Survey of Florida Law: Juvenile Law

Michael J. Dale

Copyright ©1999 by the authors. Nova Law Review is produced by The Berkeley Electronic Press (bepress). http://nsuworks.nova.edu/nlr
Survey of Florida Law: Juvenile Law

Michael J. Dale

Abstract

"When children appear, we justify all our weaknesses, compromises, snobberies, by saying: It’s for the children’s sake."
sonam jurisdiction.218

The majority explained, however, that the court had never had in
personam jurisdiction over the government. First, the forfeiture statute
under which the government had moved did not confer in personam
jurisdiction on the court.219 Second, the government had specifically de-
clined to consent to the exercise of in personam jurisdiction.220 Al-
though the dissenters argued that the court conferred in personam
jurisdiction on the court when it invoked its assistance by filing
the initial complaint, the majority rejected this position as being con-
trary to precedent, which the majority read as conferring in personam
jurisdiction only if the plaintiff seizes both the res and its owner.221

VIII. Conclusion

Shakespeare suggested that all the world is a stage. The just con-
cluded period provided Florida's international lawyers with innumera-
ble opportunities to perform, and they did, in the only place in the
country where, as the American Bar Association Journal put it during the
surveyed term, "the case of a lifetime is old news by the end of the
week."222

---

218. Id. at 1574 n.1.
219. Id. at 1575.
220. Id. at 1576.
221. Id. at 1576-77. It appears that we have seen the last of this case. Following
the en banc decision, the Eleventh Circuit turned down a request for an en banc re-
hearing. See 842 F.2d 339 (11th Cir. 1988). This, in turn, was followed by the United
States Supreme Court's refusal to grant the defendant's request for certiorari. See 108
This article will study the major reported opinions in both the juvenile justice and child welfare areas of juvenile law since January 1987. The survey is divided into three sections: Juvenile Delinquency, Dependency, and Status Offenses. The first section is devoted to a study of juvenile delinquency cases focusing on a series of opinions involving the issues of transfer to and sentencing of juveniles in adult court and a juvenile's waiver of counsel. The decision to waive, transfer or certify a juvenile charged with an act, which if committed by an adult would be a crime, to the adult courts is an extremely serious one because of the vastly more onerous penalties in the adult system. Indeed, over twenty years ago in Kent v. United States, the United States Supreme Court decided that basic due process protections applied to a child during the transfer process. Florida, by statute, has established a multi-faceted waiver and penalty system. This survey section will critically analyze the recent cases in this field.

Florida Statutes include abuse and neglect matters within the statutory definition of dependency. Section II of this article is a two-part review. First, it analyzes recent cases decided in the dependency area with specific reference to standards of proof problems. A second and equally significant part of the Florida Statutes relating to dependency govern termination of parental rights proceedings. Here, in compliance with recent federal legislation, the Adoption Assistance and Child Welfare Act of 1980, Florida's Department of Health and Rehabilitative Services (HRS) has been obligated to engage in a process known as permanency planning in an effort to either facilitate the return of children to their homes or secure other permanent placement. The survey will look at the termination of parental rights cases decided during the eighteen month period from January 1987 with specific emphasis on the cases interpreting permanency planning.

Section III of the article is an analysis of Florida's recently enacted "Child in Need of Services" statute. The Child in Need of Services provisions enunciate a new methodology for dealing with status offenders. Until January, 1988, this category of child, known generally as a status offender, was contained within the definition of dependent child. This section of the survey will compare the new statute to its predecessor and describe the changes and reasons for them.

II. JUVENILE DELINQUENCY

Sections 39.02(4) and 39.04(5) of the Florida Statutes contain a rather complicated set of procedures to determine whether a child should be tried in adult court, and if the child has been tried as an adult and convicted, whether the child should receive adult sanctions.

11. Id. §§ 39.42-447.
12. Id.
13. A status offender is usually defined as one who is beyond the control of his or her parents or who runs away, or does not go to school.
14. Fla. Stat. § 39.02(4) (1987) provides: Notwithstanding the provisions of § 743.07, when the jurisdiction of any child who is alleged to have committed a delinquent act is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age, with the same power over the child that the court had prior to the child becoming an adult. This subsection shall not be construed to prevent the exercise of jurisdiction by any other court having jurisdiction of the child if the child, after becoming an adult, commits a violation of law.
(a) If the court finds, after a waiver hearing, that a child who was 14 years of age or older at the time the alleged violation was committed and who is alleged to have committed a violation of Florida law should be charged and tried as an adult, then the court may enter an order transferring the case and certifying the case for trial as if the child were an adult. The court shall thereafter be subject to prosecution, trial, and sentencing as if the child were an adult but subject to the provisions of § 39.11(6).
(b) The court shall transfer and certify the case for trial as if the child were an adult if the child is alleged to have committed a violation of law.
This article will study the major reported opinions in both the juvenile justice and child welfare areas of juvenile law since January 1987. The survey is divided into three sections: Juvenile Delinquency, Dependency, and Status Offenses. The first section is devoted to a study of juvenile delinquency cases focusing on a series of opinions involving the issues of transfer to and sentencing of juveniles in adult court and a juvenile's waiver of counsel. The decision to waive, transfer or certify a juvenile charged with an act, which if committed by an adult would be a crime, to the adult courts is an extremely serious one because of the vastly more onerous penalties in the adult system. Indeed, over twenty years ago in Kent v. United States, the United States Supreme Court decided that basic due process protections applied to a child during the transfer process. Florida, by statute, has established a multi-faceted waiver and penalty system. This survey section will critically analyze the recent cases in this field.

Florida Statutes include abuse and neglect matters within the statutory definition of dependency, Section II of this article is a two-part review. First, it analyzes recent cases decided in the dependency area with specific reference to standards of proof problems. A second and equally significant part of the Florida Statutes relating to dependency governs termination of parental rights proceedings. Here, in compliance with recent federal legislation, the Adoption Assistance and Child Welfare Act of 1980, Florida's Department of Health and Rehabilitative Services (HRS) has been obligated to engage in a process known as permanency planning in an effort to either facilitate the return of children to their homes or secure other permanent placement. The survey will look at the termination of parental rights cases decided during the eighteen month period from January 1987 with specific emphasis on the cases interpreting permanency planning.

Section III of the article is an analysis of Florida's recently enacted "Child in Need of Services" statute. The Child in Need of Services provisions enunciate a new methodology for dealing with status offenders. Until January, 1988, this category of child, known generically as a status offender, was contained within the definition of dependent child. This section of the survey will compare the new statute to its predecessor and describe the changes and reasons for them.

II. JUVENILE DELINQUENCY

Sections 39.02(4) and 39.04(5) of the Florida Statutes contain a rather complicated set of procedures to determine whether a child should be tried in adult court and, if the child has been tried as an adult and convicted, whether the child should receive adult sanctions.

4. Because last year's Survey did not contain a study of Florida juvenile law, this survey will cover all of 1987 as well as the period through September 30, 1988.


8. Under FLA. STAT. §§ 39.01(7), (10) (1987) a dependent child is anyone under eighteen years of age who has been abandoned, abused or neglected, surrendered to the Department of Health and Rehabilitative Services or other licensed child-placing agency for adoption, or who has been voluntarily placed and a performance agreement has expired and the parents have failed to substantially comply with the agreement.

A child may be tried as an adult in Florida after a waiver hearing, through direct filing in the adult court by information or indictment, or upon the child's own motion. The state attorney may file a motion seeking transfer of a child from the juvenile court for criminal prosecution in the adult court if the child was fourteen years of age or older at the time of the alleged crime and if the child had previously been adjudicated delinquent for one of a series of violent crimes against persons. Further, the child must be currently charged with a second or subsequent such offense. A child may be filed against directly by indictment in the adult court regardless of age if he or she is charged with a violation of law punishable by death or life in prison. The state attorney may directly file an information in the adult criminal court charging a sixteen or seventeen year old child with a criminal offense, "when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed." At the waiver hearing the court shall consider eight criteria before granting transfer to adult court. Once the child has been tried as an adult and convicted of a criminal offense, the court is required to determine whether the child should receive adult sanctions. Six criteria are to be considered in making this determination.

In West v. State, the Fourth District Court of Appeal was faced with two issues. One involved the sentencing statute for juveniles tried and convicted as an adult, and the other involved an evidentiary issue. The court partially reversed the trial court and remanded based upon the lower court's failure to make specific findings of fact and to state the reasons for the decision to impose adult sentences by referring to all six criteria in the statute. In West, the trial court failed to articulate in writing that it had considered and made a finding concerning the criterion relating to the sophistication and maturity of the child. Citing a list of prior appellate court opinions in Florida, the court vacated the sentence and remanded with directions to rebase sentence based upon all six criteria.

In the other issue before the court, the appellant child claimed that the trial court erred when it refused to allow him to cross-examine the state's principal witness concerning that person's involvement in a juvenile pre-trial intervention program in order to challenge that individual's credibility. The appellate court upheld the trial court's denial of the right to cross-examine because under the facts of the case the witness had successfully completed the intervention program two years before trial. Thus, there was no possibility that the charges could be reinstated, and the witnesses, therefore, had no motive to lie. Had the witness still been on probation at the time of trial the outcome would have been different.

enforcement agencies, and the court and prospects for adequate protection of the public. Id. § 39.09(2)(a)-(l).-8.
12. Id. § 39.09(1)-(6).
14. Appellate issues involving generic evidentiary issues are beyond the scope of this survey article unless the issue is unique to a juvenile case such as the situation in West.
16. Id. § 39.09(2)(a). The crimes include murder, sexual battery, armed or strong armed robbery, aggravated battery, and aggravated assault.
17. Id.
18. Id. § 39.02(3)(c).
19. Id. § 39.042(3)(e). (4).
20. These criteria include the seriousness of the offense to the community, whether the offense was committed in an aggressive violent or predatory manner, whether the offense was against persons or property, the prospective merit of the complaint, the desirability of trial and disposition of the entire offense in one court with the others alleged to have committed the crime, the sophistication and maturity of the child, the record and previous history of the child and previous contacts with HRS law.
A child may be tried as an adult in Florida after a waiver hearing, through direct filing in the adult court by information or indictment, or upon the child’s own motion. The state attorney may file a motion seeking transfer of a child from the juvenile court for criminal prosecution in the adult court if the child was fourteen years of age or older at the time of the alleged crime and if the child had previously been adjudicated delinquent for one of a series of violent crimes against persons. Further, the child must be currently charged with a second or subsequent such offense. A child may be filed against directly by indictment in the adult court regardless of age if he or she is charged with a violation of law punishable by death or life in prison. The state attorney may directly file an information in the adult criminal court charging a sixteen or seventeen year old child with a criminal offense, "when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed." At the waiver hearing the court shall consider eight criteria before granting transfer to adult court. Once the child has been tried as an adult and convicted of a criminal offense, the court is required to determine whether the child should receive adult sanctions. Six criteria are to be considered in making this determination.

In West v. State, the Fourth District Court of Appeal was faced with two issues. One involved the sentencing statute for juveniles tried and convicted as an adult, and the other involved an evidentiary issue. The court partially reversed the trial court and remanded based upon the lower court’s failure to make specific findings of fact and to state the reasons for the decision to impose adult sentences by referring to all six criteria in the statute. In West, the trial court failed to articulate in writing that it had considered and made a finding concerning the criterion relating to the sophistication and maturity of the child. Citing a list of prior appellate court opinions in Florida, the court vacated the sentence and remanded with directions to resentence based upon all six criteria.

In the other issue before the court, the appellant claimed that the trial court erred when it refused to allow him to cross-examine the state’s principal witness concerning that person’s involvement in a juvenile pre-trial intervention program in order to challenge that individual’s credibility. The appellate court upheld the trial court’s denial of the right to cross-examine because under the facts of the case the witness had successfully completed the intervention program two years before trial. Thus, there was no possibility that the charges could be reinvented, and the witnesses, therefore, had no motive to lie. Had the witness still been on probation at the time of trial the outcome would have been different.

enforcement agencies, and the court and prospects for adequate protection of the public. Id. § 39.09(2)(d)-(e). 21. Id. § 39.11(16). 22. 503 So. 2d 435 (Fla. 4th Dist. Ct. App. 1987). 23. Appellate issues involving generic evidentiary issues are beyond the scope of this survey article unless the issue is unique to a juvenile case such as the situation in Wear. 24. Fla. Stat. § 39.111(3)(c) (1987). 25. West, 503 So. 2d at 436 (citing Perez v. State, 501 So. 2d 192 (Fla. 5th Dist. Ct. App. 1987); Crissy v. State, 489 So. 2d 858 (Fla. 1st Dist. Ct. App. 1986); Cooper v. State, 465 So. 2d 1334 (Fla. 4th Dist. Ct. App. 1985); and Uphaw v. State, 464 So. 2d 1355 (Fla. 4th Dist. Ct. App. 1983)). 26. Id. at 436. The court relied on Davis v. Alaska, 415 U.S. 308 (1974), which provides that it is error to deny cross-examination concerning the prior involvement in juvenile pre-trial intervention programs by a witness if the witness was on probation at the time he testified. Florida courts have ruled similarly in other cases. See Thorns v.
In Leonard v. State, the Fourth District Court of Appeal faced questions relating both to the propriety of the trial court's waiver decision and to the trial court's order determining adult sanctions. The underlying charge was third degree murder, and the state sought to transfer the juvenile for criminal prosecution as an adult. One of the waiver requirements was that the court consider the child's emotional attitude and pattern of living in determining the child's sophistication and maturity for purposes of transfer. While it is not clear from the brief opinion what the appellate court saw in the record on appeal, it upheld the waiver because the trial court had studied a Department of Health and Rehabilitative Services Waiver Hearing Report which it viewed as being in compliance with the intention of the law.

The second issue in Leonard, as in West, was whether the trial court had complied with the provisions of Chapter 39 in determining that adult sanctions were suitable. The appellate court noted that the trial court only dealt with three of the six subsections. The appellate

State, 485 So. 2d 1357 (Fla. 1st Dist. Ct. App. 1986).
27. 522 So. 2d 543 (Fla. 4th Dist. Ct. App. 1988).
29. Id. § 39.09(2)(c)(6) provides that the court shall consider "the sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living."
30. Leonard, 522 So. 2d at 544.
31. Id. at 545. Fla. Stat. § 39.111(7)(c)(1) (1987) provides that suitability for adult sanctions is governed by the following criteria:
1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.
2. Whether the offense was committed in an aggressive, violent, preemptive, or willful manner.
3. Whether the offense was against persons or against property, greater weight being given to the offenses against persons, especially if personal injury resulted.
4. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.
5. The record and previous history of the child, including:
   a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies, and courts,
   b. Prior periods of probation or community control,
   c. Past indications that the child committed a violation of law, and
   d. Prior commitments to institutions.
6. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to juvenile services and facilities.
32. The two earlier opinions were Upshaw v. State, 416 So. 2d 1355 (Fla. 4th Dist. Ct. App. 1983); West v. State, 503 So. 2d 435 (Fla. 4th Dist. Ct. App. 1987).
33. 529 So. 2d 341 (Fla. 1st Dist. Ct. App. 1988).
35. 392 So. 2d 1335 (Fla. 1st Dist. Ct. App. 1980).
36. Id. at 1337. But see Duke, 529 So. 2d at 342 n.1, arguing that Goodson was wrongly decided in this regard.
37. Duke, 529 So. 2d at 342.
38. Id.
39. The question certified to the court was whether an indictment for an offense punishable by death or life imprisonment constitutes a transfer pursuant to FLA. STAT. § 39.026(1) (1985) requiring compliance with the provisions of § 39.111(6). Duke, 529 So. 2d at 342.
In Leonard v. State, the Fourth District Court of Appeal was faced with questions relating both to the propriety of the trial court's waiver decision and to the trial court's order determining adult sanctions. The underlying charge was third degree murder, and the state sought to transfer the juvenile for criminal prosecution as an adult. One of the waiver requirements was that the court consider the child's emotional attitude and pattern of living in determining the child's sophistication and maturity for purposes of transfer. However, it is not clear from the brief opinion what the appellate court saw in the record on appeal, it upheld the waiver because the trial court had studied a Department of Health and Rehabilitative Services Waiver Hearing Report which it viewed as being in compliance with the intention of the law.

The second issue in Leonard, as in West, was whether the trial court had complied with the provisions of Chapter 39 in determining that adult sanctions were suitable. The appellate court noted that the trial court only dealt with three of the six subsections. The appellate court therefore vacated the sentence and remanded for resentencing, making Leonard at least the third written opinion since 1985 by the Florida appellate courts advising the trial courts to state in writing all six grounds for sentencing as an adult.

A variant on the six ground recitation rule was presented to the First District Court of Appeal in Duke v. State. In that case a fifteen year old wife appealed a sentence of seven years for aiding and abetting her husband in the commission of a sexual battery. Her claim was that the trial court failed to consider the statutory criteria for determining whether a child transferred for criminal prosecution was suitable for adult sanctions. In support of her position she cited Goodson v. State, in which the Florida Supreme Court adopted a portion of the First District Court of Appeal opinion which contained dicta to the effect that all children, whether indicted or waived, are subject to the provisions testing whether adult or juvenile sanctions should be applied. The state countered that under Florida Statutes section 39.02(5)(c)(1) (1987), it is not necessary to apply the six-part test for punishment as an adult because the juvenile charged by indictment with a crime specified in section 39.02 is treated in all respects as though she were an adult. Thus, there is actually no transfer in such a situation. If there is no transfer, the state argued, then the trial court did not abuse its discretion by failing to make written findings regarding adult versus juvenile sanctions. However, because of the possible confusion with Goodson v. State, the court certified the question to the Florida Supreme Court.

Questions concerning the waiver of the right to counsel and application of "Miranda" warnings to juveniles have regularly been decided in reasonable rehabilitation of the child if he is assigned to juvenile services and facilities.

32. The two earlier opinions were Upshaw v. State, 416 So. 2d 1355 (Fla. 4th Dist. Ct. App. 1985); West v. State, 303 So. 2d 435 (Fla. 4th Dist. Ct. App. 1988).

33. 529 So. 2d 341 (Fla. 1st Dist. Ct. App. 1988).


35. 392 So. 2d 1335 (Fla. 1st Dist. Ct. App. 1980).

36. Id. at 1337. But see Duke, 529 So. 2d at 342 n.1, arguing that Goodson was wrongly decided in this regard.

37. Duke, 529 So. 2d at 342.

38. Id.

39. The question certified to the court was whether an indictment for an offense punishable by death or life imprisonment constitutes a transfer pursuant to Fla. Stat. § 39.02(6) (1985) requiring compliance with the provisions of § 39.11(6). Duke, 529 So. 2d at 342.
by appellate courts throughout the country since the 1967 United States Supreme Court decision in In re Gault.** The issue of the sup-
pression of a confession by a juvenile was recently presented to the First District Court of Appeal in D.N. v. State.** The appeal arose in a
delinquency case involving the theft of an automobile. The juvenile
made inculminating statements to law enforcement investigators after
being advised by a police officer that the public defender could not re-
present the juvenile until the public defender was appointed by the
court and that charges would have to be filed if the juvenile insisted on
his right to counsel.** Applying the principles of Miranda v. Arizona* and
the commonly employed test of the totality of the circumstances of
the interrogation,** the appellate court determined that the defendant
child had been deprived of the right to counsel.**

In 1985 the United States Supreme Court decided that school offi-
cials conducting searches of students were bound by a lesser standard
of suspicion than police officers. In New Jersey v. T.L.O.,** the high
court ruled that the standard should be one of reasonableness as op-
tested to probable cause. The application of T.L.O. was before the First
District Court of Appeal recently in F.P. v. State.* The appeal in this
juvenile delinquency case arose from the denial of a motion to suppress
physical evidence as a result of a warrantless search at a school.** An
investigator for the Tallahassee Police Department was questioning a
child at a middle school concerning a burglary when the child told the
officer that another student had earlier shown the youngster car keys
and automobile papers from a stolen vehicle.** The officer described
the situation to a school resource office staff member, who then called the
child in question to her office where she asked the youngster if he had
anything he needed to give to her.** The child turned over the car keys
and the papers; when the police officer returned several minutes later,
the officer gave the child Miranda warnings which the child waived,
and then the child gave an inculminating statement.**

The child's lawyer argued that the T.L.O. school official exception
was not applicable because the school resource officer was a law en-
forcement officer, the child did not consent to the search but acquiesced
to apparent authority of the police officer, and the police officer did not
have probable cause.** The trial court nevertheless found that the
school exception rule in T.L.O. applied to this case. The appellate court
ruled that irrespective of whether the school resources official had a
dual role as a school official and a police officer, she acted on behalf of
and at the request of the police officer.* Under these circumstances,
the court ruled, the state is required to prove either that the child con-
sumed to the search or that probable cause existed to believe that the
child had violated the law and had the evidence in his possession.** The
court then reversed the trial court's ruling and remanded to determine
whether the evidence was voluntarily produced.** F.P. is an important
decision because it answers the question left unresolved in New Jersey
v. T.L.O. as to what the proper standard of searches should be when

41. 529 So. 2d 1217 (Fla. 1st Dist. Ct. App. 1988).
42. Id. at 1223.
43. 384 U.S. 436 (1966). Specifically, the Court ruled that a person who is in
custody to be interrogated must be informed in clear and unequivocal terms that he has
the right to remain silent, that anything said can and will be used against the individ-
ual in court, that he has the right to consult with an attorney and have an attorney
with him during interrogation, and that if he is indigent a lawyer will be appointed to
represent him. Id. at 467-73.
44. The totality of the circumstances test, which is applied to determine whether
the statement given during the custodial interrogation will be admissible, looks at
"whether the accused is fact knowingly and voluntarily decided to forgo his right to
remain silent and to have the assistance of counsel." Fare v. Michael C., 442 U.S. 725
(1979) (citing Miranda v. Arizona, 384 U.S. 435, 473-77 (1966)). When deter-
imining whether a juvenile has made a knowing and intelligent waiver the Court has
said the evaluation shall include the child's age, experience, education, background,
intelligence and capacity to understand the warnings given, his Fifth Amendment
rights, and the consequences of waiver of the rights. Id. at 725.
45. D.N., 529 So. 2d at 1223.
46. 469 U.S. 325 (1985); see also Canse v. Cooks, 811 F.2d 188 (8th Cir. 1987)
and People v. Owens, 51 Misc. 2d 140, 273 N.Y.S.2d 143 (Sup. Ct. 1965), rearg'd 2d
N.E.2d 366, 301 N.Y.S.2d 479 (1969); and Comment, Fourth Amendment Protection
in the Elementary and Secondary School Settings, 38 Mercer L. Rev. 1417, 1429-34
(1986). Note, Student Searches: Leaving Probable Cause at the Schoolhouse Gate," 29
N.Y.U. L. Rev. 673 (1954):
by appellate courts throughout the country since the 1967 United States Supreme Court decision in *In re Gault*. The issue of the suppression of a confession by a juvenile was recently presented to the First District Court of Appeal in *D.N. v. State*. The appeal arose in a delinquency case involving the theft of an automobile. The juvenile made incriminating statements to law enforcement investigators after being advised by a police officer that the public defender could not represent the juvenile until the public defender was appointed by the court and that charges would have to be filed if the juvenile insisted on his right to counsel. Applying the principles of *Miranda v. Arizona* and the commonly employed test of the totality of the circumstances of the interrogation, the appellate court determined that the defendant child had been deprived of the right to counsel.

In 1985 the United States Supreme Court decided that school officials conducting searches of students were bound by a lessar strandard of suspicion than police officers. In *New Jersey v. T.L.O.*, the high court ruled that the standard should be one of reasonableness as op-

---

41. 529 So. 2d 1217 (Fla. 1st Dist. Ct. App. 1988).
42. Id. at 1223.
43. 384 U.S. 436 (1966). Specifically, the Court ruled that a person who is in custody to be interrogated must be informed in clear and unequivocal terms that he has the right to remain silent, that anything said can and will be used against the individual in court, that he has the right to consult with an attorney and have an attorney with him during interrogation, and that if he is indigent a lawyer will be appointed to represent him. Id. at 467-73.
44. The totality of the circumstances test, which is applied to determine whether the statement given during the custodial interrogation will be admissible, looks at "whether the accused in fact knowingly and voluntarily decided to forgo his right to remain silent and to have the assistance of counsel." Fare v. Michael C., 442 U.S. 707, 725 (1979) (citing *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966)). When determining whether a juvenile has made a knowing and intelligent waiver the Court has said the evaluation shall include the child's age, experience, education, background, intelligence and capacity to understand the warnings given, his Fifth Amendment rights, and the consequences of waiver of the rights. Id. at 725.
45. D.N., 529 So. 2d at 1223.
conducted by school officials in conjunction with or at the behest of the police officer.

*The Florida Juvenile Justice Act* contains a detailed dispositional phase in juvenile delinquency proceedings. In *N.L.J. v. Komanski*, the Fifth District Court of Appeal was faced with a challenge to the trial court's action with regard to controlling dispositional alternatives available to the Department of Health and Rehabilitative Services. When a child is adjudicated to have committed a delinquent act, and when the court further determines that it will commit the child to HRS, the Act provides that the determination must be in writing and must include specific findings of the reason for the decision. The Act further requires that in such a situation the Department of Health and Rehabilitative Services has to furnish the court with a list of not less than three options for programs in which the youngster could be placed in a ranked order of preference by the Department. The court then ranks the options presented by the Department in the order of preference of the court. In *N.L.J.*, the court apparently was frustrated because the options presented did not provide a satisfactorily disposition. The statute is indeed a narrow one which can be frustrating to the court. However, the law is clear on its face and the appellate court so ruled requiring the judge to conduct the disposition hearing ranking of the options provided by the Department.

One other case decided by the Second District Court of Appeal requires brief analysis. In *Re: Forfeiture of 1987 BMW Automobile v. Wanicka*, is a case involving novel questions concerning the effect of the Florida Juvenile Justice Act upon a forfeiture proceeding under Florida Statutes, sections 932.701-932.704. At issue was the forfeiture of an automobile co-owned by a father and son where, prior to the son's eighteenth birthday the son was involved in an act of juvenile delinquency involving the use of the vehicle.

When the Lee County sheriff filed a petition seeking forfeiture of the automobile because it was involved in the commission of a felony, the father filed an answer claiming he had an ownership interest in the vehicle and had no knowledge that the vehicle had been used in criminal conduct and further that the son was a juvenile at the time of the offense. The court ruled against the father, and the appeal followed. The father's argument on appeal was first, that the term "felony" as defined in the forfeiture statute was inapplicable to an act of juvenile delinquency. Therefore, even if the act committed by the juvenile would have been a felony if committed by an adult, it was not a felony when committed by a minor; therefore the forfeiture statute did not apply. Finding no prior case law on point, the appellate court ruled that the forfeiture statute was civil in nature, and therefore the disposition in the criminal case was neither relevant nor material to the forfeiture proceedings. All that mattered was the nature and seriousness of the offense.

It then held in essence that a juvenile delinquent can be adjudicated to have committed a felony making the forfeiture statute applicable to a juvenile delinquency adjudication. The court made three arguments in support of this rationale. First, the delinquent child is defined as one who *inter alia* commits a felony. Second, double jeopardy applies giving the delinquency case the imprimatur of a criminal proceeding. Third, the rules of juvenile procedure require the delinquency petition to allege the degree of each offense charged and the law violated. Therefore, it concluded, a felony adjudication in a delinquency case is close enough to a conviction. The problem with this argument is that a delinquency adjudication is not a felony conviction. The intent and purpose as well as the procedures under the Juvenile Justice Act are essentially different. For example, a child is not entitled to a jury trial in a delinquency case. And in Florida, by statute, in certain situations a child may be waived to adult court or may be dis-
conducted by school officials in conjunction with or at the behest of the police officer.

The Florida Juvenile Justice Act contains a detailed dispositional phase in juvenile delinquency proceedings. In *N.L.J. v. Komanski*, the Fifth District Court of Appeal was faced with a challenge to the trial court's action with regard to controlling dispositional alternatives available to the Department of Health and Rehabilitative Services. When a child is adjudicated to have committed a delinquent act, and when the court further determines that it will commit the child to HRS, the Act provides that the determination must be in writing and must include specific findings of the reason for the decision. The Act further requires that in such a situation the Department of Health and Rehabilitative Services has to furnish the court with a list of not less than three options for programs in which the youngster could be placed in a ranked order of preference by the Department. The court then ranks the options presented by the Department in the order of preference of the court. In *N.L.J.*, the court apparently was frustrated because the options presented did not provide a satisfactorily disposition. The statute is indeed a narrow one which can be frustrating to the court. However, the law is clear on its face and the appellate court so ruled requiring the judge to conduct the disposition hearing ranking of the options provided by the Department.

One other case decided by the Second District Court of Appeal requires brief analysis. In *Re: Forfeiture of 1987 BMW Automobile v. Wanicza*, is a case involving novel questions concerning the effect of the Florida Juvenile Justice Act upon a forfeiture proceeding under Florida Statutes, sections 932.701-932.704. At issue was the forfeiture of an automobile co-owned by a father and son where, prior to the son's eighteenth birthday the son was involved in an act of juvenile delinquency involving the use of the vehicle.

When the Lee County sheriff filed a petition seeking forfeiture of the automobile because it was involved in the commission of a felony,

65. *Id. at 1079.*
66. *Id.*
67. *Fla. Stat. § 775.08(1) (1987)* defines a felony as “any criminal offense that is punishable under the laws of this state, or that would be punished if committed in this state, by death or imprisonment in a state penitentiary.”
68. *Wanicza*, 524 So. 2d at 1077.
69. *Id. at 1079.*
70. *Id.*
71. *Id.*
rectly filed against as an adult and thus be charged with a true felony. Unlike an adult criminal proceeding, in a juvenile delinquency case, the court may close the delinquency proceedings to the public for the welfare of the child. The child is held in detention in a facility separate from the adult jail. The court records are confidential and are destroyed after a certain period of time. Nevertheless, the court determined that a felony adjudication in a delinquency case is close enough to a conviction in an adult case to allow for the result achieved here.

The appellate court rejected the father's final argument that as owner, he was the reasonably innocent owner as provided by Florida Statute and therefore should keep the property. The court held that the "reasonably innocent" owner provision applied only to husbands and wives. The court, however, certified the question to the Florida Supreme Court.

73. See supra note 14.
75. Id. § 93.92. There is a limited exception allowing a child to be placed in a jail "[w]hen the court determines, upon a motion of the superintendent of the detention home . . . that the child is beyond the control of the detention home staff." Id. § 93.02(5)(c). Application of the provision may violate federal law. See Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5751 (West Supp. 1988); Henderson v. Griggs, 672 F. Supp. 1126 (N.D.Iowa 1987), appeal dismissed, 856 F.2d 1041 (8th Cir. 1988); and D.B. v. Tewksbury, 545 F. Supp. 896 (D.C. Or. 1982).
77. Wanička, 524 So. 2d at 1080.
78. Fla. Stat. § 932.703(2) (1987) provides that: "No property shall be forfeited under the provisions of §§ 932.701-932.704 if the owner of such property established that he neither knew nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity," and "Property titled or registered jointly between husband and wife and the vehicle, when transferred to the other owner, shall not be forfeited if the co-owner establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity."
79. Wanička, 524 So. 2d at 1080-81.
80. Id. at 1079.
81. 455 U.S. 745 (1982); Florida Juvenile Law and Practice Ch, 9.3, 9.6 (West 1988); In the Interest of C.T., 503 So. 2d 972, 973 (Fla. 4th Dist. Ct. App. 1987).
84. 523 So. 2d 1164 (Fla. 5th Dist. Ct. App. 1988).
85. Id. at 1166.
86. The criteria are: (1) the potential length of parent-child separation; (2) the degree of parental restrictions on visitations; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; and (5) the complexity of the proceedings in terms of witnesses or documents." Id.
rectly filed against an adult and thus be charged with a true felony.77 Unlike an adult criminal proceeding, in a juvenile delinquency case, the court may close the delinquency proceedings to the public for the welfare of the child.78 The child is held in detention in a facility separate from the adult jail.79 The court records are confidential and are destroyed after a certain period of time.80 Nevertheless, the court determined that a felony adjudication in a delinquency case is close enough to a conviction in an adult case to allow for the result achieved here.81

The appellate court rejected the father’s final argument that as co-owner, he was the reasonably innocent owner as provided by Florida Statute and therefore should keep the property.82 The court held that the “reasonably innocent” owner provision applied only to husbands and wives.83 The court, however, certified the question to the Florida Supreme Court.84

73. See supra note 14.
77. Winckle, 524 So. 2d at 1080.
78. Fla. Stat. § 932.703(2) (1987) provides that: “No property shall be forfeited under the provisions of §§ 932.701-932.704 if the owner of such property established that he neither knew nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity.”
79. Winckle, 524 So. 2d at 1080-81.
80. Id. at 1079.
81. When Title to a vehicle is in the conjunctive, using the word “and” or the words “and/or,” does knowledge by one non-co-owner of the vehicle’s use in a criminal activity as defined in § 932.703(2), Fla. Stat. (1985), preclude the other co-owner from using § 932.703(2), Fla. Stat. (1985) to avoid forfeiture?

3. DEPENDENCY PROCEEDINGS

A. Abuse and Neglect

As evident from the following discussion, dependency proceedings can be complicated matters, requiring representation by skilled lawyers. However, Florida’s courts, like the United States Supreme Court, have never ruled that a parent or child has an absolute right to counsel in a dependency proceeding.89 Instead, Florida’s Juvenile Justice Act provides that the court has discretion to appoint counsel,88 and if it does, to award attorney’s fees.89

The problems created by a discretionary standard for the provision of counsel to a parent in a dependency proceeding was emphasized recently in Frederick v. Department of Health & Rehabilitative Services.88 In a split opinion, the court ruled in a termination of parental rights case that the parent had not been impermissibly denied the right to counsel in the earlier dependency proceeding.88 The court applied a five-part test to determine whether the parent should have been afforded counsel.88 The majority found that during the dependency stage, HRS was only taking steps to rehabilitate the parent in order for the

84. 523 So. 2d 1164 (Fla. 5th Dist. Ct. App. 1988).
85. Id. at 1166.
86. The criteria are: (1) the potential length of parent-child separation; (2) the degree of parental restrictions on visitations; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; and (5) the complexity of the proceeding in terms of witnesses or documents.” Id.
children to be returned. There was therefore no requirement that counsel be appointed. Judge Cowart dissented on grounds that the hearings below were "riddled with reversible errors and violations of the mother's legal rights." He concluded that in the dependency proceedings the mother had never been advised of her right to obtain counsel. Significantly, he concluded that appointed counsel is required whenever the dependency proceedings are such that permanent termination of the parents' rights are at stake. For example, Judge Cowart pointed out that the mother was not represented when she signed the performance agreement and that the petition for termination of parental rights relied upon the failure of the parent to comply with the performance agreement.

Orange County v. Fishalow, is a decision by the Fifth District Court of Appeal dealing with attorney's fees in child dependency proceedings. At issue was whether a court could award attorney's fees to the lawyer for a parent beyond the statutory maximum fee provided by Florida law. The more specific issue was whether the Florida Supreme Court opinion in Makenson v. Martin County should apply in the child dependency context. Makenson held that the Florida Statute limiting attorney's fees in a criminal case was unconstitutional because it curtailed the court's apparent power to assure that representation would be adequate in a criminal defense case. The appellate court in

Fishalow suggested that Makenson could be distinguished because at issue here was a civil proceeding and not a sixth amendment right to effective counsel concern. However, even if Makenson could be found to apply under the facts in Fishalow, the court held that there was no basis for an award in excess of the statutory maximum fee. The court thus avoided the constitutional issue.

The right to counsel issue has also been raised in a much more publicized context involving the question of the involvement of HRS non-lawyer staff in the presentation of noncontested dependency court cases. In a per curiam opinion, The Florida Bar Re: Advisory Opinion H.R.S. Non-lawyer Counselor, the Florida Supreme Court decided that it would appoint an ad hoc committee to study the problem and make recommendations to the court. The issue involving both ethical and programmatic concerns, is pending.

When finding a child to be dependent, the trial court must briefly state the facts upon which the dependency finding is made. Failure to do so is reversible error just as it is in the juvenile delinquency context where the trial court fails to state the basis for a transfer. The failure of the trial court to decide an issue of dependency without mak-

87. Id.
88. Id.
89. Id. at 1168.
90. Id. at 1169 (citing Fla. Stat. § 39.406 (1987)). In his view, representation by counsel is important at the dependency stage both to assist at that stage and to protect against the later use of the allegations at the termination of parental rights proceeding.
91. Id.
92. Id. at 1170. Judge Cowart also found, inter alia, that the failure to order a predispositional report and the legal insufficiency of the petition for termination should also have constituted grounds for reversal.
93. 513 So. 2d 1109 (Fla. 1987).
94. Fla. Stat. § 39.415 (1997) provides as follows: "Appointed counsel; compensation. If counsel is entitled to receive compensation for representation pursuant to court appointment in a dependency proceeding, such compensation shall not exceed $1,000 at the trial level and $2,500 at the appellate level.
95. 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 908 (1987) (an award of attorney's fees in an indigent criminal defendant case beyond the statutory maximum is within the discretion of the trial courts to issue adequate representation.
96. Id. at 1112.
children to be returned.47 There was therefore no requirement that counsel be appointed.48 Judge Cowart dissented on grounds that the hearings below were "riddled with reversible errors and violations of the mother's legal rights."49 He found that in the dependency proceedings the mother had never been advised of her right to obtain counsel.50 Significantly, he concluded that appointed counsel is required whenever the dependency proceedings are such that permanent termination of the parents rights are at stake.51 For example, Judge Cowart pointed out that the mother was not represented when she signed the performance agreement and that the petition for termination of parental rights relied upon the failure of the parent to comply with the performance agreement.52

**Orange County v. Fishalow,53** is a decision by the Fifth District Court of Appeal dealing with attorney's fees in child dependency proceedings. At issue was whether a court could award attorney's fees to the lawyer for a parent beyond the statutory maximum fee provided by Florida law.54 The more specific issue was whether the Florida Supreme Court opinion in *Makemson v. Martin County,*55 should apply in the child dependency context. Makemson held that the Florida Statute limiting attorney's fees in a *criminal case* was unconstitutional because it curtailed the court's apparent power to assure that representation would be adequate in a *criminal defense case.*56 The appellate court in

---

87. Id.
88. Id.
89. Id. at 1168.
90. Id. at 1169 (citing Fla. Stat. § 39.006 (1983)). In his view, representation by counsel is important at the dependency stage both to assist at that stage and to protect against the later use of the allegations at the termination of parental rights proceeding.
91. Id.
92. Id. at 1170. Judge Cowart also found, inter alia, that the failure to order a predispositional report and the legal insufficiency of the petition for termination should also have controlled grounds for reversal.
93. 513 So. 2d 1109 (Fla. 5th Dist. Ct. App. 1987).
94. Fla. Stat. § 39.415 (1987) provides as follows: "Appointed counsel compensation. If counsel is entitled to receive compensation for representation pursuant to court appointment in a dependency proceeding, such compensation shall not exceed $1,000 at the trial level and $2,500 at the appellate level."
95. 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 908 (1987) (an award of attorney's fees in an indigent criminal defendant case beyond the statutory maximum is within the inherent power of Florida trial courts to insure adequate representation).
96. Id. at 1112.

---

**Fishalow** suggested that *Makemson* could be distinguished because at issue here was a civil proceeding and not a sixth amendment right to effective counsel concern.57 However, even if *Makemson* could be found to apply under the facts in *Fishalow,* the court held that there was no basis for an award in excess of the statutory maximum fee.58 The court thus avoided the constitutional issue.59

The right to counsel issue has also been raised in a much more publicized context involving the question of the involvement of HRS non-lawyer staff in the presentation of noncontested dependency court cases. In a per curiam opinion, *The Florida Bar Re: Advisory Opinion H.R.S. Non-lawyer Counselor,*60 the Florida Supreme Court decided that it would appoint an ad hoc committee to study the problem and make recommendations to the court. The issue involving both ethical and programmatic concerns, is pending.61

When finding a child to be dependent, the trial court must briefly state the facts upon which the dependency finding is made.62 Failure to do so is reversible error just as it is in the juvenile delinquency context where the trial court fails to state the basis for a transfer. The failure of the trial court to decide an issue of dependency without mak-
ing necessary factual findings on the record was before the court in *Fitzpatrick v. State*.

In a strongly worded per curiam opinion reminiscent of the delinquency cases discussed earlier, the Third District Court of Appeal explained why it is necessary for the trial court to make factual findings. Commenting that the record on appeal was deficient in numerous respects in terms of documents available for its review, the court noted it could not rule on issues as important as dependency because in addition to the inadequate record, there was no articulation of the trial court's findings.

It explained the requirement that the trial court state the facts on which it based its findings for dependency was to assist the appellate court in carrying out its review function. Because of the lack of factual findings and an inadequate record suggesting conflicting evidence, the court was obligated to remand the case to the trial court with directions to enter a final judgment with appropriate factual findings.

In *In the Interest of C.S.*, the First District Court of Appeal invalidated an order adjudicating a child dependent for failure to state the factual basis for the dependency finding. However, the appellate court in *C.S.* went further. It evaluated the facts and found that the evidence presented at the dependency hearing did not support a finding of dependency.

The initial and amended petitions in essence alleged dependency on the basis of neglect by the mother who sought repeated unnecessary medical treatment and then refused to take medical and nutritional advice thus demonstrating impaired judgment.

After a rather detailed recitation of the evidence, the court reiterated that the testimony fell short of establishing neglect by a preponderance of the evidence. Why the appellate court undertook analysis of the facts is unclear. The court recognized the difficult task faced by the trial court in this particular case because the mother evidenced over-protectiveness. But the appellate court gave no further explanation for its decision.

C.S. remains an odd case, going beyond the necessary limits of appropriate limited judicial review. The court decided an issue it did not have to reach.

The issue of Florida's definition of child abuse and how to apply the standard of proof as well as several other issues were before the court in *In the Interest of T.S.*. In this case a sixteen year old "special needs" child had been placed in the appellant's home some six years earlier for adoption. Subsequently, petitions were filed alleging dependency because the child had been physically and emotionally abused by her adoptive parents. At the same time the parents filed a dependency petition alleging the child was a runaway and ungovernable. A hearing was held on both petitions and the court adjudicated the child dependent based upon both abuse and ungovernability. The child was then removed from the custody of her parents and placed in a foster home. The parents appealed on three separate grounds, that the evidence was insufficient to establish child abuse, that the order of adjudication of dependency violated Florida law for failure to make findings of fact, and that the court abused its discretion in ordering the appellants to pay for psychological counseling. No appeal was taken from the court's order granting the dependency on the basis of ungovernability. The court first ruled that there was insufficient evidence of abuse. The evidence in this regard was a slap on the face and disparaging statements by the father to the child. Neither was found to have caused the child any significant impairment. By deciding that there was insufficient evidence of abuse, the court did not rule on the claim of a failure to elucidate the findings of abuse.

However, the appellate court upheld the trial court regarding the payment for psychological counseling. Two aspects of the analysis are significant. First, the court determined that while no section of Chapter...
ing necessary factual findings on the record was before the court in
Fitzpatrick v. State. In a strongly worded per curiam opinion re-
niscent of the delinquency cases discussed earlier, the Third District
Court of Appeal explained why it is necessary for the trial court to
make factual findings. Commenting that the record on appeal was defi-
cient in numerous respects in terms of documents available for its re-
view, the court noted it could not rule on issues as important as depen-
dency because in addition to the inadequate record, there was no articulation of the trial court's findings. It explained the requirement
that the trial court state the facts on which it based its findings for
dependency was to assist the appellate court in carrying out its review
function. Because of the lack of factual findings and an inadequate
record suggesting conflicting evidence, the court was obligated to re-
mand the case to the trial court with directions to enter a final judg-
ment with appropriate factual findings.

In In the Interest of C.S., the First District Court of Appeal
invalidated an order adjudicating a child dependent for failure to state
the factual basis for the dependency finding. However, the appellate
court in C.S. went further. It evaluated the facts and found that the
evidence presented at the dependency hearing did not support a finding of
dependency. The initial and amended petitions in essence alleged
dependency on the basis of neglect by the mother who sought repeated
unnecessary medical treatment and then refused to take medical and
nutritional advice thus demonstrating impaired judgment. After a rather
detailed recitation of the evidence, the court reiterated that the
testimony fell short of establishing neglect by the mother expected.

Why the appellate court undertook analysis of the facts is
unclear. The court recognized the difficult task faced by the trial court
in this particular case because the mother evidenced over-protective-
ness. But the appellate court gave no further explanation for its deci-

103. 515 So. 2d 319 (Fla. 3d Dist. Ct. App. 1987).
104. Id. at 320.
105. Id. at 321.
106. Id. See also 1 T. v. Department of Health & Rehabilitative Servs., 332 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1988).
107. 503 So. 2d 417 (Fla. 1st Dist. Ct. App. 1987) (quoting In the Interest of G.D.H., 496 So. 2d 479 (Fla. 1st Dist. Ct. App. 1986)).
108. Id. at 419.
109. Id. at 418.
110. Id. at 419.
111. Id.

sion. C.S. remains an odd case, going beyond the necessary limits of
appropriate limited judicial review. The court decided an issue it did
not have to reach.

The issue of Florida's definition of child abuse and how to apply
the standard of proof as well as several other issues were before the
court in In the Interest of T.S.. In this case a sixteen year old "spe-
cial needs" child had been placed in the appellant's home some six
years earlier for adoption. Subsequently, petitions were filed alleging
dependency because the child had been physically and emotionally
abused by her adoptive parents. At the same time the parents filed a
dependency petition alleging the child was a runaway and ungo-
erable. A hearing was held on both petitions and the court adjudicated
the child dependent based upon both abuse and ungoernability. The
child was then removed from the custody of her parents and placed in a
foster home. The parents appealed on three separate grounds, that the
evidence was insufficient to establish child abuse, that the order of
adjudication of dependency violated Florida law for failure to make
findings of fact, and that the court abused its discretion in ordering the
appellants to pay for psychological counseling. No appeal was taken
from the court's order granting the dependency on the basis of un-
goernability. The court first ruled that there was insufficient evidence
of abuse. The evidence in this regard was a slap on the face and
disputing statements by the father to the child. Neither was found to
have caused the child any significant impairment. By deciding that
there was insufficient evidence of abuse, the court did not rule on the
claim of a failure to elucidate the findings of abuse.

However, the appellate court upheld the trial court regarding the
payment for psychological counseling. Two aspects of the analysis are
significant. First, the court determined that while no section of Chapter

112. 511 So. 2d 435 (Fla. 2d Dist. Ct. App. 1987) (quoting FLA. STAT. § 409.166
(1983) to define a "special needs" child).
113. Id. at 436.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id. (citing FLA. STAT. § 39.01(2) (1987) (Abuse is defined as "any willful
set that results in any physical, mental or sexual injury that causes or is likely to cause
the child's physical, mental or emotional health to be significantly impaired").
120. Id.

Published by NSUWorks, 1999 17
39 of the Florida Statutes authorized payment for psychological services, a reading of several provisions "construed together empower the trial court to order appellants to pay for counseling." Specifically, the court referred to section 39.41(1)(g) which provided that the court may order adoptive parents of children placed in temporary custody to pay for support and maintenance. In addition, section 39.41(6) provided that the court may order parents to participate in counseling. Finally, section 39.407(1)(b) gave the court authority to order that a child determined to be dependent receive medical health services from a psychologist. The court ruling in T.S. has now been codified to explicitly hold parents responsible for payment of medical services.

The court also held that although the child in question was a special needs child, the parents were still fully obligated to pay for psychological services. The court could find nothing in Florida Statutes, section 409.166 concerning such children which "absolves adoptive parents of the financial responsibility incurred in the care of special needs of children." While this case was decided pursuant to the old provisions concerning dependent children — these youngsters are now classified as children in need of services — the holding would be the same under the new law.

Florida's Juvenile Justice Act provides that lack of adequate food, clothing, shelter, or medical treatment or permitting a child to live in an environment where deprivation causes the child's health to be significantly impaired "shall not be considered neglect if caused primarily by financial inability unless services for relief have been offered and rejected." In K.H. v. Department of Health & Rehabilitation Services, the court held that the statute means what it says. In K.H., the child had been found with 106 insect bites on his body under circumstances where the home appeared to be infested with yellow

121. Id.
122. Id.
123. Id.
124. Id.
126. T.S., 515 So. 2d at 436-37.
127. Id. The court went on to note that the parents may seek subsidies toward such counseling pursuant to Fla. Stat. § 409 (1987) from HRS.
129. Id. § 39.01(37).
131. Id. at 332-33.
132. Id. at 232, 234.
133. 516 So. 2d 324 (Fla. 2d Dist. Ct. App. 1987). At the time the definition of neglect was found at Fla. Stat. § 39.01(27). It has been renumbered to § 39.01(37) (1987).
134. In the Interest of R.H., 516 So. 2d at 325.
135. Id. At the adjudicatory hearing, the state elicited testimony of out-of-court statements by the children made to their grandmother to the effect that they did not know where their mother was and they had not eaten. They told their grandmother that their aunt had sent them to her house and they did not know where their mother was. When the grandmother called the police the children were taken into custody rather than being returned to the aunt's apartment in the same building where the grandmother resided.
136. Id.
137. Id.
138. Id. at 326.
139. Id.
140. Id.
39 of the Florida Statutes authorized payment for psychological services, a reading of several provisions "construed together empower the trial court to order appellants to pay for counseling." Specifically, the court referred to section 39.41(1)(g) which provided that the court may order adoptive parents of children placed in temporary custody to pay for support and maintenance. In addition, section 39.41(6) provided that the court may order parents to participate in counseling. Finally, section 39.407(1)(b) gave the court authority to order a child determined to be dependent receive medical health services from a psychologist. The court ruling in T.S. has now been codified to explicitly hold parents responsible for payment of medical services.

The court also held that although the child in question was a special needs child, the parents were still fully obligated to pay for psychological services. The court could find nothing in Florida Statutes, section 409.166 concerning such children which "absolves adoptive parents of the financial responsibility incurred in the care of special needs of children." While this case was decided pursuant to the old provisions concerning dependent children — these youngsters are now classified as children in need of services — the holding would be the same under the new law.

Florida's Juvenile Justice Act provides that lack of adequate food, clothing, shelter, or medical treatment or permitting a child to live in an environment where the deprivation causes the child's health to be significantly impaired "shall not be considered neglect if caused primarily by financial inability unless services for relief have been offered and rejected." In K.H. v. Department of Health & Rehabilitative Services, the court held that the statute means what it says. In K.H., the child had been found with 106 insect bites on his body under circumstances where the home appeared to be infested with yellow fleas. The court found that the bites did not appear significant, important, or a momentous enough impairment to rise to the level of neglect.

The question of testing the sufficiency of the evidence to establish a finding of neglect was before the court in In the Interest of R.H. The allegations in this case were that the children in question were found unsupervised, hungry, and dirty and that the whereabouts of the mother were unknown. The petition further alleged that the mother gave a non-existent address for her residence and that therefore she had no residence for herself and her children. The apppellate court found that the state had the burden of showing by a preponderance of the evidence that the children not only were unsupervised, hungry and dirty, but that as a result their physical, mental or emotional health were significantly impaired or in danger of being significantly impaired. The appellate court found that the children were not unsupervised since the aunt who was taking care of the youngsters had fed the children the night before and then again at breakfast time. The children had been outside and had gotten dirty playing in the yard and were not filthy. While the mother did not say where she was residing, the court found that the children had adequate accommodations with the aunt. The court also found no evidence of the children were physically distraught nor that they suffered any physical injuries. Both children were healthy. Because there was no significant impairment or danger of significant impairment, the court reversed.
Relying upon In the Interest of G.D.H., the appellate court reasoned that neglect will not be established in the absence of a significant impairment or danger thereof. The test for dependency arose in a rather odd context in Meredith v. Smith decided by the Fifth District Court of Appeal in 1987. The case began when sixteen year old Denise Meredith filed a complaint with the Department of Health and Rehabilitative Services accusing her mother of abuse. Because they felt they were unable to control their daughter, the parents allowed the child to live with her married sister and her sister’s husband. The parties entered into a custody agreement, and subsequently the sister and brother-in-law sought permanent custody in order to cover the child under health insurance policies held by them. At an evidentiary hearing on the matter, the court turned the proceeding into a Chapter 39 dependency proceeding. As a result, the Merediths were ordered to pay child support. They appealed. Three issues were raised on appeal. First, the respondents sought to have the matter dismissed as moot because the child was eighteen; without analysis, the appellate court declined to dismiss. It then reached the question of whether the child was a dependent or abandoned under Chapter 39. The court found that there were no allegations and no proof that the child was dependent as required by Florida Rule of Juvenile Procedure 8.720(a)(1). The court also reviewed the procedural posture of the case and found it lacking in many respects.

142. In the Interest of R.H., 516 So. 2d at 326.
143. 515 So. 2d 1386 (Fla. 5th Dist. Ct. App. 1987).
144. Id. at 1387.
145. Id.
146. Id. at 1387-88.
147. Id.
148. Id.
149. Id.
150. Id. Thus, the appellate court ruled that the trial court lacked jurisdiction. F.S.A. R. Juv. P. 8.720(a)(1) provided that: “A petition may be filed by any person. Each petition shall be entitled a petition for dependency and shall allege sufficient facts showing the child to be dependent based upon applicable law.”

151. For example, no arraignment was held as required by F.S.A. Stat. § 39.408(1)(b) (1987). Notice of hearing for an adjudicatory hearing concerning dependency was held as required by § 39.408(3).

The appellate court found that the child was not abandoned under section 39.01(1). After analyzing the facts, the court also found that there was no clear and convincing proof of abandonment as was then required by Florida law. The burden has since been changed to a preponderance of the evidence. Finally, the court decided that the trial court was wrong in entering an income deduction order because simple child support orders are not authorized by Chapter 39. Meredith v. Smith is therefore significant because it demonstrates first that dependency proceedings cannot be used as tools for resolution of problems unrelated to dependency and second, that the appellate courts will require the parties and trial courts to comply with all requirements of Chapter 39.

Issues related to first amendment rights of parents and their children to freedom of religion often arise in the context of state court dependency proceedings. In the Interest of J.J., decided in December, 1987 is such a case. The case began as a petition for dependency filed by the Department of Health and Rehabilitative Services. HRS alleged that the parents of J.J. had abused the child by failing to approve the administration of blood transfusions because of their religious beliefs as Jehovah’s Witnesses. At an emergency hearing, a medical doctor testified that it was medically necessary for the child’s survival to conduct the transfusion. The court found the child to be dependent without stating the basis and then ordered the transfusion. The appellate court ruled that there was no abuse of discretion by the court in authorizing the transfusion. Citing Florida Statutes, section made a party as provided by § 39.404(4) (Revised in 1987 at § 39.404(5).
152. Meredith, 515 So. 2d at 1389.
154. Id. § 39.408(2)(b).
155. Meredith, 515 So. 2d at 1389.
158. Id.
159. Id.
160. Id.
161. Id. at 1133-34.
Relying upon *In the Interest of G.D.H.*, the appellate court reiterated that neglect will not be established in the absence of a significant impairment or danger thereof.

The test for dependency arose in a rather odd context in *Meredith v. Smith*, decided by the Fifth District Court of Appeal in 1987. The case began when sixteen year old Denise Meredith filed a complaint with the Department of Health and Rehabilitative Services accusing her mother of abuse. Because they felt they were unable to control their daughter, the parents allowed the child to live with her married sister and her sister’s husband. Parties entered into a custody agreement, and subsequently the sister and brother-in-law sought permanent custody in order to cover the child under health insurance policies held by them. An evidentiary hearing on the matter, the court turned the proceeding into a Chapter 39 dependency proceeding. As a result, the Merediths were ordered to pay child support. They appealed.

Three issues were raised on appeal. First, the respondents sought to have the matter dismissed as moot because the child was eighteen; without analysis, the appellate court declined to dismiss. It then reached the question of whether the child was a dependent or abandoned child under Chapter 39. The court found that there were no allegations and no proof that the child was dependent as required by Florida Rule of Juvenile Procedure 8.720(e)(1). The court also reviewed the procedural posture of the case and found it lacking in many respects.

The appellate court found that the child was not abandoned under section 39.01(1). After analyzing the facts, the court also found that there was no clear and convincing proof of abandonment as was then required by Florida law. The burden has since been changed to a preponderance of the evidence. Finally, the court decided that the trial court was wrong in entering an income deduction order because simple child support orders are not authorized by Chapter 39. Meredith v. Smith is therefore significant because it demonstrates first that dependency proceedings cannot be used as tools for resolution of problems unrelated to dependency and second, that the appellate courts will require the parties and trial courts to comply with all requirements of Chapter 39.

Issues related to first amendment rights of parents and their children to freedom of religion often arise in the context of state court dependency proceedings. In *In the Interest of J.V.*, decided in December, 1987 is such a case. The case began as a petition for dependency filed by the Department of Health and Rehabilitative Services. HRS alleged that the parents of J.V. had abused the child by failing to approve the administration of blood transfusions because of their religious beliefs as Jehovah’s Witnesses. At an emergency hearing, a medical doctor testified that it was medically necessary for the child’s survival to conduct the transfusion. The court found the child to be dependent without stating the basis and then ordered the transfusion. The appellate court ruled that there was no abuse of discretion by the court in authorizing the transfusion. Citing Florida Statutes, section made a party as provided by § 39.404(4) (Reenacted in 1987 at § 39.404(5)).

142. *In the Interest of R.C.,* 516 So. 2d at 326.
143. 515 So. 2d 1386 (Fla. 5th Dist. Ct. App. 1987).
144. Id. at 1387.
145. Id.
146. Id. at 1387-88.
147. Id.
148. Id.
149. Id.
150. Id. Thus, the appellate court ruled that the trial court lacked jurisdiction.

151. For example, no arraignment was held as required by FLSA STAT § 39.06(1)(b) (1987). No notice of hearing for an adjudicatory hearing concerning dependency was served. Nor was a dispositional hearing held as required by § 39.408(3). Nor was there even a pre-disposition study prepared. Furthermore, the state was not...
39.01(30), 188 which defines medical neglect, the appellate court ruled that a court may indeed authorize medical treatment of a minor child when the parent refuses to provide the services because of "legitimate religious beliefs." 189 However, the appellate court specifically ruled that the adjudication of dependency must be set aside because Florida Statutes, section 39.01(30) sets forth an exclusion from the definition of neglect for the parent who acts based upon legitimate religious beliefs. 190 The appellate court found no evidence other than that the religious beliefs in question were legitimate, although it noted that there was no parallel exclusion from the abuse section of the Florida statute. 191 Thus, arguably the parents' willful refusal to provide medical care, despite the fact that it was based on legitimate religious beliefs, could be defined as abuse pursuant to section 39.01(2). 192 The appellate court refused to draw this distinction ruling that maxims of statutory construction require that the two provisions be read similarly in that they cover a particular subject matter, that the general provision should pertain to both of the more particular parts, and that there being an explicit prohibition in the first instance, the lack of specific inclusion in the second should therefore similarly be read to be an exclusion. 193 The court concluded that the dependency statute should be strictly construed because of the serious consequences of the finding, and finally, it reiterated that section 39.01(3) explicitly empowered the court to provide the relief necessary in this case without the finding of dependency. 194

Custody disputes may arise after a dependency adjudication has occurred. In the Interest of J.M. 195 is such a case, involving an appeal by a paternal grandmother from a court order permanently placing the

163. J.V., 516 So. 2d at 1124. The court explicitly confirmed the parens patriae interest of the state citing to an earlier Florida case, In the Interest of Irey, 319 So. 2d 53 (Fla. 1st Dist. Ct. App. 1975); See also Annotation, Power of Public Authorities to Order Medical Care for a Child Over Objection of Parent or Guardian, 30 A.L.R. 2d 1138 (1955).
165. J.V., 516 So. 2d at 1134.
166. Fla. Stat. § 39.01(2) (1983) defines abuse as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."
167. J.V., 516 So. 2d at 1134.
168. Id. at 1135.
http://nsuworks.nova.edu/nlr/vol13/iss3/1

188. 39.01(30).
189. Over a year later, the circuit court adjudicated the facts and determined that the mother and the paternal grandmother were not. A hearing was scheduled on the matter but in the interim the mother was murdered. On the date of the hearing, the father, paternal grandmother, maternal grandmother, and a representative from HRS appeared before the court. A dispositional hearing was held, and the circuit court took testimony and received written reports from HRS and its equivalent in Alabama and made a determination that the children ought to be placed in the home of the maternal aunt and uncle by applying the standard of best interest of the children. The trial court ruled that it was vested with jurisdiction to determine the best interests of the children. Based upon a change in circumstance, the death of the mother, the court was obligated to determine which relative would be most suitable. The appellate court held that the trial court's proper concern is that of the best interests of the child. The test for determining custody in the context of a dependency proceeding, however, is different than the question of determining whether the child is dependent ab initio. In the latter situation the test cannot be the best interests of the child. The statutory test applies. But as the court correctly ruled in In the Interest of J.M., the question is different when the decision is custodial placement among various adults.

170. Id. at 930.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id. at 931 (citing In the Interest of A.D.J., 460 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1984)).
178. The court must find that the child is abused, neglected or abandoned as defined by Fla. Stat. § 39.01(1)(2), (37) (1987).
which defines medical neglect, the appellate court ruled that a court may indeed authorize medical treatment of a minor child when the parent refuses to provide the services because of "legitimate religious beliefs." The appellate court specifically ruled that such actions must be based on the facts of the case and not simply a refusal to provide medical care. The appellate court's decision was based on the specific facts of the case and the state's interest in providing medical care to the child.

The court also considered the issue of dependency and the possibility of removing the child from the home. The court ruled that the child was not a fit candidate for removal and that the parents had a right to continue to care for the child.

Finally, the court considered the issue of jurisdiction. The court ruled that the family court had the authority to make the decision regarding the child's welfare and that the court's decision was final.

In conclusion, the court ruled that the child was entitled to receive the necessary medical care and that the family court had the authority to make the decision regarding the child's welfare. The court's decision was based on the specific facts of the case and the state's interest in providing medical care to the child.

Published by NSUWorks, 1999.
in custody disputes. In *Jones v. The Interest of A.W.*, 179 a dependency proceeding arose out of a custody dispute between the natural mother and the father of two children who was also the step-father of a third child. Both parents made claims of neglect and sexual abuse, and each denied the allegations of the other. 180 Interestingly, the petition was brought by the Department of Health and Rehabilitative Services which argued that the parents had produced an environment which was injurious to the children’s physical, mental, and emotional health. 181

The appellate court rejected the proposition that a custody dispute alone rises to the level of a finding of dependency. 182 Concluding that custody disputes are often intense and cause emotional effects upon children, the court held that an atmosphere of turmoil and the unsettling effects of the custody dispute alone would not give rise to dependency particularly in light of the recognition of the integrity of the family as a fundamental right. 183 However, the court left open the possibility that the circumstances could be so egregious that the parents’ rights could yield to the welfare of the children. 184

The question of what testing the court can impose upon a parent in the context of a dependency proceeding was raised recently in *S.N. v. Department of Health & Rehabilitative Services*, 185 on appeal before the First District Court of Appeal. In S.N., the trial court granted a motion by HRS to compel a parent to submit to a mental examination. 186 There had been a prior dependency adjudication resulting in the placement of a child with severe behavioral and emotional problems in a residential private school. In addition, the parent entered into a performance agreement. 187 Subsequently, the state filed a motion seeking a medical examination of the parent because the staff at the residential school thought that this information would be of assistance to

---

179. 519 So. 2d 1141 (Fla. 2d Dist. Ct. App. 1988).
180. Id.
181. Id.
182. Id. at 1142.
184. Jones, 519 So. 2d at 1142 (quoting In the Interest of W.D.N. II, 443 So. 2d 493 (Fla. 2d Dist. Ct. App. 1984)).
185. 529 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1988).
186. Id. at 1158.
187. Id.
188. Id. The specific reason for the professed need for psychological examination of the mother was to formulate an after-care plan for the child.
189. Id. at 1159. The purpose of a performance agreement is to: ensure permanency for children through recording the actions to be taken by the parties involved in order to quickly assure the safe return of the child to his parents, or if this is not possible, the permanent commitment of the child to the department or licensed child-placing agency for the purpose of finding a permanent adoptive home. Permanent adoptive placement is the primary permanency goal when a child is permanently committed to the department or a licensed child-placing agency. If it is not possible to find a permanent adoptive home, the performance agreement shall record the actions taken for preparing the child for alternative permanency goals or placements such as long-term foster care or independent living.

---

190. Fla. Stat. § 39.407(13) (1987) provides that: at any time after the filing of a petition for dependency, when the mental or physical condition, including the blood group, of a parent, guardian, or other person requesting custody of a child is in controversy, the court may order the person to submit to a physical or mental examination by a qualified professional. The order may be made only upon good cause shown and pursuant to notice and procedures as set forth by the Florida Rules of Juvenile Procedure.
191. Id. at 1159.
in custody disputes. In Jones v. The Interest of A.W., 179 a dependency proceeding arose out of a custody dispute between the natural mother and the father of two children who was also the step-father of a third child. Both parents made claims of neglect and sexual abuse, and each denied the allegations of the other. 180 Interestingly, the petition was brought by the Department of Health and Rehabilitative Services which argued that the parents had produced an environment which was injurious to the children's physical, mental, and emotional health. 181 The appellate court rejected the proposition that a custody dispute alone rises to the level of a finding of dependency. 182 Concluding that custody disputes are often intense and cause emotional effects upon young children, the court held that an atmosphere of turmoil and the unsettling effects of the custody dispute alone would not give rise to dependency particularly in light of the recognition of the integrity of the family as a fundamental right. 183 However, the court left open the possibility that the circumstances could be so egregious that the parents' rights could yield to the welfare of the children. 184

The question of what testing the court can impose upon a parent in the context of a dependency proceeding was raised recently in S.N. v. Department of Health & Rehabilitative Services, 185 on appeal before the First District Court of Appeal. In S.N., the trial court granted a motion by HRS to compel a parent to submit to a mental examination. 186 There had been a prior dependency adjudication resulting in the placement of a child with severe behavioral and emotional problems in a residential private school. In addition, the parent entered into a performance agreement. 187 Subsequently, the state filed a motion seeking a medical examination of the parent because the staff at the residential school thought that this information would be of assistance to the child and because the mother refused to voluntarily participate in the evaluation. 188 The appellate court found that on the record before it there was insufficient evidence to support a finding which would require the mother to submit to a medical examination. 189 The test for such a determination is contained in Florida Statutes, section 39.407(13) and Florida Rule of Juvenile Procedure 8.750(b). This statute and rule specifically require that three elements be shown before such an examination can take place: that the parent has requested custody of the child, that the parent's mental condition is in controversy, and that good cause has been shown to require the examination. 189 What was missing in the S.N. case was the showing of good cause, although the appellate court did find that by entering into the performance agreement the parent had implicitly sought custody of the child, and that the parent's mental condition was involved in the dependency proceeding particularly where the goal was to return the child to the home of the natural parent. 189 The appellate court found, however, that there had been no evidentiary showing that the parent was unable to meet the special needs of the child or some other reason that such an

179. 519 So.2d 1141 (Fla. 2d Dist. Ct. App. 1988).
180. Id.
181. Id.
182. Id. at 1142.
184. Jones, 519 So.2d at 1142 (quoting In the Interest of W.D.N. II, 443 So.2d 493 (Fla. 2d Dist. Ct. App. 1984)).
185. 529 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1988).
186. Id. at 1158.
187. Id. at 1157.
188. Id. The specific reason for the professed need for psychological examination of the mother was to formulate an after-care plan for the child.
189. Id. at 1159. The purpose of a performance agreement is to: Ensure permanency for children through recording the actions to be taken by the parties involved in order to quickly assure the safe return of the child to his parents, or if this is not possible, the permanent commitment of the child to the department or licensed child-placing agency for the purpose of finding a permanent adoptive home. Permanent adoptive placement is the primary permanency goal when a child is permanently committed to the department or a licensed child-placing agency. If it is not possible to find a permanent adoptive home, the performance agreement shall record the actions taken for preparing the child for alternative permanency goals or placements such as long-term foster case or independent living.

190. FLA. STAT. § 39.407(13) (1987) provides that:
At any time after the filing of a petition for dependency, when the mental or physical condition, including the blood group, of a parent, guardian, or other person requesting custody of a child is in controversy, the court may order the person to submit to a physical or mental examination by a qualified professional. The order may be made only upon good cause shown and pursuant to notice and procedures as set forth by the Florida Rules of Juvenile Procedure.
191. Id.
192. S.N., 529 So. 2d at 1159.

Published by NSUWorks, 1999
examination was necessary.\textsuperscript{193} A mere inference based upon the fact that the child had been initially removed from the home was deemed inadequate.\textsuperscript{194} The case was then remanded to the trial court for further proceedings and receipt of further evidence.\textsuperscript{195}

The evidentiary interstices in a dependency case can be complex. Such was the case in \textit{I.T. v. Florida, Department of Health and Reha-
blitative Services},\textsuperscript{196} decided by the Third District Court of Appeal in August, 1988. The case involved an appeal from an order adjudicating the child to be dependent by the natural parents who claimed that the trial court made a number of reversible errors. The parents argued the errors included the failure to set forth a factual basis for the adjudica-
tion, the failure to produce evidence to support a finding based upon a preponderance of the evidence standard, the admission of evidence of the death of the mother's first child, and aggravation of the psychothera-

ist-patient privilege to permit discovery of the parent's prior psycho-

terapy records.\textsuperscript{197} The appellate court reversed on all but the last ground.\textsuperscript{198} Despite the fact that the appellate court first found that the trial court had failed to state the facts upon which its finding of depen-
dency was made, as required by state law, and thus had no need to rule further, the appellate court went on to analyze several other evidentiary issues as it had done in other dependency cases, perhaps in an effort to instruct the lower courts.\textsuperscript{199}

193. Id.
194. Id.
195. Id.
196. 532 So. 2d 1085 (Fla. 3d Dist. Ct. App. 1988).
197. Id. at 1086-87. The facts in the case are particularly sad. The mother had been raped, received no therapy or counseling despite the fact that she had become pregnant as a result of the rape. She was making plans to place the child for adoption when she went into premature labor and gave birth to the child while seated on a toilet in her bathroom. As a result, and while the mother suffered a lapse of consciousness due to complex partial epileptic seizures, the child died. The mother was then charged with negligent homicide and pleaded not-opponent and was placed on probation. The parents married in 1982 and their first child was born microcephalic. The child was placed for adoption. The mother was hospitalized for complex partial seizures and at-
tempted suicide. She was arrested for violation of probation and was incarcerated for eighteen months. She had surgery for breast cancer compounded by Crohn's Disease, a chronic inflammation of the bowel which necessitated an ileostomy. The father who had suffered from minimal brain dysfunction since birth attempted suicide and had been hospitalized at an early age. The tragedy goes on and on.

198. Id. at 1087.
199. See supra note \textsuperscript{196} earlier decisions in the Interest of C.S., 507 So. 2d 417 (Fla. 1st Dist. Ct. App. 1987) and the Interest of G.D.H., 498 So. 2d 678.

1998]

It found that pursuant to Florida Statutes, section 415.512 the psychotherapist-patient privilege is abrogated in cases involving child abuse; therefore, it was permissible for the trial court to take testimony on the parent's psychiatric history.\textsuperscript{200} However, it concluded that the psychiatric history itself without more is not relevant in a dependency proceeding.\textsuperscript{201} What is needed is a showing by the state of an "explicit connection between the parent's past behavior and the potential signifi-
cant impairment of a child's physical, mental, or emotional health."\textsuperscript{202} The court relied upon the New York Family Court Act and prior New

York cases for this proposition.\textsuperscript{203} Thus, the state must show a nexus of sufficient degree between the psychiatric history of the parents and the likelihood that either parent would substantially impair the child's health. There was no such finding in this case. A simple belief that the parents lacked the requisite skills to bring up the child was deemed by the court to be insufficient to sustain a finding of dependency.\textsuperscript{204} \textit{I.T.} is an important case because it demonstrates that the duty is upon the State to prove the child will be abused and neglected in the future.\textsuperscript{205}

B. Termination of Parental Rights

Florida, in conformity with other states, provides statutory author-
ity within its juvenile code to terminate parental rights.\textsuperscript{206} Such a pro-
ceedure can arise in a variety of contexts and for various reasons, but is most often used to free a child for adoption. However, because the re-


200. Id., 532 So. 2d at 1088.
201. Id. at 1089-90.
202. Id. at 1088 (emphasis in the original).
204. Id., 532 So. 2d at 1090.
205. The court added that "the reality of inadequate state funding cannot justify removing I.T. from his parents' custody and effectively holding him hostage." Id.
207. 452 U.S. 18 (1981); see supra note 82.
examination was necessary. A mere inference based upon the fact that the child had been initially removed from the home was deemed inadequate. The case was then remanded to the trial court for further proceedings and receipt of further evidence.

The evidentiary interests in a dependency case can be complex. Such was the case in *I.T. v. Florida, Department of Health and Rehabilitative Services*, decided by the Third District Court of Appeal in August, 1988. The case involved an appeal from an order adjudicating the child to be dependent by the natural parents who claimed that the trial court made a number of reversible errors. The parents argued the errors included the failure to set forth a factual basis for the adjudication, the failure to produce evidence to support a finding based upon a preponderance of the evidence standard, the admission of evidence of the death of the mother's first child, and abrogation of the psychotherapist-patient privilege to permit discovery of the parent's prior psychiatric records. The appellate court reversed on all but the last ground. Despite the fact that the appellate court first found that the trial court had failed to state the facts upon which its finding of dependency was made, as required by state law, and thus had no need to rule further, the appellate court went on to analyze several other evidentiary issues as it had done in other dependency cases, perhaps in an effort to instruct the lower courts.

---

193. Id.
194. Id.
195. Id.
196. 532 So. 3d 1085 (Fla. 3d Dist. Ct. App. 1988).
197. Id. at 1086-87. The facts in the case are particularly sad. The mother had been raped, received no therapy or counseling despite the fact that she had become pregnant as a result of the rape. She was making plans to place the child for adoption when she went into premature labor and gave birth to the child while seated on a toilet in her bathroom. As a result, and while the mother suffered a lapse of consciousness due to complex partial epileptic seizures, the child died. The mother was then charged with negligent homicide and pleaded no contest and was placed on probation. The parents married in 1982 and their first child was born microcephalic. The child was placed for adoption. The mother was hospitalized for complex partial seizures and attempted suicide. She was arrested for violation of probation and was incarcerated for eighteen months. She had surgery for breast cancer compounded by Crohn's Disease, a chronic inflammation of the bowel which necessitated an ileostomy. The father had suffered from minimal brain dysfunction since birth attempted suicide and had been hospitalized at an early age. The tragedy goes on and on.
198. Id. at 1087.
199. Id. at 1089. The court relied upon its earlier decisions in *In the Interest of C.S.*, 507 So. 2d 417 (Fla. 1st Dist. Ct. App. 1987) and *In the Interest of G.D.H.*, 498 So. 2d 676 (Fla. 1st Dist. Ct. App. 1987) in *I.T.*

---

It found that pursuant to Florida Statutes, section 415.512 the psychotherapist-patient privilege is abrogated in cases involving child abuse; therefore, it was permissible for the trial court to take testimony on the parent's psychiatric history. However, it concluded that the psychiatric history itself without more is not relevant in a dependency proceeding. What is needed is a showing by the state of an "explicit connection between the parent's past behavior and the potential significant impairment of a child's physical, mental, or emotional health." The court relied upon the New York Family Court Act and prior New York cases for this proposition. Thus, the state must show a nexus of sufficient degree between the psychiatric history of the parents and the likelihood that either parent would substantially impair the child's health. There was no such finding in this case. A simple belief that the parents lacked the requisite skills to bring up the child was deemed by the court to be insufficient to sustain a finding of dependency. *I.T.* is an important case because it demonstrates that the duty is upon the State to prove the child will be abused and neglected in the future.

B. Termination of Parental Rights

Florida, in conformity with other states, provides statutory authority within its juvenile code to terminate parental rights. Such a procedure can arise in a variety of contexts and for various reasons, but is most often used to free a child for adoption. However, because the results of a termination of parental rights are so significant in terms of family relationships, the United States Supreme Court ruled in *Lassiter v. Department of Social Services* that a lawyer, while not mandatory, ought generally be provided to the parents. Florida has gone one step further, mandating the appointment of counsel for par-
ents by statute. Furthermore, Florida like other states has complied with the Unites States Supreme Court ruling in Santosky v. Kramer by setting the standard of proof in such cases as one of clear and convincing evidence. In addition, the United States Congress has recently passed legislation geared toward protecting parents and child from termination of parental rights in the absence of appropriate efforts to reunite the family. In 1987 the Florida Legislature sought to deal with the problem of children placed in foster care for extended periods of time by passing legislation requiring the establishment of performance agreements. The goal of these agreements is to assure either the swift and safe return of the child to the natural parents or the termination of parental rights. Furthermore, on a number of occasions during the survey period, Florida's appellate courts have ruled on issues involving termination of parental rights and the application of the doctrine of permanency planning.

In Warren v. Department of Health & Rehabilitative Services, the parent argued on appeal that before termination of parental rights and commitment to HRS for adoption occurs, HRS must offer the parent a performance agreement which seeks a safe return of the child to the parents. In the underlying case, the performance agreement submitted by HRS to the mother had as its stated purpose the permanent commitment of the child for adoption and not the return to the mother. The appellate court held that a performance agreement must be offered to a parent, but it need not in every instance contemplate return of the child to the parent. The court noted that in order

213. 501 So. 2d 706 (Fla. 2d Dist. Ct. App. 1987). See In the Interest of D.W.K., 402 So. 2d 1360 (Fla. 1st Dist. Ct. App. 1984), a two to one opinion holding that the failure of the trial court to require a performance agreement in a dependency case when the child was placed with a relative and not in the legal custody of HRS, did not weaken § 409.16 (now recodified as § 39.451) and was not reversible error.
214. Warren, 501 So. 2d at 707-08.
215. Id. at 708. The court relied upon Fla. Stat. § 409.161(3)(a) and the holding by the Florida Supreme Court in Gerry v. Department of Health & Rehabilitative Servs., 476 So. 2d 1279 (Fla. 1985) for this proposition. But see Fla. Stat. § 1989.

Juvenile Law

1187

to offer a performance agreement of the type made in Warren, the trial court must have determined that a child's safe return to its parents is untenable even if the reasons are other than severe physical abuse. An equally important question is how to test the evidence in a termination of parental rights case in order to support severance. In 1986, the Florida Supreme Court held in In the Interest of R.W., that a parent's failure to comply with the performance agreement alone is not a sufficient basis for termination of parental rights. The court held that the termination also must be based upon a showing of neglect, abuse, or abandonment by clear and convincing evidence to the effect that the child is or will be neglected or abused. In Spanke v. Department of Health & Rehabilitative Services, a per curiam decision by the Fifth District Court of Appeal with Judge Cowart dissenting, the court found that there was such additional evidence. Beyond the failure to comply with the performance agreement, there was evidence that the child suffered from the battered child syndrome. There was a history of physical and emotional abuse with little prospect for improvement plus the mother's denial that any abuse had occurred.

Judge Cowart's dissent focused upon his view that the petition alleged insufficient grounds to prove termination of parental rights which resulted in a denial of due process to the mother. In his view the petition for termination of parental rights did nothing more than assert that the child had been previously adjudicated dependent and that the parent had failed to substantially comply with the terms of the per
ents by statute. Furthermore, Florida like other states has complied with the Unites States Supreme Court ruling in Santosky v. Kramer by setting the standard of proof in such cases as one of clear and convincing evidence. In addition, the United States Congress has recently passed legislation geared toward protecting the parents and child from termination of parental rights in the absence of appropriate efforts to reunite the family. In 1987 the Florida Legislature sought to deal with the problem of children placed in foster care for extended periods of time by passing legislation requiring the establishment of performance agreements. The goal of these agreements is to assure either the swift and safe return of the child to the natural parents or the termination of parental rights. Furthermore, on a number of occasions during the survey period, Florida's appellate courts have ruled on issues involving termination of parental rights and the application of the doctrine of permanency planning.

In Warren v. Department of Health & Rehabilitative Services, the parent argued on appeal that before termination of parental rights and commitment to HRS for adoption occurs, HRS must offer the parent a performance agreement which seeks a safe return of the child to the parents. In the underlying case, the performance agreement submitted by HRS to the mother had as its stated purpose the permanent commitment of the child for adoption and not the return to the mother. The appellate court held that a performance agreement must be offered to a parent, but it need not in every instance contemplate return of the child to the parent. The court noted that in order to offer a performance agreement of the type made in Warren, the trial court must have determined that a child's safe return to its parents is sustainable even if the reasons are other than severe physical abuse.

An equally important question is how to test the evidence in a termination of parental rights case in order to support severance. In 1986, the Florida Supreme Court held in In the Interest of R.W. that a parent's failure to comply with the performance agreement alone is not a sufficient basis for termination of parental rights. The court held that the termination also must be based upon a showing of neglect, abuse, or abandonment by clear and convincing evidence to the effect that the child is or will be neglected or abused. In Spankie v. Department of Health & Rehabilitative Services, a per curiam decision by the Fifth District Court of Appeal with Judge Cowart dissenting, the court found that there was such additional evidence. Beyond the failure to comply with the performance agreement, there was evidence that the child suffered from the battered child syndrome. There was a history of physical and emotional abuse with little prospect for improvement plus the mother's denial that any abuse had occurred.

Judge Cowart's dissent focused upon his view that the petition alleged insufficient grounds to prove termination of parental rights which resulted in a denial of due process to the mother. In his view the petition for termination of parental rights did nothing more than assert that the child had been previously adjudicated dependent and that the parent had failed to substantially comply with the terms of the

208. Fla. STAT. § 39.465(1)(a) (1987). See also Orange County v. Fishalow, 513 So. 2d 1109 (Fla. 5th Dist. Ct. App. 1987) and In the Interest of D.B., 385 So. 2d 83 (Fla. 1983).
213. 501 So. 2d 706 (Fla. 2d Dist. Ct. App. 1987). See In the Interest of D.W.K., 493 So. 2d 1360 (Fla. 1st Dist. Ct. App. 1986), a two to one opinion holding that the failure of the trial court to require a performance agreement in a dependency case when the child was placed with a relative and not in the legal custody of HRS, did not weaken § 409.168 (now recodified at § 39.451) and was not reversible error.
214. Warren, 501 So. 2d at 707-08.
215. Id. at 708. The court relied upon FLA. STAT. § 409.168(3)(a) and the holding by the Florida Supreme Court in Gerry v. Department of Health & Rehabilitative Servs., 476 So. 2d 1279 (Fla. 1985) for this proposition. But see FLA. STAT. § 39.466(2) (1987), the 1987 revision which appears to limit Warren and Gerry.
216. Warren, 501 So. 2d at 708.
217. 495 So. 2d 133 (1986); See also Note, "Parental Rights Termination: The Interests of Parents, Children, and the State Mutually Exclusive," 17 STETSON L. REV. 205 (1987).
218. R.W., 495 So. 2d at 135.
219. 505 So. 2d 1357 (Fla. 5th Dist. Ct. App. 1987).
220. Id. at 1358.
221. Id. at 1358-59.
222. Id. at 1359-61.
ormance agreement.\textsuperscript{288} Because the allegations were legally insufficient, Judge Cowart did not believe the facts were material to the ruling on appeal.\textsuperscript{289} As a matter of due process if the allegations were insufficient, the case could not go forward. Judge Cowart did deal with the facts of the case in a footnote arguing that both the mother and child denied the abuse, that they both wished to live together, and that "both experience and wisdom teach that, as a practical matter, ultimately the state will not be successful in permanently keeping this predetermined mother and her determined fourteen, now fifteen, year old daughter from maintaining their natural relationship."\textsuperscript{289}

In \textit{K.H. v. Department of Health & Rehabilitative Services}\textsuperscript{290} discussed earlier, the court reaffirmed the basic proposition that in order to terminate parental rights the trial court must first find abuse, abandonment, or neglect before it can find that the parent failed to comply with certain performance agreements. In \textit{K.H.}, the appellate court noted that the trial court's prior finding of neglect must be based upon a clear and convincing standard to satisfy the burden of proving neglect in the permanent termination setting.\textsuperscript{291} In \textit{K.H.} not even the neglect standard of preponderance of the evidence was met.\textsuperscript{292}

Parents are able to challenge court orders concerning performance agreements on appeal. In \textit{the Interest of C.G.} is such a case.\textsuperscript{293} In this case the parents challenged both the dependency adjudication and the performance agreement.\textsuperscript{294} The underlying petition alleged that the father had sexually abused the child.\textsuperscript{295} The court found that there were sufficient facts to sustain the finding based upon a preponderance of the evidence, and the court of appeals agreed.\textsuperscript{296} However, the appellate court found otherwise with regard to the dispositional order in terms of the permanent placement plan as modified by the trial court. HRS had

\begin{itemize}
  \item 223. Id. at 1359.
  \item 224. Id. at 1360.
  \item 225. Id. at 1360 n.2 (Cowart, J., dissenting).
  \item 226. 527 So. 2d 230, 233 (citing In Re Interest of R.W., 495 So. 2d 1333 (Fla. 1986) and Darbo v. Department of Health & Rehabilitative Servs., 495 So. 2d 873 (Fla. 5th Dist. Ct. App. 1986)). See also In the Interest of R.R.G., 307 So. 2d 118 (Fla. 1st Dist. Ct. App. 1987).
  \item 227. K.H., 527 So. 2d at 232.
  \item 228. Id. at 233.
  \item 229. 506 So. 2d 1131 (Fla. 2d Dist. Ct. App. 1987).
  \item 230. Id. at 1132.
  \item 231. Id.
  \item 232. Id. at 1132-33.
\end{itemize}
formance agreement. Because the allegations were legally insufficient, Judge Cowart did not believe the facts were material to the ruling on appeal. As a matter of due process if the allegations were insufficient, the case could not go forward. Judge Cowart did deal with the facts of the case in a footnote arguing that both the mother and child denied the abuse, that they both wished to live together, and that "both experience and wisdom teach that, as a practical matter, ultimately the state will not be successful in permanently keeping this determined mother and her determined fourteen, now fifteen, year old daughter from maintaining their natural relationship."

In *K.H. v. Department of Health & Rehabilitative Services* discussed earlier, the court reaffirmed the basic proposition that in order to terminate parental rights the trial court must first find abuse, abandonment, or neglect before it can find that the parent failed to comply with certain performance agreements. In *K.H.*, the appellate court noted that the trial court's prior finding of neglect must be based upon a clear and convincing standard to satisfy the burden of proving neglect in the permanent termination setting. In *K.H.* not even the neglect standard of preponderance of the evidence was met.

Parents are able to challenge court orders concerning performance agreements on appeal. In *The Interest of C.G.* is such a case. In this case the parents challenged both the dependency adjudication and the performance agreement. The underlying petition alleged that the father had sexually abused the child. The court found that there were sufficient facts to sustain the finding based upon a preponderance of the evidence, and the court of appeals agreed. However, the appellate court found otherwise with regard to the dispositional order in terms of the permanent placement plan as modified by the trial court. HRS had originally offered the appellants a performance agreement. But when, according to HRS the parents had refused to carry out some of the acts required of them, HRS submitted a permanent placement plan to the court. Such a plan has as its purpose the freeing of the child for adoption, although in this case the permanent placement plan did not appear to have termination of parental rights as its purpose. In Florida, in order to implement a permanent placement plan, there must have been a finding that the parents could not or would not participate in preparation of the performance agreement. This did not occur in this case. Therefore, the court remanded the matter to the trial court to require HRS to develop a revised performance agreement, returning the child to her natural parents, unless the court found that it would be in the best interest of the child not to do so or if the court found that the parents had not complied with the terms of performance agreement.

Another question involving performance agreements was dealt with by the Second District Court of Appeal in *In the Interest of R.D.O., Jr.* In this case a mother appealed from a judgment permanently committing her nine year old child to HRS for adoption, claiming that HRS failed to provide her with a performance agreement prior to the permanent commitment proceeding and that there was no clear and convincing evidence of abandonment. The court found on the facts of the case that there was clear and convincing evidence of abandonment. More importantly, however, it relied upon *Burk v. Department of Health & Rehabilitative Services* for the proposition that the failure to file a permanent placement plan or the failure to offer the parent a performance agreement violates section 409 because the parent is often given no opportunity to comply with the provisions.
ever the court held on the facts of the case that the agency could not
find the mother, that she was in jail, and that once they found her it
made reasonable contact with her to explain her performance
agreement.244

IV. STATUS OFFENDERS

In its 1987 Session, the Florida Legislature passed a major revi-
sion to Chapter 39 entitled “Families In Need of Services/Children in
Need of Services.”245 The purpose of the new law, as stated in the pre-
amble to the statute, is to address the problems of truants, runaways,
and children beyond the control of their parents and the services pro-
vided to them by distinguishing those children both from abandoned,
abused and neglected youngsters, and delinquent children.246 Prior to
1975 this class of children was considered a sub-category of delinquent
children. Then, in 1975 the statute was changed to place these children
as a sub-category of dependent children. By 1986 there were 16,000
children referred to HRS for status offenses.247 The new law is a sub-
stantial change from the prior statute; it provides that HRS will be
responsible for non-judicial proceedings involving families in need of
services.248 Exclusive jurisdiction over proceedings will be in the circuit
court which shall retain jurisdiction until the child reaches the age of
eighteen.249 In addition, under the new law the child may not be de-
tained in a secure setting, a provision which complies with the Federal
Juvenile Justice and Delinquency Prevention Act.250 Rather, the child
may be held in shelter care and is entitled to a shelter care hearing
within twenty-four hours after the child is taken into custody to deter-
mine if continued placement is required.251 The length of time that a
child may be held in shelter care is limited to fourteen days.252 The
statute is primarily geared toward mediation or family arbitration to

241. Burk, 476 So. 2d at 1275.
244. Staff Analysis, Committee on Health and Rehabilitative Services, Florida State Legislature, Feb. 26
1987.
246. Id. § 39.42(5).
249. Id. § 39.42(3).
251. Id. § 39.436.
253. Id. § 39.438.
254. See id. § 39.432(6).
255. Id. § 39.422(2).
256. Id. §§ 39.439(2)(a).
257. Id. § 39.44.
258. Id.
259. Id. § 39.442.
260. Id. § 39.444.
261. Id. § 39.422(3). See generally Brooks, Noncriminal Offenders: An Enigma

http://nsuworks.nova.edu/nlr/vol13/iss3/1

1989 Juvenile Law

 resolve problems,250 and adjudication before the court will only occur
when the mediation or other services have failed.251 The new statute
provides for process, service, and court fees,252 and requires HRS to file
a motion for the appointment of a guardian ad litem to appear on be-
half of the child.253 The proceedings and procedures will comply with
the Florida Rules of Juvenile Procedure.254

Whenever a child is taken into custody, the new law provides that
HRS may provide medical screening for the child without authoriza-
tion of the court and without consent from a parent or guardian.255 If
medical treatment is needed, then consent shall be obtained from the
parent or by court order.256 The statute provides for other due process
protections including adjudicatory and dispositional hearings and pre-
disposition studies.257 The evidentiary standard in such cases is a pre-
ponderance of the evidence to establish that the child is in need of
service.258

The law further provides for various dispositional alternatives in-
cluding orders that the family and child participate in services, treat-
ment, or medication, that the parent or custodian pay fines, that the
child be placed under protective supervision, and that temporary cus-
tody be placed in one of a variety of individuals or agencies.259

Although the statute also contains contempt provisions, it is not
clear just what is intended by the contempt section of the new law.
While the statute provides that the court may punish any person who is
contempt, there is also evidence that the legislative intent was to re-
strict and limit the use of contempt against children in such cases.260
For example, the placement provisions of the new statute state that
neither a child alleged to be in need of services nor one who has been
adjudicated to be in need of services may be placed in a secure deten-
tion facility or jail under any circumstances.261 Yet the contempt provi-
ever the court held on the facts of the case that the agency could not find the mother, that she was in jail, and that once they found her it made reasonable contact with her to explain her performance agreement.481

IV. STATUS OFFENDERS

In its 1987 Session, the Florida Legislature passed a major revision to Chapter 39 entitled "Families In Need of Services/Children in Need of Services."482 The purpose of the new law, as stated in the preamble to the statute, is to address the problems of truants, runaways, and children beyond the control of their parents and the services provided to them by distinguishing those children both from abandoned, abused and neglected youngsters, and delinquent children.483 Prior to 1975 this class of children was considered a sub-category of delinquent children. Then, in 1975 the statute was changed to place these children as a sub-category of dependent children. By 1986 there were 16,000 children referred to HRS for status offenses.484 The new law is a substantial change from the prior statute; it provides that HRS will be responsible for non-judicial proceedings involving families in need of services.485 Exclusive jurisdiction over proceedings will be in the circuit court which shall retain jurisdiction until the child reaches the age of eighteen.486 In addition, under the new law the child may not be detained in a secure setting, a provision which complies with the Federal Juvenile Justice and Delinquency Prevention Act.487 Rather, the child may be held in shelter care and is entitled to a shelter care hearing within twenty-four hours after the child is taken into custody to determine if continued placement is required.488 The length of time that a child may be held in shelter care is limited to fourteen days.489 The statute is primarily geared toward mediation or family arbitration to resolve problems,490 and adjudication before the court will only occur when the mediation or other services have failed.491 The new statute provides for process, service, and court fees,492 and requires HRS to file a motion for the appointment of a guardian ad litem to appear on behalf of the child.493 The proceedings and procedures will comply with the Florida Rules of Juvenile Procedure.494

Whenever a child is taken into custody, the new law provides that HRS may provide medical screening for the child without authorization of the court and without consent from a parent or guardian.495 If medical treatment is needed, then consent shall be obtained from the parent or by court order.496 The statute provides for other due process protections including adjudicatory and dispositional hearings and pre-disposition studies.497 The evidentiary standard in such cases is a preponderance of the evidence to establish that the child is in need of services.498

The law further provides for various dispositional alternatives including orders that the family and child participate in services, treatment, or medication, that the parent or custodian pay fines, that the child be placed under protective supervision, and that temporary custody be placed in one of a variety of individuals or agencies.499

Although the statute also contains contempt provisions, it is not clear just what is intended by the contempt section of the new law. While the statute provides that the court may punish any person by contempt, there is also evidence that the legislative intent was to restrict and limit the use of contempt against children in such cases.500

For example, the placement provisions of the new statute state that neither a child alleged to be in need of services nor one who has been adjudicated to be in need of services may be placed in a secure detention facility or jail under any circumstances.501 Yet the contempt provi-

241. Birk, 476 So. 2d at 1275.
244. STAFF ANALYSIS, COMMITTEE ON HEALTH AND REHABILITATIVE SERVICES, FLORIDA STATE LEGISLATURE, Feb. 26, 1987.
246. Id. § 39.42(5).
249. Id. § 39.4231.6(b).
251. Id. § 39.436.
252. Id. §§ 39.437, 39.4375.
253. Id. § 39.438.
254. See id. § 39.426).
255. Id. § 39.424(2).
256. Id. §§ 39.439(2)(a).
257. Id. § 39.44.
258. Id.
259. Id. § 39.442.
260. Id. § 39.444.
261. Id. § 39.424(1). See generally Brooks, Noncriminal Offenders: An Exigens.
sion contains no such limitation. The provisions are thus inconsistent. Two Florida Supreme Court cases set the stage for an analysis of this issue but do not resolve it. The cases are A.O. v. State, 626 and R.M.P. v. Jones. 627 Both of these cases analyze the court’s contempt power over the previously adjudicated dependent child. R.M.P. dealt with the issue of whether the juvenile court could hold a dependent child in contempt under Chapter 39 and then place the child in secure detention for violation of the court order which had imposed conditions upon the child. 628 R.M.P. was a runaway adjudicated under the superseded statute in which children in need of services were included within the definition of the dependent child. 629 The court held that the trial court had inherent contempt power to punish for violation of valid court orders and that the courts have statutory power to punish for contempt citing Florida Statutes, section 38.22. Significantly, in this case, R.M.P. implied that the juvenile court could not use the mechanisms of Chapter 39 to place a child in secure detention.630 Rather, the juvenile court could properly sentence a child to secure detention, not for being a child in need of services, but for being a “criminal contemner.” 631 The decision was over a dissent by Justice Sunberg who found that Chapter 39 explicitly eschewed the placement of state offenders in secure detention. 632 He viewed the court’s analysis as a subversion of Chapter 39.

In A.O. v. State, the court was asked to decide whether a juvenile could be adjudicated delinquent upon a finding of contempt for violation of an earlier court order adjudicating him dependent. The court held that “a juvenile may not be adjudicated delinquent for contempt of court under Chapter 39 for continuing to be truant after being ordered to attend school on a previous dependency order.” 633 The court noted that while sanctions under Chapter 39 were not permissible for dependent children, the court retained its inherent authority to punish for contempt including placing the child in a secure detention facility.

to the Juvenile Justice System, 9 CHILDREN’S LEGAL RTS. J. 14 (Fall 1988).
262. 456 So. 2d 1177 (Fla. 1984).
263. 419 So. 2d 618 (Fla. 1982).
264. Id.
265. Id. at 619.
266. Id. at 620.
268. R.M.P., 419 So. 2d at 620.
269. A.O., 456 So. 2d at 1175.
270. Id.

for a reasonable period of time.” 634 Thus, the question remaining is whether the courts’ inherent contempt power may be limited by statute and whether Chapter 39 accomplishes this. There does not appear to be a Florida case on point. One case on the federal level, United States v. Fidani, 635 held that the court’s contempt power could be limited but the limitation by statute must be explicit. It may be argued that pursuant to Chapter 39, the limitation is indeed explicit. After all, section 39.442(8) could not be clearer. 636 Nothing in section 39.444 regarding contempt seems to change this. Thus, reading the two sections in pari delicto, the contempt power is limited by the enforcement mechanism whereby the child may not be placed in secure detention or in jail. Nor can R.M.P. v. Jones be read to negate section 39.442(8). While the court held that a juvenile court may sentence a child to secure detention, not for being a child in need of services but for being a criminal contemnor, subsection eight simply says that one who is in need of services may not be held in secure detention.

CONCLUSION

With Florida’s rapidly expanding juvenile population, it can be expected that Florida’s appellate courts will continue to see and decide issues running the gamut from delinquency to dependency and status offenses. Florida’s expansive waiver and direct filing system in the criminal law context will continue to be the source of litigation as attorneys for juvenile defendants seek to protect their clients from the penalties of the adult criminal justice system. With the implementation of the Federal Adoption Assistance and Child Welfare Act, it can be anticipated that Florida’s appellate courts will continue to see challenges to HRS’s efforts to carry out permanency planning under that law. And the passage of the new Child in Need of Services provisions to the Juvenile Justice Act of 1987 will doubtlessly produce appellate issues.

If the district courts of appeal have sent one signal to the Florida

271. Id. See also In the Interest of L.M.H., 462 So. 2d 1210 (Fla. 4th Dist. Ct. App. 1985).
272. 465 F.2d 755 (5th Cir. 1972).
273. FLA. STAT. § 39.422(7) (1987) provides: “A child who is alleged to be from a family in need of services or a child in need of services may not be placed in a secure detention facility or jail under any circumstances.”
sion contains no such limitation. The provisions are thus inconsistent. Two Florida Supreme Court cases set the stage for an analysis of this issue but do not resolve it. The cases are A.O. v. State, \(^{362}\) and R.M.P. v. Jones. \(^{363}\) Both of these cases analyze the court's contempt power over the previously adjudicated dependent child. R.M.P. dealt with the issue of whether the juvenile court could hold a dependent child in contempt under Chapter 39 and then place the child in secure detention for violation of the court order which had imposed conditions upon the child. \(^{364}\) R.M.P. was a runaway adjudicated under the superseded statute in which children in need of services were included within the definition of the dependent child. \(^{365}\) The court held that the trial court had inherent contempt power to punish for violation of valid court orders and that the courts have statutory power to punish for contempt citing Florida Statutes, section 38.22. In this regard see. \(^{366}\) Significantly, the court in R.M.P. implied that the juvenile court could not use the mechanisms of Chapter 39 to place a child in secure detention. \(^{367}\) Rather, the juvenile court could properly sentence a child to secure detention, not for being a child in need of services, but for being a "criminal contemnor." \(^{368}\) The decision was over a dissent by Justice Sunberg who found that Chapter 39 explicitly eschewed the placement of status offenders in secure detention. \(^{369}\) He viewed the court's analysis as a subversion of Chapter 39.

In A.O. v. State, the court was asked to decide whether a juvenile could be adjudicated delinquent upon a finding of contempt for violation of an earlier court order adjudicating him dependent. The court held that "a juvenile may not be adjudicated delinquent for contempt of court under Chapter 39 for continuing to be truant after being ordered to attend school on a previous dependency order." \(^{370}\) The court noted that while sanctions under Chapter 39 were not permissible for dependent children, the court retained its inherent authority to punish for contempt including placing the child in a secure detention facility for a reasonable period of time. \(^{371}\)

Thus, the question remaining is whether the court's inherent contempt power may be limited by statute and whether Chapter 39 accomplishes this. There does not appear to be a Florida case on point. One case on the federal level, United States v. Fidian, \(^{372}\) held that the court's contempt power could be limited but the limitation by statute must be explicit. It may be argued that pursuant to Chapter 39, the limitation is indeed explicit. After all, section 39.422(8) could not be clearer. \(^{373}\) Nothing in section 39.444 regarding contempt seems to change this. Thus, reading the two sections in pari delicto, the contempt power is limited by the enforcement mechanism whereby the child may not be placed in secure detention or in jail. Nor can R.M.P. v. Jones be read to negate section 39.442(8). While the court held that a juvenile court may sentence a child to secure detention, not for being a child in need of services but for being a criminal contemnor, subsection eight simply says that one who is child in need of services may not be held in secure detention.

CONCLUSION

With Florida's rapidly expanding juvenile population, it can be expected that Florida's appellate courts will continue to see and decide issues running the gamut from delinquency to dependency and status offenses. Florida's expansive waiver and direct filing system in the criminal law context will continue to be the source of litigation as attorneys for juvenile defendants seek to protect their clients from the penalties of the adult criminal justice system. With the implementation of the Federal Adoption Assistance and Child Welfare Act, it can be anticipated that Florida's appellate courts will continue to see challenges to HRS's efforts to carry out permanency planning under that law. And the passage of the new Child in Need of Services provisions to the Juvenile Justice Act of 1987 will doubtlessly produce appellate issues.

If the district courts of appeal have sent one signal to the Florida
Annual Survey of Florida Law — Legal Ethics

Patricia J. Allen*

During the survey period The Florida Bar saw some things remain the same in legal ethics and discipline: many, many lawyers neglected their clients, misappropriated their clients' funds or otherwise abused their clients, and a number of lawyers had sanctions imposed on them personally outside of discipline proceedings for persisting in frivolous litigation or handling litigation in a dilatory manner. At the same time, a trend seemed to be developing in that substance abuse became more frequently acknowledged or claimed as the cause of other misconduct. Florida Lawyers Assistance, Inc., which was created in 1986 to assist lawyers to rehabilitate themselves from drug or alcohol addiction, kept busy. Drug-related crimes were the basis for a number of disbarments. Some changes also were in the works: Florida Bar committees struggled mightily with the issues of advertising and solicitation abuses and a lawyer's duty when his client insists on giving perjured testimony, but found these matters to be not easily resolved. The Bar's Professional Ethics Committee issued eleven opinions on a variety of subjects, and the bar's ethics attorneys issued thousands of oral and written opinions. Amendments to the Rules of Professional Conduct

* Ethics Counsel, The Florida Bar, B.A., 1972, University of South Florida, J.D., 1981, Georgetown University Law Center. All opinions expressed or implied in this article are those of the author personally, and do not necessarily reflect opinions of The Florida Bar.


2. In its brief existence Florida Lawyers Assistance has accumulated close to 400 cases through mandatory discipline-related referrals and self-referrals. Florida Lawyers Assistance Hotline Newsletter, Dec. 12, 1988. With regard to mandatory referrals, see the cases discussed infra under the heading "Substance Abuse." For self-referrals, the corporation regularly publishes a toll-free number in the Florida Bar News. Rule of Discipline 3-7.1(h), entitled "confidentiality regarding treatment for alcohol abuse," states that voluntary consultations with Florida Lawyers Assistance will not come to light in disciplinary proceedings except by the lawyer's own choice.

3. The committee's opinions are published in the Florida Bar News when issued and are compiled in The Florida Bar, Professional Ethics on The Florida Bar