed the petition within forty-five days of the date the youngster returned to Florida and was placed in custody of the Florida officials, there was no violation of the Florida statute. The appellate court rejected the state’s argument that the juvenile speedy trial rule should be construed in comparison to the Florida rule of criminal procedure on speedy trial. Finding no Florida case on point, however, the court held that in order for the forty-five day rule to make sense, all provisions of Chapter 39 had to be read and interpreted in pari materia. First, the Interstate Compact on Juveniles, to which Florida is a signatory, provides that a youngster is subject to the laws of the foreign state when initially taken into custody and remains there until he returns to Florida. Second, Chapter 39 contains sections providing for the processing of the youngster upon return to Florida. These provisions for processing take time, and if the speedy trial rule were to commence upon taking the child into custody in a foreign state, the time frames within which to carry them out might be impossible to meet. The court concluded that the statute could not be read to interfere with these two sections of the law.

In Florida, trial court jurisdiction in a delinquency case ceases when a child reaches nineteen years of age. A jurisdictional question arose in D.M. v. State, where the trial court failed to adjudicate the child delinquent or withhold adjudication, but set the case for a dispositional hearing five days after the juvenile was to reach the age of nineteen. When the child filed a motion to terminate jurisdiction after his nineteenth birthday, the court entered a nunc pro tunc order adjudicating the child delinquent as of the date of the trial. The First District Court of Appeals reversed finding that the purpose of a nunc pro
**tunc** order is to correct a clerical mistake or refer to judicial acts which memorialize a previously-taken judicial act. The purpose is not to make a new or de novo decision, or supply an omitted action by the court which occurred here.95

### D. Dispositional Issues

Once adjudicatory and dispositional hearings have been held and the child is awaiting placement in an HRS facility, Florida statutes limit the length of time the child can be held in secure detention. Until the passage of the 1990 law, the period was five days.96 The five-day rule produced a number of appellate decisions admonishing the trial courts to comply with that provision.97 Perhaps recognizing that the time constraints were difficult to meet, the legislature amended the law in 1990 to provide that in addition to the five-day period in secure detention, HRS is allowed an additional ten days from the date of commitment to transfer the child from secure detention to non-secure or home detention if HRS timely seeks an order for continued detention.98

Regretfully, HRS seems unable to comply with the new rule as evidenced by the First District Court of Appeals decision in *R.L. v. State.*99 HRS exceeded both the initial five-day secure detention limit and the total fifteen-day transfer time limit. HRS argued that because the child was ultimately released to home detention the case was moot.

95. *Id.*
97. See 1990 *Survey,* supra note 7, at 1182-83 (citing cases decided in 1989); 1989 *Survey,* supra note 11, at 873-74 (discussing a 1989 case).

> When a child is committed to the department awaiting dispositional placement, removal of the child from detention care shall occur within 5 days, excluding Saturdays, Sundays, and legal holidays. A child placed into secure detention care and committed to the department who is awaiting dispositional placement in a commitment program shall be transferred by the department into non secure or home detention care if placement does not occur within 5 days after commitment, excluding Saturdays, Sundays, and legal holidays. If the child is committed to a residential program, the department may seek an order from the court authorizing continued detention for a specific period of time necessary for the appropriate residential placement of the child. However, such continued detention in secure detention care or transfer to non secure or home detention care shall not exceed 15 days after commitment, excluding Saturdays, Sundays, and legal holidays.

The court disagreed, holding simply that the time frames were violated and that the writ of habeas corpus on behalf of the child should be granted.100

Further evidence of HRS' problems can be found in Interest of M.C..101 There the youngster was waiting for placement in a facility for mentally disturbed children. HRS could not immediately place the child because of lack of space in appropriate programs. The child remained in secure detention beyond the statutory period. The Court granted the writ. Then, recognizing that this problem was on-going for some time, the court opined that "what this shows us is that all of the legislative changes will mean nothing unless the legislature has committed resources to expand the treatment programs for juveniles."102 It remains to be seen whether the necessary appropriations will be forthcoming from the legislature. If they are not, the appellate courts will be forced to continue ordering the release of children who need services on writs of habeas corpus for lack of compliance with statutory time frames.

A technical but not insignificant issue of appellate practice was recently presented to the First District Court of Appeals in K.K.P. v. State.103 In that case, a child was charged with escape from a juvenile facility in Duval County. The trial court found the appellant had committed the escape and transferred the matter to the Circuit Court of Pinellas County, the youngster's county of residence. That circuit court adjudicated the child delinquent and ordered commitment to HRS. The child appealed to the First District Court of Appeals which hears appeals from the Judicial Circuit in Duval County. The child's argument, in response to an order to show cause at the trial level why the case should not be transferred to the Second District Court of Appeals, was that the youngster did not intend to contest the order of disposition but rather the adjudicatory order. The First District Court of Appeals, on its own motion, transferred the case to the Second District Court of Appeals for the following reasons. First, the only order entered by a circuit court in the First District was the finding that the child had

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100. Id. at 863. The court noted that although no placement was available to HRS and would not be available for months, the statute is mandatory and there must be compliance. This case demonstrates the on-going problem produced by the lack of funding for delinquency commitment programs.
102. Id. at 1039.
committed the escape and that order was not an adjudicatory order. Second, even if it was an adjudicatory order, the case was then transferred to a court in the Second Appellate District for all purposes. Third, even if the Second District Court of Appeals would agree with the child's argument that there was insufficient evidence to adjudicate him, the only relief available would be to discharge the child, an order which should be directed to the judicial circuit over which the First District Court of Appeals had no power. 104

Various provisions of the delinquency law governing dispositional alternatives continue to raise problems as evidenced by recent appellate court decisions. 105 For example, in M.L. v. State, 106 the First District Court of Appeal was asked to decide whether the trial court could place a child on community control, Florida's term for probation, after release from commitment when such disposition was not ordered in the original commitment proceeding. 107 The child had been adjudicated to have escaped from an HRS facility and was committed to HRS' custody for an indeterminate term not to exceed the child's nineteenth birthday or the maximum allowed by law. 108 When the particular commitment program did not work out, a hearing was held on the issue of imposition of community control following the child's discharge from the commitment. The child raised the issue of whether the placement on community control would constitute an improper increase in punishment. A modification of the original disposition order allowing the change in status was made over the child's objection.

In a technical decision interpreting several provisions, the appellate court in M.L. concluded that the modification order was appropriate under the Florida statute. First, the court concluded that the law allowed the trial court to make an order placing the child on community control following discharge from commitment in the initial order. 109 Second, under the court's general dispositional powers, the court

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104. Id. at 308.
107. Id. at 465.
108. Id.

The court may also require the child be placed in a community control program following the child's discharge from commitment. Community-based sanctions may be imposed by the court at the disposition hearing or at any time prior to the child's release from commitment.
only retains authority to discharge a child from commitment if in the original commitment order it retained authority to do so. The appellate court concluded that the trial court could require that a child be placed in a community control program following the child's discharge from commitment and that the provision holding that the court had no authority over the discharge of the child from commitment, unless the court in its commitment order had stated that it retained jurisdiction, did not apply. It found the order in this case was a modification which did not purport to discharge the child from HRS commitment status.

There are two problems with the court's decision. First, the very statute the court sought to avoid, chapter 39.11(4), Florida Statutes, states that a subsequent modification of a dispositional order is permitted only where the trial court retained authority to do so in its original order. The trial court failed to do this in its commitment order. There is no exception to the statute. Second, apparently in an effort to avoid chapter 39.11(4) which is absolute on its face in precluding further court authority over discharge of the child in absence of the tension of jurisdiction in the commitment order, the appellate court argued that chapter 39.09(3)(e) actually gave it continuing authority. This section allows the court to add community-based sanctions prior to the child's release from commitment and after the initial commitment order. The problem with the court's reasoning is that community-based sanctions are not the same as community control. Community-based sanctions may be a part of community control but community control is far more extensive. Community-based sanctions include restitution, curfew and revocation of the child's driver's license and they may be

111. M.L., 578 So. 2d at 466.

(4) Any commitment of a delinquent child to the department shall be for an indeterminate period of time, but the time shall not exceed the maximum term of imprisonment which an adult may serve for the same offense . . . . Under no circumstances shall the court have authority over the discharge of a child from commitment provided in this subsection unless the court, in its commitment order, states that it retains such authority.


If the court decides to commit a child to the department, the department shall furnish the court, in order of the preference of the department, a list of not less than three options for programs in which the child may be placed.
considered as part of community control. To read the statute as the court has is to avoid the language of chapter 39.11(4).\textsuperscript{114}

May a court prohibit a child from wearing certain clothing or jewelry as a condition of community control? The issue was raised in \textit{L.S. v. State}\textsuperscript{118} where the trial court, on recommendation of HRS, imposed a condition that the child not wear any jewelry. The child had been adjudicated delinquent for possession of marijuana and sale of cocaine. The case was a \textit{per curiam} affirmance upholding the condition with a dissent by Judge Griffin who argued that the case fit within the test of \textit{Grubbs v. State}.\textsuperscript{118} Judge Griffin reasoned that a condition of community control must be related to the offense and that the standard of conduct imposed be essential to rehabilitation as well as protection of the public. He believed that there was nothing in the record to indicate that jewelry was in any way connected with the child or the crimes committed by the youngster. Nor was there any showing that the use of jewelry was more typical of drug dealers than law-abiding citizens, or that prohibiting its use would impair the ability to sell drugs.\textsuperscript{117} Finally, Judge Griffin noted that selection of apparel is a basic means of personal expression, concluding that "there is not a great difference between forcing a probationer to wear certain clothing or symbols as a badge of shame and prohibiting the wearing of certain items."\textsuperscript{118}

E. \textit{Transfer Issues}

Appeals involving issues related to the transfer and handling of juveniles in adult court continued this past year. In certain situations, a child may be tried in adult court under Florida law.\textsuperscript{119} One of the requirements calls for the court to decide whether a child should receive adult or juvenile sanctions when a child has been tried as an adult and convicted, irrespective of whether the child was waived to adult court

\textsuperscript{114} In a sense, all of this begs the more significant public policy question of whether dispositional orders under Florida law should be viewed as rehabilitative in nature or punitive in nature. If they are punitive in nature, then to modify them to require the child to suffer a greater penalty smacks of double jeopardy. On the other hand, if the goal is rehabilitation, then modifications to help the child are appropriate.\textsuperscript{115}

\textsuperscript{115} 575 So. 2d 331 (Fla. 5th Dist. Ct. App. 1991).

\textsuperscript{116} 373 So. 2d 905, 909 (Fla. 1979).

\textsuperscript{117} \textit{L.S.}, 575 So. 2d at 331.

\textsuperscript{118} \textit{Id.} at 332.

or the proceeding began in the adult court under the direct file provisions. The court must consider six criteria. Yet, the trial courts continue to violate the written binding provisions of the statute which states that:

Suitability for adult sanctions is determined by reference to the six criteria and any decisions shall be in writing and in conformity with those criteria with the court making a specific finding of fact and reasons for the decision.

In *Tighe v. State*, a child who had been sentenced as an adult on a series of offenses argued on appeal that the trial court had failed to enter adequate written findings to support the imposition of adult sanctions. The appellate court found that the record did not reveal that the trial court made any written findings of fact. The appellate court explained that even a transcript which is made a part of the appellate record might satisfy the statute if it contained oral findings of fact and reasons for the decision, as opposed to being part of the written record.

In *Taylor v. State*, the Fifth District Court of Appeal remanded for findings to support the imposition of adult sanctions in the case where a youngster, nearly seventeen years old, had been convicted of attempted first degree murder of a police officer. There, the closest item to a separate written order containing findings supporting the decision to impose adult sanctions was a two-part commentary on the sentencing score sheet stating that the court had made findings as provided by

123. 571 So. 2d 83 (Fla. 5th Dist. Ct. App. 1990).
124. Id. at 84. In a significant concurrence, Judge Dauksch argued that the 1990 Supreme Court opinion in *Pope v. State*, 561 So. 2d 554 (Fla. 1990) should apply to juveniles. *Pope* held that where an appellate court reverses an adult departure sentence because there were no written reasons, the appellate court must remand for resentencing with no possibility of departure from the guideline. According to Judge Dauksch, the effect in a juvenile context is a remand with instructions to impose juvenile sanctions. 573 So. 2d at 84.
Chapter 39 that the juvenile sanctions were not appropriate. The appellate court noted that the state had not asserted on appeal that the requisite findings were made on the record at the sentencing hearing which the court of appeal would have accepted had they been made. Thus, the court remanded.

A separate adult sentencing guideline issue arose in Lang v. State, where a child charged as an adult with armed robbery entered into a plea agreement to reduce the charge to robbery with a weapon along with a recommendation from the state for a guideline sentence. The court rejected the defense counsel's plea that it impose juvenile sanctions or, if it imposed adult sanctions, to withhold adjudication and place the child on probation or community control. The appellate court first ruled that a negotiated plea of guilty to a reduced charge and recommended guideline sentence does not by itself act as a waiver of the court's obligation to address the six specified criteria for the imposition of adult sanctions under chapter 39.111(7)(c). Relying on the supreme court decision in State v. Rohden, the court stated that, had the child waived or bargained away his right to have the court consider adult sanctions under the Florida Juvenile Justice Act, it would have upheld the adult sentence. However, it could find no such waiver in the Lang case. And thus, the trial court was obligated to comply with chapter 39.111. The appellate court then found like so many appellate courts before it, that the trial court had failed to make proper findings for sentencing the child as an adult. For example, a check list used by the trial court was found not to satisfy the requirements of Chapter 39 because the court is required to render specific findings of fact with the reasons for the decision to impose adult sanctions using all six criteria.

The problems in Florida's Juvenile Justice System also manifest themselves in cases involving the lack of dispositional alternatives in juvenile delinquency cases. Chapter 39 provides that when a court decides that it shall commit a child to HRS, the department shall furnish a list of not less than three placement alternatives to the court and rank

126. Id. at 174.
127. Id. at 175.
128. 566 So. 2d 1354 (Fla. 5th Dist. Ct. App. 1990).
129. 448 So. 2d 1013 (Fla. 1984).
130. Lang, 566 So. 2d at 1357 (citing Keith v. State, 542 So.2d 440, 441 (Fla. 5th Dist. Ct. App. 1989)); see also 1989 Survey, supra note 11, at 881-83 (discussing Keith and other cases).
them in order of preference. In Interest of C.S., the Fourth District Court of Appeals reversed the trial court's substitution of another program option for one of the three furnished by HRS, finding that the trial court cannot do so on the basis of prior case law and the statute. It can be expected that if the state's financial difficulties continue, the appeals courts will continue to be upset with the placement alternatives provided by HRS.

III. DEPENDENCY

A. Right to Counsel Issues

Appellate cases involving questions of the role of counsel in the dependency field regularly come before Florida's courts of appeal. They demonstrate the ongoing inability of trial courts to properly address the right to and role of counsel in dependency proceedings. By statute in Florida, the parents are entitled to representation by counsel in a dependency proceeding. However, Florida's law does not provide for the absolute right to appointment of counsel free of charge for an indigent parent. Any decision to appoint a lawyer is made on an individual basis.

Two cases decided this past year exemplify the continuing problem. In Interest of G.L.O., the appellate court reversed and re-

133. Id. at 169 (citing M.M. v. Korda, 544 So. 2d 318 (Fla. 4th Dist. Ct. App. 1989); see 1989 Survey, supra note 11, at 873 (discussing Korda); 1990 Survey, supra note 7, at 1185-86 (discussing other recent cases); see also HRS v. R.S., 567 So. 2d 533 (Fla. 5th Dist. Ct. App. 1990) (commenting on trial court exceeding its statutory authority by specifying, in dicta, the facility in which HRS might place the child).
134. See 1988 Survey, supra note 11, at 1171-74; 1989 Survey, supra note 11, at 885; 1990 Survey, supra note 7, at 1188-91 (discussing cases decided in past years and briefly discussing the analytic framework for the right to counsel for parties in dependency proceedings); Michael J. Dale, The Right to Counsel in Dependency Proceedings, Florida Continuing Legal Education Chapter (available currently through the Nova Law Review and forthcoming from CLE).
136. See Davis v. Page, 714 F.2d 512 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984); Potvin v. Keller, 313 So. 2d 703 (Fla. 1975) (setting certain criteria pursuant to the Ninth Circuit opinion in Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) (to determine whether appointed counsel is required)).
137. 573 So. 2d 442 (Fla. 2d Dist. Ct. App. 1991) (interestingly, the appellant
manded an order adjudicating the appellant’s son dependent because the trial court failed to advise the mother of the right to counsel at any point during the dependency proceeding. In *Interest of J.G.*, the appellate court affirmed a trial court order refusing to terminate parental rights and resetting the case for a new dispositional hearing because of the delay by the state in advising the indigent parents of their right to counsel in the earlier dependency proceeding. Under Florida law, HRS is also obligated to advise the parent of his or her right to counsel.

Where parents retain counsel themselves in dependency proceedings, they may, in only very limited situations, seek payment of the attorney’s fees from the state. This issue arose in *Interest of A.C., K.C., & J.B., Jr.* HRS commenced a dependency proceeding which resulted in a court declaration that one child was dependent based upon the parents’ stipulation to that fact and that the other two children should return to their parents. Subsequently, the court held HRS and the child’s protective investigator jointly and severally liable for the parents’ attorney’s fees. The Second District Court of Appeals held that the statutory provision governing the award of attorney’s fees required that “the suit must be so clearly devoid of merit based on the facts or the law as to be completely untenable.” The court held that merit is determined at the point the claim is initially presented, and that there must be a showing that the party made a reasonable effort to investigate the claims before filing suit. Applying this test, the court held that the award of fees could not be sustained because initially there was a meritorious claim and HRS had made a reasonable investigation.

Nor does a child possess an absolute constitutional right to counsel in a dependency proceeding. However, because of its participation in the Federal Child Abuse Prevention Act of 1974, Florida provides for a

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139. *Id.* at 696. The appellate court described the delay as “outrageous.”
142. *Id.* at 884.
143. *Id.* at 885 (citing FLA. STAT. § 57.105(1) (Supp. 1990); Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501, 505 (Fla. 1982)).
144. *Id.*
guardian ad litem program to act on behalf of children in dependency
proceedings.\textsuperscript{146} A combination of Florida statutes, Florida Rules of Ju-
venile Procedure and an unreported Florida Supreme Court order de-
fine the role of the guardian ad litem and lawyer if appointed as attor-
ney guardian ad litem.\textsuperscript{147}

The cases of \textit{HRS v. Cole}\textsuperscript{148} and \textit{Brevard County v. Hammel},\textsuperscript{149} involved issues of payment of guardian ad litem attorney's fees. \textit{HRS v. Cole} was a dependency proceeding which emanated from an underlying
divorce. When a custody dispute was consolidated with dependency
proceedings, the juvenile court entered an order appointing the district
guardian ad litem program on behalf of the child. It then asked the
program to appoint a specific guardian ad litem which was done.
Thereafter, apparently because the mother defied a visitation order, the
juvenile court on its own motion appointed a lawyer as attorney guardian
ad litem for the child and ordered him to locate the youngster.\textsuperscript{150}
Then, the director of the local guardian ad litem program filed a peti-
tion stating that the program itself had appointed a lawyer as “pro
bono attorney” for the guardian ad litem program and asked that this
lawyer be allowed to attend depositions and that his fees to attend
them be paid by the court. Later both the attorney guardian ad litem
for the child and the attorney for the guardian ad litem program filed
motions for payment of attorney's fees.\textsuperscript{151} The trial court ordered the
county to pay the attorney guardian ad litem's fees and HRS to com-
pensate the guardian ad litem program’s attorney. HRS appealed.\textsuperscript{152}

After discussing the history of Florida’s guardian ad litem pro-
gram, the appellate court found, first, that the court could not appoint
the guardian ad litem program and ask it to choose a specific guardian.
Rather, the court should receive a list of qualified persons from the
program from which the court shall appoint a guardian ad litem.\textsuperscript{153}
Second, the appellate court could find no authority for obligating HRS

\begin{footnotes}
\item 148. 574 So. 2d 160 (Fla. 5th Dist. Ct. App. 1990).
\item 149. 575 So. 2d 772 (Fla. 5th Dist. Ct. App. 1991).
\item 150. \textit{Cole}, 574 So. 2d at 161.
\item 151. \textit{Id.} at 162.
\item 152. \textit{Id.}
\item 153. \textit{Id.} at 163.
\end{footnotes}
to pay the attorney's fees for the guardian ad litem program's counsel because HRS has no statutory responsibility for operating the guardian ad litem program. The court distinguished earlier decisions which held that HRS could be responsible for payment of attorney's fees to a guardian ad litem attorney appointed pursuant to the Florida statute. In fact, the guardian ad litem program is operated through the Office of the State Administrator, a part of the supreme court and not by HRS.

_Brevard County v. Hammel_ concerned a far simpler matter. The trial court had entered an order granting an attorney guardian ad litem's motion for an order compensating him the day after his motion was filed and without providing an opportunity to the county to be heard in opposition. The court granted the county's writ of certiorari, quashed the order and remanded the case for further proceedings. Significantly, the court did not reach the issue of whether HRS or Brevard County was the appropriate entity to pay the attorney's fees assuming the county had been given adequate notice and opportunity to be heard.

More important than the issue of who pays the attorney guardian ad litem is the question of the proper role of the guardian ad litem in a dependency proceeding. There is a growing body of case law on the subject. The most recent case is _In re J.M. and R.M._ There the guardian ad litem appealed from an order denying the guardian's petition for dependency and alternative motion for rehearing. The case began when an HRS child protection investigator filed an affidavit requesting detention of the children and thereafter filed a dependency petition on the basis of information from a physician that one of the children had experienced significant physical trauma. The court then appointed a guardian ad litem nominated by the local guardian ad litem program to represent the child's interests. At the adjudicatory

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155. _Hammel_, 575 So.2d at 773.

156. The guardian ad litem also plays an important role in termination of parental rights proceedings. See footnotes 148-65 and accompanying text in this article.


159. _Id._ at 821. It is interesting to note that at the adjudicatory hearing HRS, the parents, and the _guardian ad litem_ were represented by separate counsel.
hearing, the court found that HRS had failed by a preponderance of the evidence to prove dependency.

Approximately two weeks later, the guardian ad litem filed a petition for dependency and, in the alternative, a motion for new hearing on the basis of a statement made by one of the children to an adult care-giver at a residential facility. The guardian ad litem argued that HRS had been aware of this statement, but had not advised the guardian ad litem of it. The guardian argued that a separate party's notice to HRS or its agents does not constitute notice to the guardian. The trial court rejected both arguments by finding that the evidence was not newly-discovered and attributed HRS' knowledge to the guardian. Treating the motion for a new hearing as a motion for rehearing, the trial court denied it as not timely filed. It then dismissed the guardian's petition for dependency.

The appellate court found that the guardian ad litem functions independent of, and has separate party status from, HRS in a dependency proceeding. The appeals court also noted that the guardian ad litem program is administered by the Office of the State Administrator under the supervision of the supreme court, whereas HRS is a separate administrative agency. The court then held that pursuant to Florida Statute section 39.404(1), the guardian ad litem is a person who may commence a dependency proceeding. Pursuant to discovery rules, the guardian also was entitled to learn from HRS the names and addresses of all persons who might have relevant information as well as obtain statements given to HRS by these persons. Because HRS failed to provide discovery, the information constituted newly-discovered evidence upon which the guardian, as an independent party, was entitled to file either a petition for dependency or a motion for a new hearing. The appellate court reversed and remanded to consider the newly-dis-

160. Id.
162. Id. This case raises the interesting issue of who then should be paying guardians ad litem. Some of the older case law suggests that HRS can be made to pay apparently because of Florida's funding under the Federal Adoption Assistance Act the flow of which funds passes through HRS.
163. Fla. Stat. § 39.404(1) (Supp. 1990) provides in relevant part that "any . . . person who has knowledge of the facts alleged or is informed of them and believe that they are true, may file a dependency petition."
covered evidence and such other evidence as deemed necessary to de-
cide the dependency issue.165

B. Procedural Issues

Confidentiality in dependency proceedings and the public's right to
know raises thorny constitutional problems. Two cases decided recently
elucidate the issues. In Florida Publishing Co. v. Brooke,166 a Jackson-
ville newspaper's reporter asked the First District Court of Appeal to
review an order of the circuit court in Duval County which prohibited
them from publishing the contents of a letter from a licensed psycholo-
gist in a dependency proceeding.167 The appellate court granted the
petition and quashed the order for three reasons. First, it interpreted
chapter 39.408(2)(c) which allows a trial court to close a dependency
proceeding in the court's discretion and in certain proceedings man-
dates that they be closed.168 It held that this confidential proceedings
section could not reach the letter which was no longer part of the pro-
ceedings. Second, it held that Florida's statutory provision governing
the maintenance of court records by the clerk did not provide authority
for the trial judge to restrain publication because the letter was not a
court record as defined in the relevant statute.169 Third, it found that
the judge's order constituted prior restraint in violation of the newspa-
per's rights under the First Amendment to the United States Constitu-

165. Id. at 823.
167. Id. at 844. The letter which the newspaper wished to publish came from a
psychologist, was sent to an HRS official and was sharply critical of HRS actions and
its employees. Copies of the letter were forwarded to the court, the attorney-guardian
ad litem for the child and through the court to other counsel as record. Ultimately, the
child's mother gave a copy of the letter to the newspaper reporter.
168. Id. at 845 citing FLA. STAT. § 39.408(2)(c) (Supp. 1990) which provides in
relevant part:

(c) All hearings, except as hereinafter provided, shall be open to the pub-
lic, and no person shall be excluded therefrom except on special order of
the judge, who, in his discretion, may close any hearing to the public when
the public interest or the welfare of the child, in his opinion, is best served
by so doing. All hearings involving unwed mothers, custody, sexual abuse,
or permanent placement of children shall remain confidential and closed to
the public. Hearings involving more than one child may be held simultane-
ously when the several children involved are related to each other or were
involved in the same case. The child and the parents or legal custodians of
the child may be examined separately and apart from each other.
169. Id. at 845 (citing FLA. STAT. § 39.411 (Supp. 1990)).
tion and article I, section 4, of the Florida Constitution. The court could find no facts which would overcome the presumptive unconstitutionality of prior restraint.\textsuperscript{170}

The issue of confidentiality came up in an entirely different context in \textit{Brown v. Pate}.\textsuperscript{171} In that case, a parent moved to disqualify the judge on grounds which included a claim that the judge had opened the dependency proceedings to members of the news media contrary to chapter 39.408(2)(c), the same confidentiality provision which was involved in the \textit{Brooke} case. The father argued that trying the case in the media was not in the best interests of the children, that the court's order making the matter public was received by the media prior to the father's counsel, that the court had made comments about its concern about allowing the children to have access to their father, and that the court had made comments implicating the father in the homicide of his wife, for which homicide he later had been found not guilty in a criminal case.\textsuperscript{172} The appeals court rejected all of the grounds for recusal and specifically found that the court's decision to open the hearing to the media was not a basis for disqualification.\textsuperscript{173}

A procedural case with significant overtones is \textit{HRS v. D.H.}\textsuperscript{174} A boy had been found dependent because the mother was hospitalized and comatose, the father was in jail, and a legal guardian turned the child over to HRS because that person could no longer care for him.\textsuperscript{175} In a dependency proceeding, the court ordered the care, custody and control of D.H. to be placed in HRS. Six months later, when HRS filed its standard petition for review and the court learned that, in the interim, the child had been charged with homicide and jailed, the court vacated the order of dependency and left the child in the total care of the jailers.\textsuperscript{176}

The appellate court noted that Florida law gives the court the option to terminate jurisdiction over the child after the statutory six-


\textsuperscript{171} 577 So. 2d 645 (Fla. 1st Dist. Ct. App. 1991).

\textsuperscript{172} \textit{Id.} at 646-47.

\textsuperscript{173} \textit{Id.} at 647. Whether the ruling was correct as a matter of law was not before the court.

\textsuperscript{174} 575 So. 2d 1382 (Fla. 5th Dist. Ct. App. 1991).

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.} at 1382-83.
month period of review. It held that the court also had authority to continue jurisdiction and keep the child in the care of HRS. Then, in pointed language, it said:

All children need someone to look after their welfare and to be concerned for them. That need does not end upon, nor is it diminished by, incarceration. A good argument could be made that this child now needs someone to look after him more than ever; someone other than just a lawyer, who will only look after his legal needs.

Finding that the trial court had abused its discretion in refusing to accede to the wishes of HRS, which would have continued to care for the child, the appellate court reversed the order terminating jurisdiction and remanded for further proceedings.

C. Adjudicatory Issues

Challenges to the trial court’s findings of fact are regularly litigated in the appellate courts. A rather frustrated appellate bench continues to see cases in which the trial court fails to state the facts upon which a dependency finding is made as required by Florida statute. As in the case of delinquency proceedings, where the trial court fails to articulate the basis for a transfer to adult court or sentence as an adult, the failure to state the facts upon which a dependency finding is made is reversible error. However, recent appellate cases also suggest that the courts of appeals may go beyond the statutory mandate and decide whether, irrespective of the failure to make factual findings, evidence exists in the record to support the determination of dependency. Luszczyk v. HRS is a typical case. The trial court removed

177. See id. at 1383 (citing Fla. Stat. § 39.453(1)(b) (Supp. 1990)).
179. D.H., 575 So. 2d at 1383.
180. Id.
184. See Interest of T.S., 557 So. 2d 676, 677 (Fla. 2d Dist. Ct. App. 1990);
a youngster from the mother's home and placed the child in the temporary custody of the paternal grandparents without making written findings of fact. The appeals court simply found that the failure to make the findings was reversible error, there being no record. 186

In *Interest of D.H. and M.H.*, 187 the issue was whether the Florida Rules of Juvenile Procedure required findings of fact in addition to the conclusion that the child was not dependent in a trial court order which denies a dependency petition - the opposite of the usual issue on appeal which involves the failure to make written findings of dependency. The Fourth District Court of Appeal affirmed the trial court's order denying the petition for an adjudication of dependency, but certified the question to the Florida Supreme Court in light of its finding that Rule of Juvenile Procedure 8.650 only speaks to findings of fact in the case of the determination of dependency. 188

In *Williams v. HRS*, 189 the court was also faced with an order of adjudication of dependency which failed to contain the statutory-mandated findings. Similarly, the order of disposition failed to comply with requirements related to the "reasonable efforts" that HRS must make to prevent or eliminate the need for removal of a child from his home. 190 The court found that the failure to comply with the statutory requirements was reversible error. 191 It also commented that the dispositional order could not be salvaged because it neither tracked the facts of the dependency petition nor referred to a previous order which contained the proper findings. 192 The court's explanation of the need for

1990 Survey, supra note 7, at 1193 (criticizing this approach).


186. *Id.* at 762. The opinion is silent as to why the court did not look to the record for factual findings. Perhaps the answer is that the court also found other reasons to reverse. The court noted the failure to hold a hearing on the evidentiary issue of the trustworthiness of the child's out of court statement to two psychologists pursuant to Florida Statute § 90.803(23). The appellate court also reversed on the basis that the trial court committed error by allowing a psychologist, HRS caseworkers and the guardian ad litem to testify as to their opinions that the child was telling the truth.


188. *Id.* at 762.

189. 568 So. 2d 995, 997 (Fla. 5th Dist. Ct. App. 1990).

190. *Id.*; see Fla. STAT. § 39.41(4) (Supp. 1990).

191. William, 568 So. 2d at 997. In this particular case, the question was whether the parents had abused their child through excessive use of corporal punishment.

192. *Id.* (relying upon the holdings in Castellanos v. HRS, 545 So. 2d 455 (Fla. 3d Dist. Ct. App. 1989)).
finding of facts is particularly illuminating and contains reasoning similar to that expressed by this writer in the past. The court commented that irrespective of the statutory obligation to make findings, "it is difficult, if not impossible, to review the basis upon which the trial court arrived at its determination of dependency in the absence of those findings." The court recognized that the legislative mandate to make specific findings "can be overdone and are burdensome." But, as the court added, the requirement seems logical, and the findings are useful to assist the parties and others to understand the court's reasoning for finding dependency and its plan for remedial action. It also creates a record for the court to look back to in subsequent proceedings, aids a successor judge, and allows the court to make later decisions without having to review the entire record.

In *Hardy v. HRS*, Florida's Fifth District Court of Appeals also was faced with an appeal from an adjudication and disposition of dependency in which the trial court failed to restate the factual basis for the court's finding of dependency in its dispositional order. The appellate court in *Hardy* rejected this argument as not violative of chapter 39.409(3) because the trial court had made the proper factual findings when it entered its initial order after the adjudicatory hearing. Judge Peterson, concurring, distinguished the facts from *Williams v. HRS* and added that he believed the better practice would be to place the findings in order of the court or incorporate them by reference in later orders.

In *Interest of D.G. and P.G.*, the court did not find dependency after a two-day hearing but withheld adjudication. The parent appealed by arguing that a finding of no dependency and a withholding of adjudication of dependency are mutually exclusive. The appellate court agreed relying upon Florida Statute chapter 39.409 which governs orders of adjudication. If the trial court wished to order the parents'
home placed under the supervision of HRS as a disposition, there must have been a dependency finding with a decision that no other action than home supervision was required. In this case, the finding of the trial court was inconsistent with this order. Therefore, the appellate court remanded.\(^{203}\)

Finally, in *Interest of S.W., E.J. and L.M.*,\(^{204}\) the issue was whether a "single" incident allegation that on one day a mother repeatedly hit one of her children with a belt constituted abuse.\(^{205}\) The evidence showed that the mother repeatedly hit the child with the belt, that the child was taken to the Child Protection Team doctor under contract with HRS later the same day, and that the physician found evidence of recent bruises including some to the face which were consistent with belt marks. The appellate court noted that the marks on the face also might have been consistent with a fall which the mother claimed the child suffered when the youngster ran away after the incident.\(^{206}\) Significantly, no treatment was required for any of the child's injuries. The appellate court reversed the finding of dependency as to the child who was struck and two other siblings who, on the basis of the language of the Florida statute, were at risk. The statute states that "abuse means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause a child's physical, mental, or emotional health to be significantly appear impaired."\(^{207}\) The appellate court, after finding that the facts did not match the statutory definition, commented on the underlying events. Apparently, the mother awoke to find one child attempting to feed a younger child a mixture of bleach and baby oil. The mother then spanked the daughter for the behavior.\(^{208}\) The court recognized that the reaction may have been excessive and that the mother may have been agitated. It found that while it did not condone the reaction, the actions of the mother were

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\(^{203}\) D.G., 568 So. 2d at 1001.
\(^{204}\) 581 So. 2d 234 (Fla. 4th Dist. Ct. App. 1991).
\(^{205}\) Id. at 235; see FLA. STAT. § 39.01(2) (Supp. 1990).
\(^{206}\) S.W., 581 So. 2d at 235.
\(^{207}\) FLA. STAT. § 39.01(2) (1989) (emphasis added).
\(^{208}\) S.W., 581 So. 2d at 235.
not sufficient to warrant a finding of dependency.\footnote{209}

D. Child Abuse Reporting Issues

Mandatory reporting of child abuse and neglect is governed by Florida Statute chapter 415.054.\footnote{210} In addition to listing the persons who must report suspected abuse or neglect, establishing a central abuse registry and tracking system, establishing a procedure to investigate the reports, the statute sets up certain due process procedures whereby the alleged perpetrator may challenge the report.\footnote{211} Two recent cases involved such efforts.

In \textit{D.J. v. HRS},\footnote{212} a parent appealed from a final order by HRS denying a request to have her name expunged from the child abuse registry. HRS investigated a report of child abuse involving appellant's four-year-old son. An HRS investigator had seen a scratch on the child's face and a bruise on the child's neck. The mother told the investigators two days earlier she had slapped the child for throwing objects and not minding her. The appellate court overruled the hearing officer's conclusions for several reasons. First, the officer did not make any specific findings of excessive corporal punishment as required by the law.\footnote{213} Second, the court rejected the hearing officer's finding that the evidence created a rebuttable presumption of abuse. The court viewed that standard as inconsistent with its own prior decision in \textit{B.R. v. HRS}.\footnote{214} The court took the position that whether corporal punishment is excessive must be shown in each instance by "competent, substantial evidence," and all relevant issues presented must be considered "with-
out resort to arbitrary presumptions fixed by the passage of time." 215

Finally, in *M.O. Mc.C. v. HRS*, 216 a stepmother of a child also sought review of an HRS order which denied a request to expunge her name from the child abuse registry. The court reversed because it also found that there was no competent, substantial evidence to support the hearing officer's conclusion that there was excessive corporal punishment. However, in this case, the appellate court's reversal was based solely on the fact it viewed the facts as not constituting excessive punishment. At issue was paddling of a step child pursuant to a code of discipline which had been set up for the youngster by his father and step mother with the aid of an outside professional. The court rejected the significance of the fact that the paddle broke during the incident. It had previously broken and had been repaired with common glue. The court found no evidence of extraordinary force. The court disagreed with the conclusion that the parent did not exercise sound judgment and found no deviation by the parent from the code of discipline nor that an inordinate number of hits were used. 217

While the appellate cases in the dependency field often involve horrific physical and psychological injury to children, occasionally a case appears which demonstrates that not all claims are as they appear. One such case is *Interest of C.G. and C.B.* 218 C.G. complained of vaginal irritation and her mother bought and applied an over-the-counter ointment. Although the treatment appeared at first to be working, when the irritation persisted for two weeks the mother took the child to the doctor. The physician diagnosed trichomoniasis which is usually, but not always, sexually transmitted. 219 The family cooperated with the physician in reporting the diagnosis to HRS. Because the family was

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217. *Id.* at 1355. For a detailed summary of the legislative scheme for prevention of abuse and neglect employing the state abuse registry, see *B.R. v. HRS*, 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989).
218. 570 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1990).
219. Trichomonal vaginitis is an infection of the vagina caused by Trichomonas, a tiny one-celled organism. Symptoms of the infection are similar to those of yeast infections . . . , and the two infections can occur together. However, the discharge of trichomonas vaginitis is usually heavy, unpleasant smelling and greenish-yellow in color. Trichomonal vaginitis is common and not thought to be dangerous, but it can be irritating and painful. And because the disease is usually transmitted through sexual intercourse, it is likely that the sexual partner also has it. *The American Association Family Medical Guide* 602 (1982).
anxious to learn what caused the infection, family members were tested voluntarily with negative results. Then, they sought a second opinion by taking the child to a board certified gynecologist, who disputed the diagnosis of trichomonas. HRS commenced a dependency proceeding based on medical neglect. There were no allegations of sexual abuse. The basis for the petition appeared to be the fourteen-day treatment with an over-the-counter medication. Describing the evidence as bureaucratic overkill, the Fourth District explained that the trial court removed both children from their home including a child who was never alleged to have been neglected. They were placed in foster care for a long period of time. Upon returning the children to their home, the juvenile court withheld adjudication of dependency and ordered protective supervision of both children with a guardian ad litem and a direction for family therapy. In what may best be described as an understatement, the appellate court concluded, “surely seeking medical attention when it appears that an over-the-counter medication is not curing” without more “does not support a finding of child neglect and the separation of children from their parents.”

IV. TERMINATION OF PARENTAL RIGHTS

*Padgett v. HRS* is a major decision by the Florida Supreme Court. It holds that the prior termination of a parents' rights in one child can support the severing of the parents' rights in another child. *Padgett* was an appeal from a Fifth District Court of Appeal decision which had initially certified the question of prospective abuse, neglect or abandonment. The Florida Supreme Court rephrased the question to determine whether a prior termination as to one child could be used to sever the parental rights to a different child.

A review of the facts helps place the court's detailed legal analysis and decision in context. The mother and father appealed from an order terminating their parental rights to their child, W.L.P. Two years before W.L.P. was born, five children born to the father during a previous marriage were committed to HRS for adoption. These children had been found to be dependent based upon extreme neglect by the father.

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220. *C.G.*, 570 So. 2d at 1137.
221. *Id.*
222. 577 So. 2d 565 (Fla. 1991).
223. See *Padgett v. HRS*, 543 So. 2d 1317, 1318 (Fla. 5th Dist. Ct. App. 1989).
224. 577 So. 2d at 566.
The year before the birth of W.L.P., the mother gave birth to a child that was promptly placed in HRS custody and was permanently committed for adoption. It is unclear from the opinion whether a finding of dependency was ever made as to this child. Two days after W.L.P. was born, HRS filed a petition for detention of W.L.P. and the court subsequently entered an order of dependency finding both parents unfit. The parents and HRS signed a performance agreement which authorized the return of W.L.P. if the parents could demonstrate sufficient parenting ability after undergoing psychotherapy and taking parenting classes. Although the opinion does not say so, it would appear that the return of the children to the parents became impossible and the agency then sought to terminate their parental rights. While the termination proceeding was pending, two additional events occurred. The mother staged a bizarre fake rape of herself and sexually abused a four-year-old girl who was in her care. The circuit court entered an order permanently terminating parental rights and freeing W.L.P. for adoption. The parents appealed claiming that the statute did not allow for termination of parental rights based upon prospective mistreatment, that such a test was speculative, that it involved a fundamental liberty interest decision which must be left to the legislature, and that under the facts the evidence was insufficient to make a finding of prospective neglect.

The Florida Supreme Court refocused the issue on whether the prior termination of parental rights in other children could serve as grounds for permanently severing rights in the present child. It correctly sought to answer the question based both on statutory and constitutional grounds. First, it held that the Florida Juvenile Justice Act provides statutory authority for this kind of decision. The court pointed to chapter 39.464 which, until it was amended in 1990, provided that termination of parental rights could be based upon severe or continuous abuse or neglect of the child before the court “or other children.”
The court next held that prior case law employed public policy grounds to uphold the practice of terminating parental rights based upon evidence of neglect of children other than the one before the court.\textsuperscript{231} The public policy rationale rejects the requirement that a child suffer actual abuse or neglect before it can be permanently removed from a caretaker who has seriously mistreated others and cannot be rehabilitated.\textsuperscript{232}

Finally, the Florida Supreme Court held that the practice does not violate the constitutionally protected liberty interests of the natural parents. The court was clear, however, in its assertion that the parents’ familial interest, which includes raising children free from control by the state, is both long-standing and fundamental.\textsuperscript{233} The balance to be struck, according to the Florida Supreme Court, is in favor of the child’s “entitlement to an environment free of physical and emotional violence at the hands of his or her most trusted caretaker.”\textsuperscript{234} The court found that the state has a compelling interest in protecting the

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offering a performance agreement or permanent placement plan to the parents . . . .

(b) The state may petition under this subsection only under the following circumstances:

2. Severe or continuous abuse or neglect of the child or \textit{other children} by the parent that demonstrates that the parent’s conduct threatens the life or well-being of the child regardless of the provision of services as evidenced by having had services provided through a previous performance agreement or permanent placement plan.

This statutory section has since been amended but still includes the provision for terminating parental rights based upon abuse or neglect of other children. That section reads as follows:

(3) \textit{Severe or Continuing Abuse or Neglect}.

The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life or well-being of the child regardless of the provisions of services. Provision of services is evidenced by having had services provided through a previous performance agreement, permanent placement plan, or offer of services in the nature of a case plan from a child welfare agency. A current performance agreement or placement plan need not be offered to the parent or parents, and the petition may be filed at any time before a performance agreement or permanent placement plan has been accepted by the court.

231. \textit{Id.} at 569-70.
232. \textit{Id.} at 570.
233. \textit{Id.}
234. \textit{Padgett,} 577 So. 2d at 570.
children against clear threats of abuse, neglect or death. The court then set up a multi-part test for termination based upon evidence of abuse or neglect of other children. First, the state must make a showing by clear and convincing evidence. Second, it must show that reunification with the parent "poses a substantial risk of significant harm to the child." Third, the evidence may be abuse or neglect of a different child. Fourth, termination of parents' liberty based rights to their children must be the least restrictive means of protecting the child from serious harm. Fifth, in most cases HRS must show its good faith effort to rehabilitate the parents and reunite the family through a performance agreement or other plan for the present child. Sixth, lack of financial resources cannot support permanent termination of parental rights. Finally, the parent's intelligence is ordinarily not relevant to the inquiry.

Padgett is defensible as a matter of statutory analysis, public policy, and constitutional law. The termination statute can properly be read to allow for a transfer of neglect such that the neglect of one child will serve as the basis for neglect of a second. Public policy historically obligates the state, as parens patriae, to protect the interests of children. That protection, when balanced against constitutional rights of familial integrity, weighs in favor of protecting the rights of children over those of parents, but only when there is compelling need to do so. Thus, the Florida Supreme Court's test for the grounds under which the termination can occur, strikes a proper balance between the interests of parents and children.

There are, however, two problems with the opinion. One is more significant than the other. First, by reframing the question to be whether neglect of one child can form the basis for termination of parental rights to another, the court fails to fully acknowledge and defend the fact that it is still upholding the right of the trial court to predict that neglect will occur in the future. Of course, Padgett is not a case where there is evidence of either present or past neglect of the child before the court and the court is faced with deciding whether it will occur in the future. Rather, the court is allowing the fact finder to decide whether a particular child will be abused and neglected in the

235. Id. at 571.
236. Id.
237. Id. (citing Fla. Stat. § 39.464(5) (Supp. 1990)).
238. Id.
future based upon evidence of abuse of another child in the past. That is still clearly a predictive process. The supreme court should acknowledge it as such and justify it. Second, on a more technical level, the supreme court might have employed different phraseology describing this kind of decision-making as involving "transferred neglect." Such language more precisely defines what the supreme court was holding.

Padgett demonstrates the serious nature of termination proceedings. Among the other elements necessary to be proven at a termination of parental rights hearing is that the parent was informed of his or her right to counsel in the dependency proceedings. In Belflower v. HRS, the appellate court reversed the finding of termination of parental rights based upon the clear failure of proof as to advising the parents of their right to counsel at the dependency proceeding. However, Belflower is significant because it also held that, even when a petition for termination of parental rights is denied, the court may still decide whether the child shall remain in foster care or be returned to the parent with or without protective supervision. The justification for such consideration is the best interest of the child. Furthermore, in that particular case, because the parent failed to appeal from the adjudication of dependency within thirty days as provided by Florida law, the adjudication of dependency remained standing although it was not a valid basis for termination of parental rights. Thus, the trial court also had continuing jurisdiction in light of the outstanding dependency adjudication to decide whether the youngster required further supervision or foster care or might be safely returned home.

In dicta which seems at odds with the Florida statute, the appellate court commented that because there was no fundamental constitutional right to counsel at a dependency proceeding, the underlying dependency adjudication is not void ab initio for failure to advise the

240. See Schall v. Martin, 467 U.S. 253 (1984); (upholding the right to predict future behavior in the context of pre-trial detention of juveniles and adults as not violative of the individual's constitutionally based liberty interests).
243. Id. at 828 (citing Fla. Stat. § 39.468(2) (Supp. 1990)).
244. Id.
246. Belflower, 578 So. 2d at 829.
247. Id. at 828.
parents of their right to counsel. The problem with the court's assertion is that the second proposition does not follow from the first. Florida, by statute, requires that the parents be advised of the right to counsel in a dependency proceeding. What the Florida law does not provide is the appointment of counsel if the parent is indigent. Thus, if the court and HRS fail to advise the parent of his or her right to counsel in a dependency proceeding, even though the parent may have to pay for the lawyer, if the parent appeals in a timely fashion, the adjudication of dependency will fall. This is not a matter of constitutional law but a matter of compliance with the Florida statute. Although the dicta is suspect, the court in Belflower was correct in holding that a dependency proceeding is not void ab initio when a parent is not advised of the right to counsel in a dependency proceeding. It remains up to the parent to challenge that failure on appeal. Finally, the right to counsel free of charge for a parent in a dependency proceeding under Florida law is to be determined on a case by case basis employing the test the Supreme Court set out in Potvin v. Keller.

The important question of what individual may commence a proceeding to terminate parental rights was raised recently in Norris v. Spencer. A child had been placed in the care of the appellant caretakers by the child's natural mother. The child was subsequently declared dependent and the caretakers were appointed custodians of the child. The natural mother entered into a case plan with HRS and then asked the court to return custody of the child. The parents' motion was denied and thereafter, the custodians filed a petition for severance of parental rights. The mother moved to dismiss on grounds that the custodians lacked standing to commence termination of parental rights proceedings. The motion was granted and the custodians appealed. The appellate court held that HRS is not the only party entitled to bring a petition for termination of parental rights. In fact, the court stated that the ability to protect a child from unreasonable action or inaction by

248. Id. at 829.
250. 313 So. 2d 703 (Fla. 1975). In Potvin, the Florida Supreme Court set up a five-part test to determine whether a parent should be provided with counsel in a dependency proceeding. They are: (1) the potential length of the parent/child separation; (2) the degree of parental restriction on visitation; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; (5) and the complexity of the proceedings in terms of witnesses and documents.
251. 568 So. 2d 1316 (Fla. 5th Dist. Ct. App. 1990).
252. Id. at 1317.
HRS is facilitated by the ability of third parties to commence petitions to terminate parental rights. It therefore reversed. 253

V. Conclusion

The appellate courts seem to have had little difficulty in interpreting the Juvenile Justice Reform Act of 1990 in the cases that have come before them. The appellate courts continue to express concern about the legislature's failure to properly fund delinquency programs. And the appellate courts continue to upbraid the trial courts for their failure to comply with basic statutory applications, both in the delinquency and dependency areas. It remains to be seen whether the trial courts will at long last listen to appellate judges. Padgett is a major decision by the Florida Supreme Court in the dependency field, having finally answered the question of what constitutes prospective or transferred neglect and how it should be tested. While the decision may not be quite as precise as it could be, it does resolve the issue in this jurisdiction.

253. Id.; see also Interest of C.B., 561 So. 2d 663 (Fla. 5th Dist. Ct. App. 1990); Interest of J.M., 569 So. 2d 1287 (Fla. 4th Dist. Ct. App. 1990); Interest of J.R.T., 427 So. 2d 251 (Fla. 5th Dist. Ct. App. 1983).