

FLORIDA GUARDIAN AD LITEM DEPENDENCY PRACTICE MANUAL

Florida Statewide Guardian ad Litem Program
April 2016



GAL

Guardian ad Litem

**A POWERFUL VOICE FOR
FLORIDA'S CHILDREN**

**FLORIDA GUARDIAN AD LITEM
PROGRAM**

The Florida Guardian ad Litem Program is dedicated to ensuring all of Florida's dependent children receive effective best interest representation. It is hoped that *The 2016 Guardian ad Litem Dependency Practice Manual* will be a valuable tool for attorneys and other child welfare professionals interested in legal advocacy and a deeper understanding of the legal issues facing Florida's most vulnerable children.

The 2016 Guardian ad Litem Dependency Practice Manual includes case law, practice tips, checklists and other practice aids. The citations in the manual have been abbreviated. A citation to § 39.01, Fla. Stat. (2015) appears as § 39.01; Fla. R. Juv. P. 9.800 appears as Rule 9.800; The Department of Children and Families appears as the department; and Child's Best Interest Attorney appears as program attorney.

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Thank you to Debra Ervin, Elizabeth Overton, and Kelly Razzano for their indispensable editorial assistance.

The Guardian ad Litem Program also thanks authors from outside the Guardian ad Litem Program including Matthew Dietz, Deborah Schroth, Jodi Siegel, Karen Oehme, and Sonia Crockett. These child welfare professionals went above and beyond to contribute to the Practice Manual – THANK YOU.

A handwritten signature in black ink, appearing to read 'Alan F. Abramowitz'.

Alan F. Abramowitz
Executive Director
Guardian ad Litem Program



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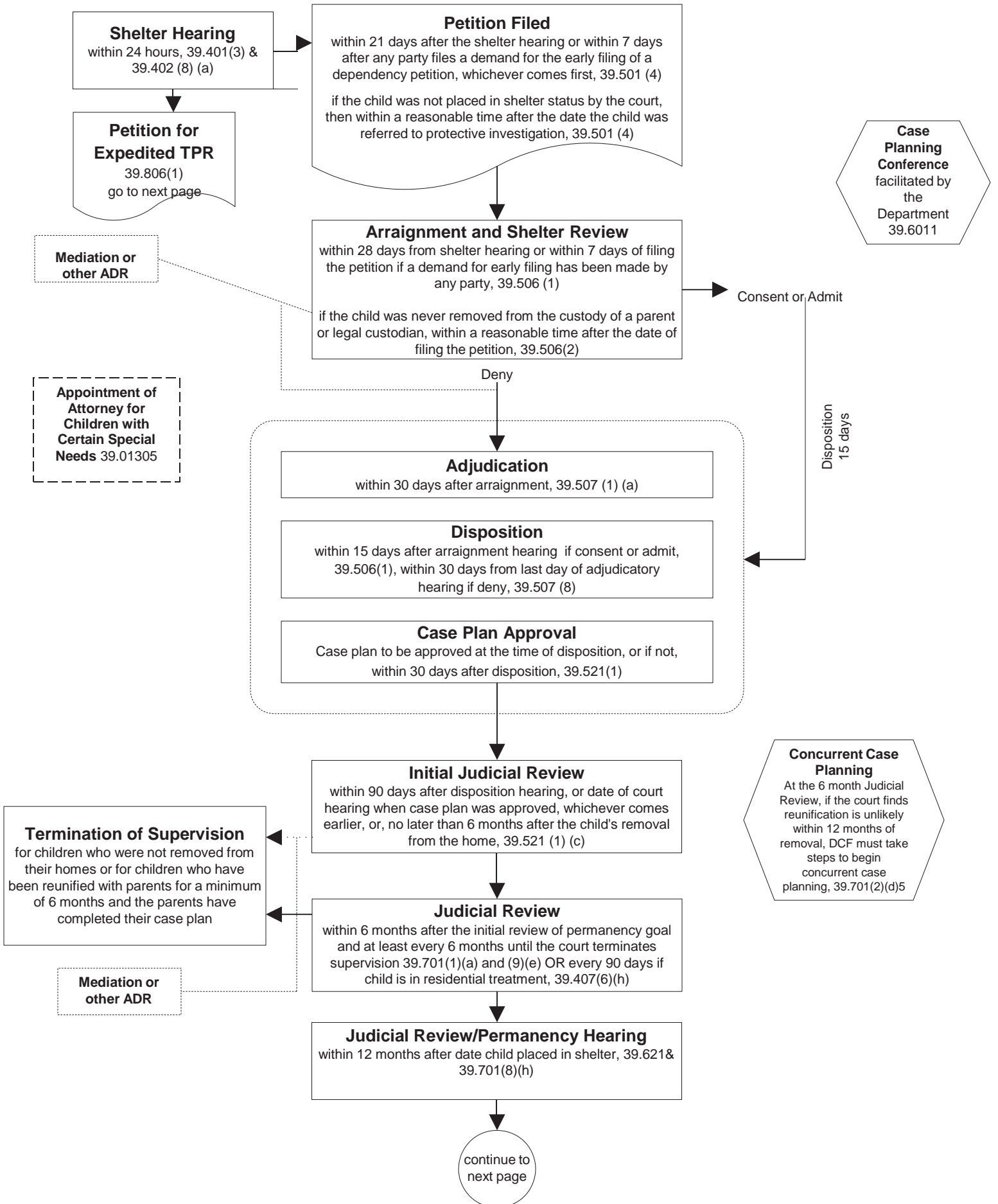
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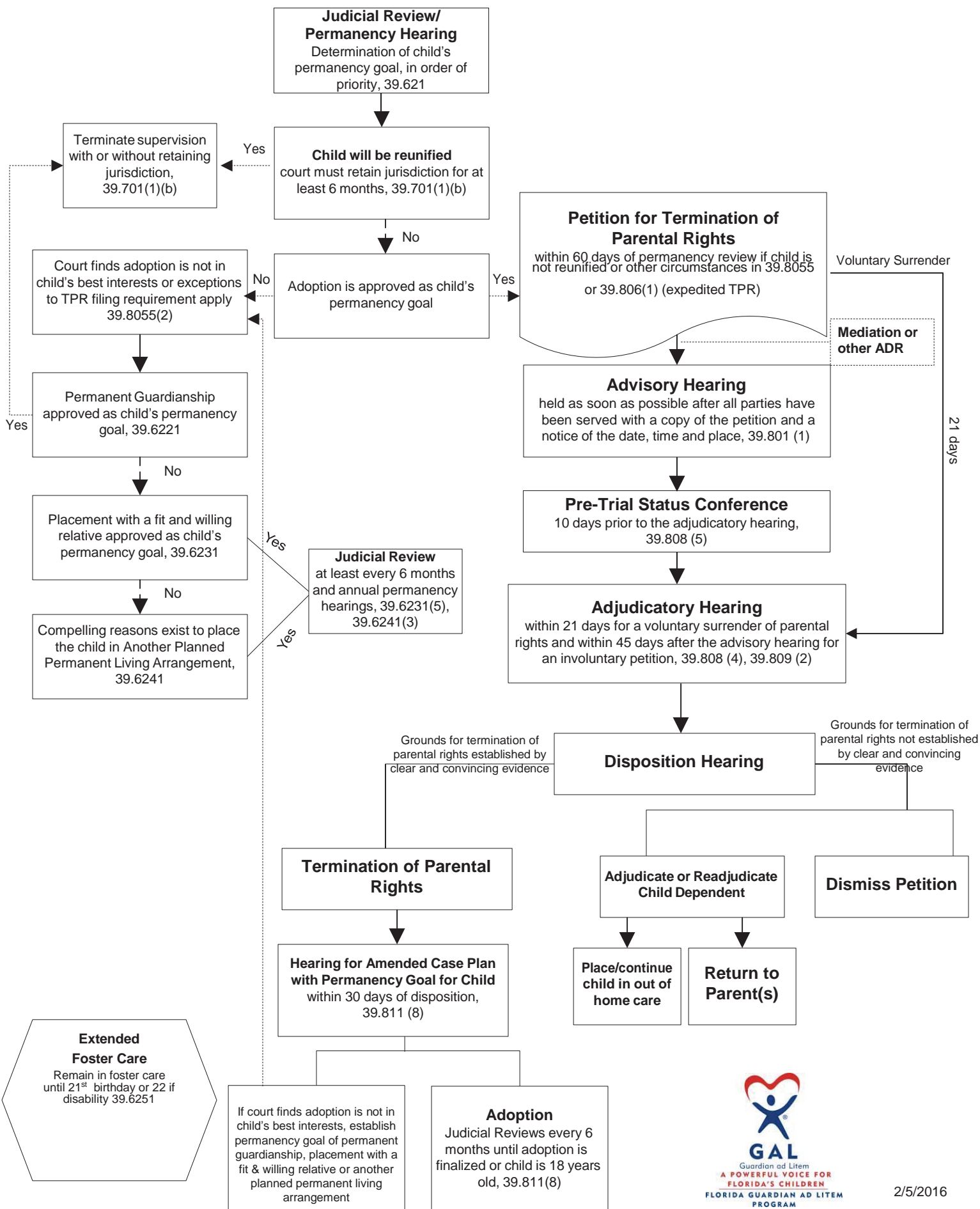
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Dependency Case Management Flowchart



Dependency Case Management Flowchart

(continued)



BASICS FOR EVERY GUARDIAN AD LITEM PROGRAM ATTORNEY

VANESSA CORDERO ESQ., SENIOR CHILD'S BEST INTEREST ATTORNEY, FLORIDA
GUARDIAN AD LITEM PROGRAM

HEARINGS AND STANDARDS OF PROOF AT A GLANCE

SHELTER PETITION

- At the shelter hearing, the petitioner must prove abuse, abandonment, or neglect by probable cause. § 39.402.
- Services may be requested at the shelter hearing, although they may not be a part of the case plan.
- Visits and referrals to services ordered at the shelter hearing shall be done by the child protective investigator until the case transfers to the case manager.
- The court shall determine visitation rights absent a clear and convincing showing that visitation is not in the best interest of the child.

DEPENDENCY PETITION

- At arraignment, parents enter a plea to the dependency petition.
- If parents enter a denial, then the petitioner must prove the allegations in the petition by preponderance at the trial on the dependency petition. § 39.507.

DISPOSITION HEARING

- The disposition hearing occurs after the parents' consent to the dependency petition or the petitions allegations are proven.
- At the disposition hearing, the child is adjudicated dependent on the state of Florida.
- The guardian ad litem must make recommendations regarding the child's placement, sibling and parental visits, services needed, and permanency recommendations.

CASE PLAN ACCEPTANCE HEARING

- Ensure the case plan tasks correspond to the dependency petition.
- Motions to amend the case plan to add a service must be proven by preponderance. § 39.6013.

JUDICIAL REVIEW

- The guardian ad litem must make recommendations regarding the child's placement, sibling and parental visits, services needed, and permanency recommendations.

- Hearsay is allowed at Judicial Review Hearings. § 39.701(9).

TERMINATION OF PARENTAL RIGHTS PETITION

- At the TPR advisory hearing, parents plea to the TPR petition.
- If parents enter a denial, the petitioner must prove the allegations in the petition by clear and convincing evidence at the TPR trial. § 39.809.

PRACTICE TIP: The standard of proof is greater for cases with children subject to ICWA. See Federal Legislation chapter.

CONFIDENTIALITY OF RECORDS AND OPEN HEARINGS

ALL RECORDS AND INFORMATION REQUIRED IN DEPENDENCY PROCEEDINGS ARE CONFIDENTIAL AND EXEMPT FROM PUBLIC INSPECTION OR ACCESS. § 39.0132

Section 39.0132 lists who can access this information without court order:

- the child;
- the child's parents;
- authorized court personnel;
- correctional probation officers;
- law enforcement agents;
- the guardian ad litem; and
- others entitled under Chapter 39. See § 39.0132(3).

DEPENDENCY COURT RECORDS ARE ONLY ADMISSIBLE IN THE FOLLOWING CIVIL AND CRIMINAL PROCEEDINGS: §§ 39.0132, 39.814

- appeal;
- perjury;
- disqualification;
- adoption; and
- those related to placement, parental time, adoption or termination of parental rights for the child or the sibling of a child whose rights have already been terminated.

ABUSE HOTLINE REPORTS AND RECORDS ARE NOT OPEN TO PUBLIC INSPECTION

- Section 39.202 governs the confidentiality of all reports and records held by the department, including reports made to the central abuse hotline regarding a child's abandonment, abuse or neglect. Such reports and records are not open to public inspection.
- Anyone who "knowingly and willfully" discloses confidential information contained in the central abuse hotline or departmental records of child abuse, abandonment, or neglect, is guilty of a 2nd degree misdemeanor. § 39.205(3).

DEPENDENCY HEARINGS ARE OPEN TO THE PUBLIC

Dependency hearings are open to the public; however the court may close any hearing or exclude someone in particular if the court determines “that the public interest or the welfare of the child is best served by so doing.” § 39.507(2).

TERMINATION OF PARENTAL RIGHTS HEARINGS ARE CLOSED TO THE PUBLIC § 39.809(4)

- See Natural Parents of J.B. v. Florida Department of Children and Family Services, 780 So. 2d 6 (Fla. 2001) (holding that closure is statutorily mandated, therefore the court need not make particular showing to justify closure).
- A party, which includes the guardian ad litem volunteer, may remain in the termination of parental rights hearings, even when the rule of sequestration is invoked. § 90.616

MEDIATIONS ARE CONFIDENTIAL

- All information discussed at mediation is confidential. The information learned through mediation cannot be used against a party, unless the information is known through another means.
- Non-parties cannot participate in the mediation, unless all parties agree to their presence.

PRACTICE TIP: One of the program attorney’s roles is to keep volunteers operating within the legal parameters of the dependency court. This is especially important with regard to confidentiality of records.

JURISDICTION AND VENUE IN DEPENDENCY PROCEEDINGS

- Jurisdiction attaches either when the department takes a child into custody or when a Shelter, Dependency or Termination of Parental Rights (TPR) petition is filed, whichever is first. § 39.013(2).
- Jurisdiction may be transferred within a circuit, between circuits, and between states.
- Once TPR has occurred, the court retains jurisdiction over the child until the adoption is finalized. § 39.812(4).
- Indian Child Welfare Act (ICWA) determines the jurisdiction for Indian children, or those eligible for tribal membership.
 - ICWA and its implications are detailed later in Federal Legislation chapter.

SUBJECT MATTER JURISDICTION

- Jurisdiction over dependency and termination of parental rights proceedings is vested in the circuit court. §§ 39.013(2), 39.801(2).
- The court hearing the dependency matter may also exercise jurisdiction over guardianship proceedings (Chapter 744) and relative custody proceedings (Chapter 751) involving the same child. § 39.013(3).
- The court that conducted the TPR proceedings is granted continuing jurisdiction for purposes of adoption (Chapter 63). § 39.813.
- Dependency issues may arise in other cases such as dissolution, custody, delinquency, and criminal cases. In the absence of local rules, transfer of such issues (e.g., custody, visitation, dependency, child support) to the court that hears dependency cases is provided by Rule 8.205(a).

- The shelter hearing shall be held by the circuit court, or the county court if so designated by the chief judge of the circuit court. § 39.402(6)(a). Pursuant to § 39.402(12), all hearings conducted by a judge, other than the juvenile court judge, must be reviewed within 2 working days of the original shelter hearing by the juvenile court judge.

PERSONAL JURISDICTION

- Jurisdiction over the child attaches upon the first of the following taking place:
 - when a child is taken into custody by the department; or
 - when a shelter, dependency, or TPR petition is filed. § 39.013(2).

OTHER STATES' INVOLVEMENT

- **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).** Dependency proceedings are included in the UCCJEA's definition of "custody proceeding," and, as a result, are subject to the UCCJEA. §§ 61.501-61.503.
- **Interstate Compact on the Placement of Children (ICPC).** The ICPC involves the placement of children by the sending agency to receiving state, typically under supervision of the child welfare agency in the other state, rather than the transfer of the court's jurisdiction from one state to another. §§ 409.401-409.405. See ICPC Chapter.

TRANSFER OF JURISDICTION

- Jurisdiction over dependency cases can be transferred within a circuit, between circuits, and between states, typically for reasons dealing with venue issues and convenience. Rule 8.205.

RETENTION OF JURISDICTION (EXTENDING JURISDICTION)

- The court must retain jurisdiction in cases of permanent guardianship, placement with a fit and willing relative, or another planned permanent living arrangement. §§ 39.6221(5), 39.6231(5), 39.6241(3).
- If a child has been adjudicated dependent, the court retains jurisdiction until the child/young adult reaches the age of 21 unless the young adult chooses to leave foster care at the age of 18 or does not meet the requirements for extended foster care. § 39.013(2).

TERMINATION OF PARENTAL RIGHTS CASES JURISDICTION

- Following TPR and permanent commitment of a child to the department, the court retains jurisdiction over the child until adoption is finalized. § 39.812(4). During this time, the court may consider continued relative and parental contact, as well as appropriateness of adoptive placement under § 39.811(7)(b).

TERMINATION OF JURISDICTION

The court in a dependency proceeding **shall** terminate its jurisdiction under the following circumstances:

- the court finds that the department has not proven its case and the child is not dependent. § 39.507(4);
- the court in a dependency proceeding **may** terminate its jurisdiction under the following circumstances:
 - the court adjudicates the child dependent while in custody of one parent, and places the child with the non-custodial parent § 39.521(3)(b)1; or
 - the child has been returned to parents or legal custodians, residing safely and continuously with the parents for at least 6 months § 39.521(7);

- termination in such cases is not mandatory, and some courts choose to terminate supervision while retaining jurisdiction until the child reaches the age of 18. § 39.521(7).

A motion may be filed by any party to terminate department supervision, jurisdiction of the court, or both, pursuant to Rule 8.345(b). However, the court cannot terminate its jurisdiction unless the child is returned to his or her parents or placed in a home providing child with permanency for at least 6 months. Rule 8.345(b), 8.415(f)(5).

VENUE

- The venue in a dependency case is in either the county in which the child and parents reside, or the county where the alleged abandonment, abuse or neglect occurred.
- Venue can also be with an Indian tribe, if the child is Indian, pursuant to ICWA.

PRACTICE TIP: Department policy is that it cannot transfer a case to another circuit without the receiving circuit's permission. Remember that you can still request that the court transfer a case over the department's objection, if a transfer is in the child's best interests, but remember to also address issues of delay in this request (assignment of a courtesy worker, referrals for services, relative caregiver funds and any other task the receiving department district will need to address).

DEFINING PARTIES AND PARTICIPANTS

PARTIES

Parties to dependency proceedings include the parents, the petitioner, the department, the guardian ad litem and the child. § 39.01(51), Rule 8.210.

PARTICIPANTS

Participants to dependency proceedings include any person who is not a party but should receive notice of hearings involving the child.

Examples of potential participants are foster parents, prospective parents, grandparents, actual custodians of the child or any other person whose participation may be in the best interests of the child. § 39.01(50).

AN ATTORNEY AD LITEM REPRESENTS THE CHILD

An Attorney ad litem shall be appointed for a child with special needs who resides in a skilled nursing facility or is being considered for placement in a skilled nursing home; is prescribed a psychotropic medication but declines to assent to the psychotropic medication; has a diagnosis of a developmental disability as defined in § 393.063; is being placed in a residential treatment center or is being considered for placement in a residential treatment center; or is a victim of human trafficking as defined in § 787.06(2)(d). § 39.01305(3). Section 39.4085(20) establishes a goal for all children to have "where appropriate, an attorney ad litem appointed to represent their legal interests." See also § 39.4085(20), Rule 8.217. See Attorneys for Children with Certain Special Needs chapter.

PRACTICE TIP: The child must be present for all court hearings unless the court finds that appearance is not in the best interests of the child. The court will take into account the reasonable

preferences of the child in making this determination. § 39.01(51), Rule 8.255(b). The child's mental and physical condition and age should be considered in making this determination. Rule 8.255(b).

PATERNITY AND DILIGENT SEARCH

When the identity of a parent is unknown at the time a shelter, dependency or when a TPR petition is filed, the court must conduct the following inquiry of the available parent, relative or custodian present before the court and order notice is given to the prospective parent identified:

- Whether the mother of the child was married at the probable time of conception;
- Whether there is a man who co-habitated with the mother at the probable time of conception;
- Whether there is a man, who claims to be the father, and who made the mother payments or promises of support in connection with the pregnancy or in regard to the child;
- Whether there is any man named on the birth certificate or in connection with applying for public assistance; or
- Whether there is any man who has acknowledged or claimed paternity of the child in a jurisdiction where the mother and/or child have resided since conception. See §§ 39.503(1) and 39.803(1). See also Form 8.969.

PRACTICE TIP: Paternity should be addressed as early as possible in the life of the case. If the court does not make this inquiry, the program attorney should ask the questions regarding paternity determination. The court may order genetic testing on any individuals named as prospective fathers. Once a legal father has been identified, any man coming forward as the biological father must have paternity established through an affidavit executed by both the legal and biological fathers. The legal father must disestablish his paternity before the biological father can establish his paternity. See Parentage and Paternity chapter.

DILIGENT SEARCH AND AFFIDAVIT OF DILIGENT SEARCH

If parental location is unknown, and a permanent address designation has not been filed with the court by that person, then a diligent search shall be conducted by the petitioner. Rule 8.225(b)(2).

IMPORTANCE OF CONDUCTING DILIGENT SEARCH AND AFFIDAVIT OF DILIGENT SEARCH

- If the court finds that petitioner has conducted a diligent search, failure to serve parents with unknown identity or location shall not affect the validity of an order of adjudication or disposition. Rule 8.225(b)(5)(A).
- Diligent search must include, at a minimum, inquiries of:
 - all relatives of parents or prospective parents known to petitioner;
 - all offices of program areas of the department that are likely to have information regarding parents or prospective parent;
 - other state and federal agencies likely to have information regarding parent or prospective parent;
 - appropriate utility and postal providers; and

- appropriate law enforcement agencies. § 39.503(6).
- If parental location is still unknown after completion of diligent search, then an affidavit of diligent search shall be executed and filed with the court by the person who conducted the search and inquiry. Rule 8.225(b)(3).

Until excused by the court, the petitioner and the department (if required by the court) are under a continuous duty to search for and attempt to serve the parent of unknown location after an affidavit of diligent search has been filed in a dependency or TPR proceeding. The department shall report on the results of the continuing search at each court hearing until the person is located or until further search is excused by the court. Rule 8.225(b)(4).

PRACTICE TIP: The petitioner must ask for a finding that the diligent search is indeed “diligent” to be excused from further efforts to locate a parent.

CONTINUANCES

THE PROGRAM ATTORNEY SHALL:

- Advocate for timely hearings to ensure that permanency for the child is reached as quickly as possible;
- Only request case continuances in extraordinary circumstances; and
- Shall make reasonable efforts to expeditiously conclude litigation.

There are specific time limitations that affect when shelter, arraignment, adjudicatory and disposition hearings must be held.

THE COURT IS REQUIRED TO:

- Limit continuances to the amount absolutely necessary to preserve the best interests of the child or the rights of a party. § 39.0136.
- Limit the cumulative days permitted for continuances permitted to 60 days. § 39.0136(3). See Rule 8.240(d)(5). **Time limitations are the right of the child.**

PRACTICE TIP: Generally, proceedings may not be continued for more than a total of 60 days for all parties within any 12-month period; however, Rule 8.240(d)(4) states that continuances at the request of the child’s guardian ad litem or attorney ad litem where appointed is not calculated as part of the 60 days permitted. Specifically, “these time limitations do not include the following: (A) Periods of delay resulting from a continuance granted at the request of the child’s counsel or the child’s guardian ad litem.” See § 39.0136(2). As continuances delay permanency for the child, it is crucial to scrutinize each request for a continuance and only agree when absolutely necessary to preserve the best interests of the child.

PRESENCE OF THE CHILD

PRESENCE IN COURT

- The child has the right to be present unless the court finds that the child’s appearance is not in the best interests of the child. § 39.01(51).

- The program attorney shall take steps necessary to ensure the child's attendance at hearings when appropriate.
- In making this determination, the program attorney shall consider: the age, maturity and child's wishes; the purpose of the hearing; the advice of those consulted; and the potential risk of trauma to the child if they attend court.

TESTIFYING

If the child has been subpoenaed by another party to testify at a hearing, the program attorney and the Program shall determine if testifying is in the child's best interests.

- Determine the possible benefits and repercussions of testifying and the necessity of the child's direct testimony.
- Consideration should be given to the availability of other evidence or hearsay exceptions that may substitute for direct testimony.
- If it is determined that it would not be in the child's best interests to testify, seek an agreement of the parties not to call the child as a witness or utilize other remedies such as an order from the court to limit the scope or circumstances of the testimony.
- If the child is compelled to testify, minimize the consequences by seeking appropriate accommodations as allowed by law such as in camera testimony, videotaped testimony, or testimony via closed circuit television (all require motion and hearing as well as specific findings of fact).
- The court can limit the number of times a child is subject to testimony. See § 92.55(3); Rule 8.245(i)(4).

APPOINTMENT OF THE GUARDIAN AD LITEM PROGRAM

Appointment of a guardian ad litem shall occur at the earliest possible time in any civil or criminal abuse, neglect, or abandonment judicial proceeding. See §§ 39.402(8)(c)(1); 39.807(2); 39.822. Rule 8.215; 8.305(b)(7)(A); 8.510(a)(2)(C).

- The Program requests appointment and assigns a staff or a volunteer.
- Once appointed, the Program remains appointed until discharged by the court.
- There is no fundamental error in discharging the Program and proceeding without a guardian ad litem. See e.g. Lopez & Elegeant v. Variety Children's Hospital, 600 So. 2d 506 (Fla. 3d DCA 1992).
- The Statewide Guardian ad Litem Program is expressly designed and intended to be independent of the judiciary. Statewide Guardian Ad Litem Office v. Office of State Attorney Twentieth Judicial Circuit, 55 So.3d 747, 750 (Fla. 2d DCA 2011) (holding the court cannot "compel the Statewide Guardian ad Litem to appear and assist children.")
- The Guardian ad Litem Program is not obligated to expend its resources if the Program has established other priorities. Id. See also Dep't of Corr. v. Grubbs, 884 So.2d 1147, 1148 (Fla. 2d DCA 2004) (holding the judiciary may not interfere with an agency's resource allocation).

GUARDIAN AD LITEM'S ACCESS TO RECORDS

- The guardian ad litem provides critical information to the court and to represent the child's best interests in dependency proceedings.

- The plain language of § 39.822 grants the guardian ad litem the authority to inspect and copy any records relating to the best interests of the child who is the subject of appointment. Since the dependency court aims to make the child safe by reunifying children with their rehabilitated parents or prevent reunification if it is not safe, then the child’s best interest is served when the guardian ad litem has access to all of the relevant records. See the Guardian ad Litem’s Access to Records chapter.

PRACTICE TIP: The part of the statute reading, “any records relating to the best interests of the child” does not just mean the child’s records; it also includes the parents’ records.

DISCOVERY

DEMANDS FOR DISCOVERY

- The program attorney shall file a demand for discovery in each case.
- The program attorney must ensure a discovery request is for information that cannot be obtained from another source that may be more timely and responsive.

RESPONSE TO DEMAND FOR DISCOVERY

- A response to a demand for discovery must be filed within 15 days of service of the request. Rule 8.245(d)(2).
- The program attorney shall redact any work product from Program files before the file is reviewed by any other party, as well as any other non-discoverable information (e.g., social security numbers, the names of other minors, etc.).

DEPOSITIONS

Any party may take the deposition upon oral examination of any person who may have information relevant to the allegations in the petition. Rule 8.245(g).

- Depositions may be used at any hearing for the purposes of:
 - Impeachment
 - Testimonial evidence if the deponent is unavailable because:
 - he or she is dead;
 - he or she lives farther than 100 miles from the place of hearing or is out of state unless it appears that the absence of the witness was procured by the party offering the deposition;
 - no service (and proof that proper service attempted);
 - he or she is unable to testify because of age, illness, infirmity, or imprisonment;
 - it has been shown on application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or
 - the witness is an expert. Rule 8.245(g)(3).
- The court may set conditions for the depositions of a child under the age of 16 after proper notice and an evidentiary hearing where good cause is shown. Rule 8.245(i)(2).

- “good cause” is shown based on the following considerations:
 - the age of the child;
 - the nature of the allegations;
 - the relationship between the child victim and the alleged abuser;
 - the child has undergone previous interviews that were recorded;
 - the examination would adversely affect the child; or
 - the manifest best interests of the child requires the limitations or restrictions.

PRACTICE TIP: Depositions in dependency take an extraordinary amount of time and should be scheduled as early as possible to avoid delays at trial.

TERMINATION OF PARENTAL RIGHTS

- Pursuant to § 39.802 (1), a TPR petition may be filed by the department, the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true. *See also* Rule 8.500(a)(2): “A petition for termination of parental rights may be filed at any time by the department, the guardian ad litem, or any person having knowledge of the facts.”
- If the department or another person having knowledge filed the TPR petition, the guardian ad litem attorney should review the petition for legal sufficiency. If appropriate, join and amend the petition.
- In an effort to ensure timely permanency, the judge must submit a ruling with findings of fact and conclusions of law in a proceeding for TPR within 60 days. § 39.809(5), Fla. R. Jud. Adm. Rule 2.215.

FLORIDA UNIFORM CITATIONS

Except for citations to case reporters, all citations forms should be spelled out in full if used as an integral part of a sentence either in the text or in footnotes. Abbreviated forms as shown in Fla. R. App. P. 9.800 should be used if the citation is intended to stand alone either in the text or footnotes.

FLORIDA STATUTES

- **In a Sentence.** Section 39.01(50), Florida Statutes (2009).
- **Stand Alone.** § 39.01(50), Fla. Stat. (2009).
- **Florida Statutes Annotated.** 32 Fla. Stat. Ann. 116 (Supp. 1975)

FLORIDA RULES

- **In a Sentence.** Florida Rule of Juvenile Procedure 8.012
- **Stand Alone.** Fla. R. Juv. P. 8.012

COMMONLY USED RULE CITATION FORMS

- Fla. R. Civ. P. 1.180.
- Fla. R. Juv. P. 8.070.
- Fla. R. App. P. 9.100.
- Fla. Admin. Code R. 62D-2.014

CASE CITATIONS

Case names shall be **underscored** (or **italicized**) in text and in footnotes

FLORIDA SUPREME COURT

- *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992).
- For recent opinions not yet published in the Southern Reporter, cite to Florida Law Weekly: *Traylor v. State*, 17 Fla. L. Weekly S42 (Fla. Jan. 16, 1992). If not therein, cite to the slip opinion: *Medina v. State*, No. SC00-280 (Fla. Mar. 14, 2002).

FLORIDA DISTRICT COURTS OF APPEAL

- *Sotolongo v. State*, 530 So. 2d 514 (Fla. 2d DCA 1988); *Buncayo v. Dribin*, 533 So. 2d 935 (Fla. 3d DCA 1988).
- For recent opinions not yet published in Southern Reporter, cite to Florida Law Weekly: *Myers v. State*, 16 Fla. L. Weekly D1507 (Fla. 4th DCA June 5, 1991). If not therein, cite to the slip opinion: *Fleming v. State*, No. 1D01-2734 (Fla. 1st DCA Mar. 6, 2002).

FLORIDA CIRCUIT COURTS AND COUNTY COURTS

- *Whidden v. Francis*, 27 Fla. Supp. 80 (Fla. 11th Cir. Ct. 1966).
- For opinions not published in Florida Supplement, cite to Florida Law Weekly: *State v. Campeau*, 16 Fla. L. Weekly C65 (Fla. 9th Cir. Ct. Nov. 7, 1990). If not therein, cite to the slip opinion: *State v. Campeau*, No. 90-4363 (Fla. 9th Cir. Ct. Nov. 7, 1990).

FLORIDA ATTORNEY GENERAL OPINIONS

- **In a Sentence.** In opinion 96-51, the Attorney General
- **Stand Alone.** Op. Att'y Gen. Fla. 96-51 (1996)

UNITED STATES SUPREME COURT

- *Sansone v. United States*, 380 U.S. 343 (1965).

FEDERAL COURTS OF APPEALS

- *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960).
- For opinions not published in the Federal Reporter, cite to Florida Law Weekly Federal: *Cunningham v. Zant*, 13 Fla. L. Weekly Fed. C591 (11th Cir. March 27, 1991).

CONSTITUTION

Florida Constitution. (Year of adoption should be given if necessary to avoid confusion.)

- **In a Sentence.** Article IV, section 3 of the Florida Constitution
- **Stand Alone.** Art. IV, §3, Fla. Const.

United States Constitution.

- Art. IV, § 2, cl. 2, U.S. Const. Amend. V, U.S. Const.

INTERNET CITATIONS

Cite to Internet sources only when those materials are unavailable in printed form or are difficult to obtain in their original form.

- Randall R. Smith, *Jones on the Internet: Confusion and Confabulation*, Citation Debate Forum at <http://www.citations.org> (last visited Jan. 20, 2001).

CAPITALIZATION

When referring to a court:

- When referring to the United States Supreme Court. The Court concluded in *Roe v. Wade* that there is a constitutional right to privacy
- When referring to the full name of any court. The Florida Supreme Court. **But:** the supreme court.
- In legal documents when referring to the court in which the document will be submitted. This Court accepted jurisdiction based on article V, section 3(b)(3) of the Florida Constitution.

Florida Supreme Court

- the court
- the supreme court
- the Florida Supreme Court
- the Supreme Court of Florida [the official name]

Florida District Courts of Appeal

- the court
- the district court
- the Third District Court
- the Third District Court of Appeal

Florida Circuit Courts

- the court
- the circuit court
- the Sixteenth Circuit Court

FOR MORE INFORMATION

- Florida Style Manual (7th Edition) <http://www.law.fsu.edu/docs/default-source/journals/law-review/florida-style-manual.pdf>
- *Introduction to Basic Legal Citation* (LII 2014 ed.) www.law.cornell.edu/citation
- Fla. R. App. P. 9.800 Uniform Citations (updated February 2016) [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/830A6BC6B90DA05685256B29004BFAC0/\\$FILE/Appellate.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/830A6BC6B90DA05685256B29004BFAC0/$FILE/Appellate.pdf?OpenElement)

DEPENDENCY AT A GLANCE CHECKLIST

REPORTS

- GAL Report Received (72 hours) § 39.701(2)(b)-(c)
- JR Report Received (72 hours) § 39.701(2)(b)-(c)
- Report of Agency (if applicable)
- Report of Citizen Review Panel (if applicable)
- Master Trust - Quarterly Accounting Attached to Each JR
- Medical, Psychological, and Educational Records
- Transition Plan
- Missing Child – Child’s Status & Efforts to Locate – Weekly Documentation for the First 3 Months; then Monthly Documentation 65C30.013(2)(c) F.A.C.

JUDICIAL REVIEW PREPARATION

- Permanency goal change
- Review permanency goal options § 39.01(52)
- Clarify any issues or questions with gal & staff
- Recommendations of gal program
- Child presence at hearing - encourage
- Clothing allotment
 - o Initial
 - o Annual
- Understand the child’s wishes
- Subpoena witnesses / gather documents
- Child prescribed psychotropic medication § 39.407(3)(a)

CASE PLAN

- Parent’s Tasks / Referrals Made / Compliance
 - o **No Substantial Compliance** - File TPR
 - o **Material Breach** – File TPR Earlier than 12 Months
- Child’s services ~ referrals made
- Services provided to foster parents / placement
- Department Compliance
- Case Plan Amendments § 39.6013
 - o **Preponderance of the Evidence.** Goal Changes, Concurrent Planning, Add or Remove Parent’s Tasks § 39.6013(4).
 - o **Competent Evidence.** Amend services for the child
- Adoption – Documentation of steps for permanent placement (the department)
- IL Needs, Tasks & Referrals
- Concurrent Planning ~ Appropriate Tasks

Psychotropic Medication § 39.407(3)(a)

- Prescribing physicians signed medical report
- Motion for more frequent reviews?

NORMALCY § 39.4091(3)

Caregivers must use a **reasonable prudent parent** standard to determine if child can participate in **age-appropriate** activity considering the child’s:

- Age, maturity and developmental level
- Risks of activity
- Best interest of child
- Importance of child's growth
- Importance most family-like living experience
- Behavior

Caregiver is **not liable** for harm caused to child, provided decision was reasonable and prudent.

Remove barriers by ensuring:

- CBCs / department prior approval not required
- There is an identified caregiver (a *person*) making normalcy decisions (even if child placed in group home or shelter)

VISITATION

- Parents ~ Frequency, Duration, Results, Recommendations, Agency Report?
- Siblings (Frequency, Kind, Duration) – Grandparents § 39.509

PLACEMENT

- Current placement, family-like, stability; with siblings (reasonable efforts, if not why?) § 39.402(9)(b)?
- Supervised Independent Living Considered (16+)

CONCURRENT PLANNING § 39.01(19)

- Case plan may be amended at any time to employ concurrent planning § 39.6013(2)
 - If court finds reunification unlikely at 6 month review, then must change goal to concurrent planning § 39.701(2)(d)5
- Department to file motion 10 days from court's finding

EDUCATION

- Placed in same school / stability / efforts made
- Educational needs & services considered
- Child has appropriate clothing & supplies
- Transportation
- Attendance issues
- Performance level (educational evaluation, GPA, etc.)
- Educational advocate
- Individual education plan (IEP)
- Child has physical, mental health issues –services

FINANCIAL

- Master trust ~quarterly accounting attached to JR
 - Personal allowance – no less than \$15 a month
 - Notice of ability to request fee waiver or change in foster care or personal allowance 65c-17.005 F.A.C.
 - Funds Distributed?
- Plan for Achieving Self-Sufficiency (PASS) Sub-Account for SSI beneficiaries. 65C-17.003(2) F.A.C.
- Foster care allowance - part of board rate sent to foster parents

DEVELOPMENTAL DISABILITY

- Disability services applied for / receiving before 18
- Guardian advocate in place by 18th birthday if appropriate § 393.12(2)(c)

MINOR PARENTS

- Access To Services, IL Services, Plan for Future, Child Placed with Minor (Unless at “Significant Risk”) 65C-28.010(1) F.A.C.

COURT ORDER

- Review the court order to make sure it is correct / identify issues

FOLLOW-UP

- Discuss follow-up issues with GAL team and develop plan
- Appellate Issues

EXPEDITING PERMANENCY: ENSURING POSITIVE OUTCOMES

ELIZABETH DAMSKI, ESQ., SPECIAL COUNSEL, FLORIDA GUARDIAN AD LITEM PROGRAM

Expediting Permanency for children is an important part of advocating for children in Florida's dependency system. Simple steps taken by the attorney will help to ensure children find their forever home as soon as possible.

OVERVIEW

READ THE FILE

Always review the child's file from shelter petition forward. Understand the path of the case and the current legal status of the case. Review motions filed and court orders

KNOW THE LAW

Understand statutes and case law that concern permanency and time frames and be prepared to submit memorandums of law when necessary. Sign up for the Guardian ad Litem Legal Briefs Newsletter to keep up to date on the latest case law. Go to www.GuardianadLitem.org.

ISSUE SPOT

Every fact has a corresponding legal issue. Treat the facts like a law school hypothetical and spot the issues for every fact provided.

DOCKET YOUR CASES

It is important to calendar any dates received on a case immediately. Find a system that works for you. You should know (subject to last minute changes) what you have on calendar in advance and prepare for your calendar.

ACT

File a motion, prepare for trial, attend mediations, case planning conferences, etc.

USE AVAILABLE RESOURCES

Review the Guardian ad Litem website (www.GuardianadLitem.org) for checklists, worksheets, training, and other information.

KEEP YOUR EYE ON THE CLOCK

Ensure timeframes are met, continuances are limited, and be sure to use concurrent planning if appropriate.

SHELTER

ENSURE TIMEFRAMES ARE MET

- Hearing within 24 hours of removal. §§ 39.402(8)(a), 39.401(3)(b).
- May be continued up to 72 hours (child remains in shelter) in certain circumstances. § 39.402(8)(d)(2). The shelter may be continued once it is commenced.

REQUESTING APPOINTMENT

- Section 39.402(8)(c)1 provides that “At the shelter hearing, the court shall: Appoint a guardian ad litem to represent the best interest of the child, unless the court finds that such representation is unnecessary.”
- Section 39.822(1) provides that “A guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceedings, whether civil or criminal.”

ENSURE SHELTER PROCEEDINGS ARE THOROUGH

- **Unknown Parent.** If the identity or location of a parent is unknown, the court is required to apply § 39.503 special procedures.
 - Was mother married at conception or birth
 - Cohabiting
 - Mother received payment or promises of support
 - Father named on birth certificate
 - Acknowledgement of paternity
- **Relative Placements.** Ensure that all possible relative placements are identified and that the parent is instructed of their continuing duty to inform the court of possible relative placements as well. See § 39.402(17).
- **Services for the Child.** Ensure court orders for services, such as medications, evaluations or educational needs. See §§ 39.407; 39.0016(3), 39.402(11)(d), and 39.4085(17).
- **Placement.** Health and safety of the child. Placement with a non-offending parent if parent currently seeking custody, completed home study, and placement does not endanger the child. § 39.521(3)(b). Ensure the department has made reasonable efforts to keep siblings together if they are removed and placed in out-of-home care unless such placement is not in the best interest of each child.
- **Visitation.** Visitation should begin in 72 hours unless there is clear and convincing evidence showing that visitation is not in the child’s best interests. § 39.402(9). Visitation should occur at least once a week with siblings § 39.4085(15) and at least once a month with parents unless the court orders otherwise. Review visitation with grandparents. See Keeping Children Safe Act Chapter.
- **Child Support.** The parents should be ordered to pay child support based on the child support guidelines. This may require the court to order the parents to submit financial affidavits by a date certain. § 39.402(11)(a).
- **Education.** Consider location of the school. Does child have IEP? Have parents given consent to provide access to educational records? Ensure Educational Stability.

- **Counseling.** Counseling may start immediately if appropriate. Ensure the compliance with court orders (i.e. referrals).
- **Psychotropic Medications.** See information, practice aids and guidelines on www.GuardianadLitem.org and Psychotropic Medication Chapter.
- **Other.** Substance abuse assessments ordered for anyone with custody or anyone requesting custody. § 39.407(16); ICPC (within 24 hours if out of state placement being considered. ICWA (if the child is a member of a tribe or eligible for membership, confirm the department has notified the tribe); AAL Appointment; Developmental Disabilities; Appointment of Registry Attorney for Children with Certain Special Needs; and no contact orders if appropriate.
- **Review Court Order.** The order should be ALWAYS be carefully reviewed for written findings required in § 39.402(8)(h). Ensure everything discussed during the hearing is reflected in the court order.
- **Review Shelter Checklist.** See Shelter chapter.

ARRAIGNMENT

ENSURE TIMEFRAMES ARE MET

- For a child in an out of home placement - within 28 days of shelter hearing. § 39.506(1).
- For a child not sheltered - within reasonable time after dependency filed. § 39.506(2).

REVIEW PETITION FOR LEGAL SUFFICIENCY

- Abandoned, abused, or neglected by a parent or legal custodian;
- Surrendered to the department or a child-placing agency for adoption;
- Voluntarily placed with the department, a relative or licensed agency and the case plan expired or parents failed to substantially comply with its requirements;
- Voluntarily placed for adoption and parents have signed consents;
- No parent or legal custodian capable of providing supervision or care;
- Substantial risk of imminent abuse, abandonment or neglect by a parent or legal custodian, or
- Sexually exploited and to have no parent, legal custodian, or responsible adult relative currently known and capable of providing the necessary and appropriate supervision and care. § 39.01(15)

See Dependency Petition Checklist.

PROPER SERVICE

Parents must be properly served with notice pursuant to §§ 39.402(5)(a), and 39.502(1). Proper service is required to make the record for entry of consent, if applicable. Service must be 72 hours in advance of the arraignment. § 39.502(4). May be substitute service on an adult household member.

- The department must notify relatives within 30 days of removal (due diligence).

DILIGENT SEARCH

If service cannot be perfected, ask the court to order diligent search. Monitor to ensure diligent search is timely initiated and completed with the filing of an affidavit of diligent search by the petitioner. § 39.503(6).

- If the diligent search is sufficient, the court may relieve the petitioner of further duty to search for the missing parent or prospective parent.
- Publication is not required.

Do not get an implied consent on a prospective parent as their parentage and party status have not been established.

- Ensure the order reflects that the petitioner complied with the statutory requirements to provide notice and the prospective parent did not appear despite the petitioner's efforts to provide notice. See Rule 8.225.

ADJUDICATION AND ADJUDICATORY HEARING

ENSURE TIMEFRAMES ARE MET

The hearing should take place "as soon as practicable after the petition for dependency is filed . . . but no more than 30 days after arraignment." § 39.507(1)(a)

ALL PARTIES HAVE THE RIGHT TO BE PRESENT AT ALL HEARINGS. RULE 8.330(C)

Determine if the child wishes to be present at the hearing and if appropriate whether transportation is arranged. If necessary, file a motion.

CONTINUANCES

The court is required to limit continuances to the amount necessary to preserve the child's best interests or the rights of a party. Section 39.0136(3) limits the cumulative days permitted for continuances by ALL parties to 60 days within any 12-month period.

CONCURRENT PLANNING

If appropriate, concurrent planning should be utilized to ensure efficient permanency. The case plan may be amended at any time to employ concurrent planning. § 39.6013(2). If court finds reunification unlikely at the 6 month review, then must change goal to concurrent planning § 39.701(2)(d)5.

RELATIVE AND NON-RELATIVE CAREGIVER FUNDS

Monies will not go into effect until the child has been adjudicated dependent.

DISPOSITION

The purpose of the disposition is for the court to determine what needs to be done by the parent, department, and the child to ensure the safety of the child and to move the parties toward the stated goal of the case plan.

ENSURE TIMEFRAMES ARE MET

- Disposition hearing must occur within 30 days of the last day of the adjudicatory hearing. § 39.507(8)
- If parent consents or admits at arraignment disposition must occur within 15 days “unless a continuance is necessary.” § 39.506(5)

PRE-DISPOSITION STUDY

Prepared by the department and furnished to the parties 72 hours prior to the hearing. § 39.521(1)(a). Must state reasonable preferences of the child § 39.521(2)(e). Further requirements § 39.521(2).

GUARDIAN AD LITEM DISPOSITION REPORT

Prepared by the guardian ad litem volunteer in consultation with the Child Advocacy Manager and program attorney. Furnished to the parties 72 hours before the hearing.

PLACEMENT

The court will make determinations as to placement - home studies must be completed. Ensure siblings are placed together if in the best interests of both siblings (if not, why?); close to home; close to school (school stability).

IDENTIFICATION OF RELATIVES

The parents have a continuing obligation to identify possible relative placements. Ensure compliance with ICPC and ICWA.

VISITATION

Parents, siblings, and grandparents.

KEEPING CHILDREN SAFE ACT

Review Keeping Children Safe Act Chapter. § 39.0139

CASE PLAN

- Regularly attend staffings and case plan meetings.
- Ensure that all needed services for the child are in the case plan.
- Ensure that all required services for the parent(s) are in the case plan.
- Look for creative tasks that truly address barriers to reunification.
- Consider staggering the case plan tasks so that the case plan best addresses the issues. For example, it may be most beneficial to have the parent receive substance abuse treatment before attending parenting classes.
- Ensure that an incarcerated parent has a meaningful case plan and that the parent is personally served with that case plan.
- Case plan may be amended at any time to employ concurrent planning.

- Has anything new arisen that was not previously considered in developing the case plan?

AMEND CASE PLAN

Amend the case plan as necessary. There may be changes in information or circumstances as the case progresses. Section 39.6013(2) permits amendment of the case plan “at any time.” Move to amend the case plan. It is not sufficient to simply have the court issue an order requiring the service. The case plan must be amended to require the service.

Make sure that the order amending the case plan also requires the agency to produce an amended (new) case plan within 30 days of the ruling. If the task is in a court order and not in the case plan, failure to comply with the court ordered task does show failure to comply with the case plan.

CHANGE THE CASE PLAN GOAL

The goal of the case plan can be changed “at any time.” § 39.6013(2). To change the goal, review at the factors in § 39.621. If the facts change and you think the goal should change, file a motion.

See Case Plan chapter.

JUDICIAL REVIEW

ENSURE TIMEFRAMES ARE MET

- Initial judicial review must occur no later than 90 days after the earlier of disposition or case plan approval hearing, but no more than 6 months after removal. § 39.701(1)(d)(1); Rule 8.415(b).
- Permanency hearing must occur no later than 12 months after the date the child is removed and no later than 30 days after a determination that further reunification efforts are without merit. §§ 39.621(1).
- Judicial reviews in every case must occur at least every 6 months. § 39.701(1)(a); Rule 8.415(b)

GUARDIAN AD LITEM JUDICIAL REVIEW REPORT

Review the guardian ad litem volunteer’s Judicial Review Report. Determine legal sufficiency (i.e., that the recommendations of goal, visitation and services are legally appropriate). Report should be in state approved format and include a statement to the court of the child’s wishes. Report should be filed and served on the other parties and the custodians 72 hours prior to the hearing. § 39.701(2)(b)(1).

See Guardian ad Litem Report Writing chapter.

CONCURRENT PLANNING

Consider whether to ask for a finding that it is unlikely that the child will be reunified with the parent within 12 months of removal under § 39.701(2)(d)5.

- If the court finds reunification unlikely, must begin concurrent planning. § 39.701(2)(d)5.
- The department must file an amended case plan with concurrent case plan tasks 10 business days after the findings of the court.
- The case plan may be amended at *any* time to employ concurrent planning. § 39.6013(2).

REVIEW THE JUDICIAL REVIEW SOCIAL STUDY REPORT (JSSR)

Ensure that master trust accountings (quarterly) are attached for any child with a master trust account. If accounting is not attached, determine if a motion to compel the filing of an accounting.

See Master Trust chapter.

- Medical, mental health, educational, and pre-independent living, life-skills, and independent living records/assessments should be filed as appropriate.
- The court will - review permanency goal, review guardian ad litem recommendations, clothing allotment, understand the child's wishes, psychotropic medication issues, referrals made for services, case plan amendments, concurrent planning, visitation, placement – including supervised independent living, educational issues, financial issues (master trusts, PASS accounts, foster care allowances, removal of disability of non-age), and developmental disabilities.

REVIEW CASE PLAN GOAL AND SERVICES

Child's Presence at Hearing. Determine if the child wishes to be present at the hearing and if so whether transportation is arranged. Child should be given opportunity to address the court § 39.701. Consider appearance via telephone or video conference.

Notice. Ensure notice was sent to all persons required to receive notice.

Consider Motions to remove the disability of non-age at the 17-year old judicial review.

- Disabilities of non-age removed for the following: Banking § 743.044; Residential Leases § 743.045; Utilities § 743.046; Car Insurance § 743.047; Borrowing Money for Education § 743.05. Must be in separate order.

PERMANENCY HEARING

Purpose of the Permanency Hearing is to determine whether the current permanency goal for the child is appropriate or should be changed; when the child will achieve one of the permanency goals; and whether the departments has made reasonable efforts to finalize the permanency plan.

ENSURE TIMEFRAMES ARE MET

- Permanency hearing must be held no later than 12 months after the date of removal or within 30 days of a judicial determination that reasonable efforts to reunify with parents are not required. § 39.621(1).
- After the initial permanency hearing, subsequent permanency hearings must be held every 12 months while the child is in care. § 39.621(1).

REVIEW THE GUARDIAN AD LITEM JUDICIAL REVIEW REPORT

- Review GAL Report prior to filing to determine legal sufficiency of recommended goal.
- If the goal is something other than reunification or adoption, the court must make specific findings. Finding must be explicitly documented. § 39.621(7). For any goal other than reunification or adoption, the court must say why adoption is not in the child's best interest.

TERMINATION OF PARENTAL RIGHTS: TPR = STATUTORY GROUND (+) MBI (+) LRM

Termination of Parental Rights: Must prove by Clear and Convincing evidence grounds for TPR under § 39.806, and TPR is in the child's Manifest Best Interest (MBI) under §39.810, and TPR is the Least Restrictive Means (LRM) of protecting the child from harm.

REVIEW THE TPR PETITION

Upon receipt of the petition, review to determine the appropriateness of the allegations and grounds. Go through the TPR checklist and review what is required to prove each ground and what witness will supply the required evidence.

See Termination of Parental Rights Chapter.

DEMAND FOR DISCOVERY

File a demand for discovery from the opposing parties. Respond to any demands for discovery. Include a witness list and an exhibit list if you will be entering exhibits. Work with opposing counsel to work out stipulations to exhibits and facts prior to trial. If there are any delays in the discovery process obtain a pre-trial order with time deadlines for conducting discovery.

PREPARE FOR TRIAL

- Prepare a list of all elements that must be proven and from which witnesses the evidence is expected. As the questions are asked eliciting the evidence, check it off.
- Issue subpoenas.
- Provide exhibits to opposing counsel.
- Speak with witnesses to prepare them to testify. File any necessary motions for in camera examination, child victim hearsay, etc.
- Prepare an opening statement and closing argument.
- Research case law and make copies for court and opposing counsel to use in closing argument.
- Keep up with current case law by subscribing to the Legal Briefs Newsletter. Archived newsletters are available on the website. The website also has a searchable case summary library.
www.GuardianadLitem.org
- Identify weaknesses in your case and be prepared to respond to objections, cross examine witnesses, rehabilitate your witnesses, and call rebuttal witnesses.

See Trial Advocacy chapter.

ENSURE APPROPRIATE APPOINTMENT OF APPELLATE COUNSEL

It is the duty of TRIAL COUNSEL to:

- File the notice of appeal;
- File designations to the court reporter;

- File directions to the clerk; and
- Present an affidavit of indigency to the court. Remember appeal is a new proceeding and indigency has to be established.

SHELTERING CHILDREN

DONALD J. FRENETTE, SR., ESQ., NORTHEAST REGIONAL COUNSEL, FLORIDA GUARDIAN AD LITEM PROGRAM

A guardian ad litem is generally appointed at the shelter hearing and should advocate *at a minimum* for safe and appropriate child placement, visitation in the child's best interests, and necessary services for the child's physical, mental, and emotional well-being. It is important to remember that the **child's best interest is the paramount concern in dependency proceedings**. An important consideration to keep in mind is that each case is unique and therefore, although there are very specific statutes and rules regarding the removal and sheltering of children, each case must be considered individually according to its own merits and factors. The following discussion regarding the removing and sheltering of children, with examples and hypotheticals, is used for illustrative purposes only and certainly not intended to limit guardian ad litem advocacy or discourage alternative means for handling any particular case.

REPORTING ABUSE, ABANDONMENT OR NEGLECT

When any person has knowledge or reasonable cause to suspect that a child may have been abused, abandoned or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare; that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care; that a child is abused by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare; or that a child is the victim of childhood sexual abuse or the victim of a known or suspected juvenile sexual offender, that person is required to call the **Florida Abuse Hotline (1-800-96-ABUSE)** to report such knowledge or suspicion. §§ 39.201(1)(a), 39.201(2)(a). Additionally, reporting may also be made online via the Department of Children and Families Abuse Reporting Portal at <https://reportabuse.dcf.state.fl.us/>; through Florida Relay 711; TTY/TDD 1-800-453-5145; or by faxing a report to 1-800-914-0004. This central abuse hotline is the first step in the safety assessment and investigation process. The department is capable of receiving and investigating, 24 hours a day, 7 days a week, reports of known or suspected child abuse, abandonment, or neglect and reports that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care. When receiving a report, if it appears that the immediate safety or well-being of a child is endangered, that the family may flee or the child will be unavailable for purposes of conducting a child protective investigation, or that the facts otherwise so warrant, the department shall commence an investigation immediately. In all other child abuse, abandonment, or neglect cases, a child protective investigation shall be commenced within 24 hours after receipt of the report. § 39.201(5).

Any allegations that a child was abused or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare will be investigated by the department, while allegations of child abuse by someone other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare will be accepted at the Hotline and immediately electronically transferred to the appropriate local law enforcement agency where the child lives. Professionals treating or counseling any person, as a result of a report of child abuse, abandonment, or neglect, are not required to again report to the central abuse hotline the abuse, abandonment, or neglect that was the subject of the referral for treatment. Likewise, an officer or employee of the judicial branch who has information provided to them in the course

of carrying out their official duties is not required to again provide notice of reasonable cause to suspect child abuse, abandonment, or neglect when that child is currently being investigated by the department, there is an existing dependency case, or the matter has previously been reported to the department, provided there is reasonable cause to believe the information is already known to the department. See § 39.202(1)(e)-(f).

All records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, are **confidential and the name of the reporter may not be released** except under very limited circumstances. § 39.202(1). However, hotline counselors are trained to encourage reporters to provide their names when reporting abuse, abandonment, or neglect. Questions asked by the hotline counselor include the name and occupation of the reporter, the relationship between the child and the reporter and the contact information for the reporter. Any person who knowingly and willfully makes public or discloses any confidential information contained in the central abuse hotline or in the records of any child abuse, abandonment, or neglect case commits a second degree misdemeanor. § 39.205(6). Although any report may be made anonymously to the hotline, according to § 39.201(1)(d), certain persons must provide their names (doctors, medical staff, mental health professionals, spiritual healing practitioners, teachers, school personnel, social workers, day care staff, foster care and residential or institutional workers, law enforcement officers and judges).

The names of **reporters shall be entered into the record of the report, but shall be held confidential and exempt from disclosure** as provided in § 39.202. Additionally, the department will gain access to the phone number, fax number, or Internet protocol (IP) address from which the report was received. But that information remains confidential as well. Reports made to the central abuse hotline and all records generated as a result of such reports, *excluding* the name of the reporter may be released to the parent or legal custodian of any child who is alleged to have been abused, abandoned, or neglected, and the child, and their attorneys, including any attorney representing a child in civil or criminal proceedings. § 39.202(2)(d).

Once the report is received, personnel at the department's hotline must make an initial determination if the report meets the statutory definition of abuse, abandonment or neglect. Any report meeting one of these definitions shall be accepted for the protective investigation. § 39.201(2)(a). Thereafter, a child protective investigator (CPI) is assigned to investigate the allegations. The department maintains a statewide automated child welfare information system to determine if the victim, alleged perpetrator, or other subjects of the report have any active, open investigations or history of prior reports or service provision. If the caller is reporting the exact same incident as contained in a prior closed report and the current allegations do not offer new information, additional subjects, new evidence, or additional allegations or incidents, a new report will not be generated for investigation. The hotline will process and document all allegations reported. However, not every call to the hotline is accepted as a report of abuse, abandonment, neglect, or that a child is in need of supervision and care, to be investigated. For example, a call will not be considered a report of abuse, neglect, or abandonment solely because an infant has been left at a hospital, emergency services station, or fire station pursuant to § 383.50. There are several types of calls to the hotline that do not constitute reports of abuse, neglect or abandonment. They include complaints of custody disputes, of withholding or misuse of child support which do not allege child abuse, neglect or abandonment; or a request for services such as transportation, food, and housing. Under these circumstances, the hotline counselor will provide the caller with appropriate community referral information, if available. For a complete list of hotline calls that do not constitute reports of abuse, neglect or abandonment. Fla. Admin. Code R. 65C-29.002(6)(e).

Any person, official, or institution participating in good faith in any act authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect to the department or any law enforcement agency, shall be immune from any civil or criminal liability which might otherwise result by reason of such action. § 39.202(5). See Urquhart v. Helmich, 947 So. 2d 539 (Fla. 1st DCA 2006).

Both failing to make a child abuse report and making a false child abuse report are considered crimes. A person who is required to report known or suspected child abuse, abandonment, or neglect and who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree. § 39.205(1). Moreover, a person who submits a false child abuse report is not only subject to criminal prosecution, but also subject to administrative fines imposed by the department and civil liability for damages suffered as a result of the false report. § 39.206. Criminally, a person who knowingly and willfully makes a false report of child abuse, abandonment, or neglect, or who advises another to make a false report, is guilty of a third degree felony. § 39.205(9). A false report is a report of abuse, neglect or abandonment of a child to the central abuse hotline, which is maliciously made for the purpose of: (a) harassing, embarrassing, or harming another person; (b) personal financial gain for the reporting person; (c) acquiring custody of a child; or (d) personal benefit for the reporting person in any other private dispute involving a child. The term “false report” does not include a report of abuse, neglect, or abandonment made in good faith to the central abuse hotline. § 39.01(27).

PROTECTIVE INVESTIGATION

Once a report is accepted as meeting the criteria of known or suspected child abuse, abandonment, or neglect, or that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care, the central abuse hotline shall determine if the report requires an immediate onsite protective investigation. For reports requiring an immediate onsite protective investigation, the central abuse hotline shall immediately notify the department’s designated district staff responsible for protective investigations to ensure that an onsite investigation is promptly initiated. For instance, when an allegation is made that a child’s immediate safety or well-being is endangered or that the family may flee or the child will be unavailable within 24 hours, an investigator will conduct an initial on-site response immediately. For reports not requiring an immediate onsite protective investigation, the central abuse hotline shall notify the district staff in sufficient time to allow for an investigation to be commenced within 24 hours. The central abuse hotline also provides information to district staff on any previous report concerning a subject of the present report or any pertinent information relative to the present report or any noted earlier reports. § 39.301(1). An investigation is commenced when the CPI attempts to make the initial on-site, face-to-face contact with the victim. When a family cannot be located at the time of the initial visit, attempts to locate them on a daily basis, at different times, must be continued.

When a report contains allegations of criminal conduct, the department must immediately forward those allegations to the municipal or county law enforcement agency of the municipality or county in which the alleged conduct has occurred. § 39.301(2)(a). If a criminal investigation is warranted, the law enforcement agency shall coordinate its investigation efforts with the CPI, if feasible. § 39.301(2)(c). All abuse and neglect cases transmitted for investigation to a district by the hotline must be simultaneously transmitted to the Department of Health child protection team (CPT) for review. § 39.303(5). The CPT provides services such as medical and mental health evaluations, specialized interviewing, nursing and family psychosocial assessments, expert testimony, and multi-agency/disciplinary staffings. Abuse and neglect reports that

must be referred by the department to CPT for an assessment and other appropriate available support services include the following:

- Injuries to the head, bruises to the neck or head, burns, or fractures in a child of any age;
- Bruises anywhere on a child 5 years of age or under;
- Any report alleging sexual abuse of a child;
- Any sexually transmitted disease in a prepubescent child;
- Reported malnutrition of a child and failure of a child to thrive;
- Reported medical neglect of a child;
- Any family in which one or more children have been pronounced dead on arrival at a hospital or other health care facility, or have been injured and later died, as a result of suspected abuse, abandonment, or neglect, when any sibling or other child remains in the home; or
- Symptoms of serious emotional problems in a child when emotional or other abuse, abandonment, or neglect is suspected. § 39.303(4).

Protective investigations shall be performed by the department or its agent. In certain counties, the child protection investigations are undertaken by the Sheriff's office. § 39.3065. The CPI supervisor may downgrade an immediate response to a 24-hour response when additional information from the reporter or law enforcement has been obtained subsequent to the information collected by the Florida Abuse Hotline that indicates the child is no longer in imminent danger of being harmed. The rationale for this determination shall be approved by the supervisor and documented in the Florida Safe Families Network (FSFN). Fla. Admin. Code R. 65C-29.003(1)(a). In some situations the parents, legal custodians, or caregivers might be uncooperative and not give the investigator reasonable access to the child. If that occurs, the department has statutory authority to seek an appropriate court order or other legal authority before examining and interviewing the child. § 39.303(12).

Upon commencing the investigation, the CPI shall inform any subject of an investigation of the following:

- The names of the investigators and identifying credentials from the department;
- The purpose of the investigation;
- The right to obtain his or her own attorney and ways that the information provided by the subject may be used;
- The possible outcomes and services of the department's response;
- The right of the parent or legal custodian to be engaged to the fullest extent possible in determining the nature of the allegation and the nature of any identified problem and the remedy; and
- The duty of the parent or legal custodian to report any change in the residence or location of the child to the investigator and that the duty to report continues until the investigation is closed. § 39.301(5)(a).

The CPI shall also fully inform parents or legal custodians of their rights and options, including opportunities for audio or video recording of investigators' interviews with parents or legal custodians or children. § 39.301(5)(b).

The health and well-being of the children and parents is a primary concern of the CPI and an assessment of safety and the perceived needs for the child and family will be conducted. The assessment, which must be

done in a manner that is sensitive to the social, economic, and cultural environment of the family, will include a face-to-face interview with the child, other siblings, parents, and other adults in the household along with an onsite assessment of the child's residence. § 39.301(7).

For every report accepted for investigation, the department or the sheriff providing child protective investigative services shall perform the following child protective investigation activities to determine child safety:

1. Conduct a review of all relevant, available information specific to the child and family and alleged maltreatment; family child welfare history; local, state, and federal criminal records checks; and requests for law enforcement assistance provided by the abuse hotline. Based on a review of available information, including the allegations in the current report, a determination shall be made as to whether immediate consultation should occur with law enforcement, the child protection team, a domestic violence shelter or advocate, or a substance abuse or mental health professional.
2. Conduct face-to-face interviews with the child; other siblings, if any; and the parents, legal custodians, or caregivers.
3. Assess the child's residence, including a determination of the composition of the family and household, including the name, address, date of birth, social security number, sex, and race of each child named in the report; any siblings or other children in the same household or in the care of the same adults; the parents, legal custodians, or caregivers; and any other adults in the same household.
4. Determine whether there is any indication that any child in the family or household has been abused, abandoned, or neglected; the nature and extent of present or prior injuries, abuse, or neglect, and any evidence thereof; and a determination as to the person or persons apparently responsible for the abuse, abandonment, or neglect, including the name, address, date of birth, social security number, sex, and race of each such person.
5. Complete an assessment of immediate child safety for each child based on available records, interviews, and observations with the child; other siblings, if any; and the parents, legal custodians, or caregivers and appropriate collateral contacts, which may include other professionals.
6. Document the present and impending dangers to each child based on the identification of inadequate protective capacity through utilization of a standardized safety assessment instrument. If present or impending danger is identified, the child protective investigator must implement a safety plan or take the child into custody. If present danger is identified and the child is not removed, the child protective investigator shall create and implement a safety plan before leaving the home or the location where there is present danger. If impending danger is identified, the child protective investigator shall create and implement a safety plan as soon as necessary to protect the safety of the child. The child protective investigator may modify the safety plan if he or she identifies additional impending danger.

§ 39.301(9)(a)1-6.

SAFETY PLAN

Under legislation in 2014, the use of safety planning was codified in Chapter 39. A "safety plan" means a plan created to control present or impending danger using the least intrusive means appropriate to protect a child when a parent, caregiver, or legal custodian is unavailable, unwilling, or unable to do so. § 39.301(67). "Present danger" means a significant and clearly observable family condition that is occurring at the current moment and is already endangering or threatening to endanger the child. Present danger threats are conspicuous and require that an immediate protective action be taken to ensure the child's safety. § 39.301(59). The term "impending danger" is defined as a situation in which family behaviors,

attitudes, motives, emotions, or situations pose a threat that may not be currently active but that can be anticipated to become active and to have severe effects on a child at any time. § 39.301(31).

Chapter 39 is specific in regard to the implementation and the use of or discontinued use of a safety plan. A safety plan must be specific, sufficient, feasible, and sustainable in response to the realities of the present or impending danger. It may be an in-home plan or an out-of-home plan, or a combination of both and may include tasks or responsibilities for a parent, caregiver, or legal custodian. However, the safety plan may not rely on promissory commitments by the parent, caregiver, or legal custodian who is currently not able to protect the child or rely on services that are not available or will not result in the safety of the child. If the parents, guardian, or legal custodian lacks the capacity or ability to comply, a plan may not be implemented. Further, if the department is not able to develop a plan that is specific, sufficient, feasible, and sustainable or if any party to a safety plan fails to comply with the safety plan resulting in the child being unsafe, the department shall file a shelter petition. § 39.301(9)(a)6.a.

THE FLORIDA SAFETY DECISION MAKING METHODOLOGY

The department has also implemented the use of a new child welfare practice model called the Florida Safety Decision Making Methodology that serves as a very comprehensive scheme for providing, *in part*, guidance for safety planning sufficiency criteria for child protective investigators. Safety planning is a vital component within the safety methodology. “The Safety Methodology provides a set of common core constructs for determining when children are unsafe, the risk of subsequent harm and how to engage caregivers in achieving change.” See Safety Methodology Practice Guidelines, All Staff, page 4, on the web at: http://centerforchildwelfare.fmhi.usf.edu/kb/DCF_Pol/SM_PracticeGuidelines-AllStaff.pdf.

“Florida’s practice model includes the expectation that when children are safe and at high risk or very high risk for future maltreatment, affirmative outreach and efforts will be provided to engage families in family support services designed to prevent future maltreatment.” *Id.* The methodology practice model focuses on the engagement and empowerment of parents and caregivers. To review a comprehensive guide for child protective investigators, please visit the following link:

http://centerforchildwelfare.fmhi.usf.edu/kb/DCF_Pol/SM_PracticeGuidelines-CPI.pdf.

The following link leads to the Florida’s Center for Child Welfare - Safety Methodology Home Page: http://www.centerforchildwelfare.org/Training/transformation_home.shtml.

In cases of certain child deaths or other serious incidents, the department provides an immediate multiagency investigation under a statutory provision creating a Critical Incident Rapid Response Team (CIRRT). The purpose of such investigation is to identify root causes and rapidly determine the need to change policies and practices related to child protection and child welfare. An immediate onsite investigation conducted by a critical incident rapid response team is required for all child deaths reported to the department if the child or another child in his or her family was the subject of a verified report of suspected abuse or neglect during the previous 12 months. § 39.2015(1)-(2).

When necessary to safeguard and ensure the child’s safety and well-being and development, the CPI shall cause the delivery of protective, treatment, and ameliorative services through the early intervention of the department or its agent. When domestic violence is an issue, the child protective investigator must inform parents and caregivers how and when to use the injunction process under § 741.30 in order to remove a perpetrator of domestic violence from the home as an intervention to protect the child. If the investigator determines that the interests of the child and the public will be best served by providing the child care or other treatment voluntarily accepted by the child and the parents or legal custodians, the parent or legal

custodian and child may be referred for such care, case management, or other community resources. But the parents or legal custodians shall be informed of the right to refuse services, as well as the responsibility of the department to protect the child regardless of the acceptance or refusal of services. However, if services are refused and the investigator determines that the child is in need of protection and supervision, the department shall take the child into protective custody and petition the court as provided in Chapter 39. See §§ 39.301(9)(b)1-2, (14)(b).

THE CHILD MALTREATMENT INDEX

The Child Maltreatment Index is a tool used by both Hotline counselors and child protective investigators to guide consistent and accurate decision making. The index applies to all calls received at the Hotline and all child protective investigations conducted under Chapter 39. The index contains 20 defined maltreatments that are inclusive of all forms of child abuse, neglect and abandonment. Upon completion of an investigation, the CPI will reach a determination regarding each of the alleged maltreatments from the hotline allegations. This determination will be based upon whether information gathered from interviews, records reviews, and observations during the investigation constitute credible evidence that indicators of child abuse, abandonment, or neglect are present. The findings for each maltreatment are then entered into the Florida Safe Families Network (FSFN) as follows:

- **VERIFIED.** This finding is used when a preponderance of the credible evidence results in a determination that the specific harm or threat of harm was the result of abuse, abandonment or neglect.
- **NOT SUBSTANTIATED.** This finding is used when there is credible evidence, which does not meet the standard of being a preponderance, to support that the specific harm was the result of abuse, abandonment, or neglect.
- **NO INDICATORS.** This finding is used when there is no credible evidence to support the allegations of abuse, abandonment, or neglect.

CF Operating Procedure No. 175-28, *Child Maltreatment Index*, State of Florida, Department of Children and Families, June 1, 2010.

The department shall complete its protective investigation within 60 days after receiving the initial report, unless:

- There is also an active, concurrent criminal investigation that is continuing beyond the 60-day period and the closure of the protective investigation may compromise successful criminal prosecution of the child abuse or neglect case, in which case the closure date shall coincide with the closure date of the criminal investigation and any resulting legal action.
- In child death cases, the final report of the medical examiner is necessary for the department to close its investigation.
- A child who is necessary to an investigation has been declared missing by the department, a law enforcement agency, or a court, in which case the 60-day period shall be extended until the child has been located or until sufficient information exists to close the investigation despite the unknown location of the child. § 39.301(16).

Additionally, the CPI shall make diligent efforts to locate a family prior to closing the investigation. If the CPI has reason to suspect that the family has fled to avoid the investigation, the CPI, child protective investigations supervisor, and counsel from Children's Legal Services shall conduct a legal staffing to determine if sufficient probable cause exists to file a shelter petition based on credible evidence that the

child is in imminent danger. When the child protective investigator has made a preliminary determination that the family has fled to avoid the investigation, a 'Statewide Alert' will be issued in the Florida Safe Families Network (FSFN). Fla. Admin. Code R. 65C-29.013(1)-(4).

ALTERNATIVES TO SHELTER

Prior to removing a child from the home, the department must make an initial determination either that there are no services or protections which can be placed in the home to alleviate the risk to the child or that the risk to the child is so high that removal is the only possibility. If conditions warrant, the department may proceed with the filing of a petition for dependency while leaving the children in the home with appropriate services. Therefore, if the risk is low and services can be put in place, there are alternatives to removal. The CPI shall offer families that have no need for ongoing supervision the necessary referrals for services available in the community or governmental programs in lieu of referring the family for Voluntary Protective Services (VPS), as appropriate. Fla. Admin. Code R. 65C-30.010(4). When it is determined that the provision of in-home services, such as Family Builder's or Intensive Crisis Counseling, are the appropriate and only required services, staff in collaboration with family preservation providers must ensure that the child's safety is the primary issue.

Hypothetical: If the call to the hotline is regarding a report of domestic violence in which the parents were engaging in domestic violence and the mother is the victim but, the protective investigator learns that the mother has obtained a restraining order and the alleged perpetrator is in jail, removal of the child may not be necessary. In this situation, a determination must be made as to whether the mother has taken the appropriate steps to protect her child. If there are no additional risk factors, placement of voluntary in-home services may be appropriate to ensure the children's safety without a removal. In the alternative, if there is a history of domestic violence between the parents or a parent and a paramour, where the mother has repeatedly sought restraining orders but later dismissed them or has sought to bail the perpetrator out of jail, removal of the children may be warranted.

Voluntary Protective Services (VPS): The department is authorized to determine if the family can be offered VPS in the home to prevent the removal of children. However, prior to offering VPS to a family, the CPI shall first determine, in consultation with his or her supervisor, whether the child is at high risk. Fla. Admin. Code R. 65C-30.010(1). Additionally, there must be a determination that there is not a high likelihood of lack of compliance with voluntary services, and such noncompliance would result in the child being unsafe. § 39.301(14)(a)2. In determining whether a high risk exists, the following factors must be considered by the CPI and his or her supervisor:

- The parent's or legal custodian's ages and maturity level;
- Whether there is evidence that they use illegal drugs or there is domestic violence in the home;
- The criminal, domestic violence and abuse/neglect or abandonment history of the parents or legal custodians and others who live in or frequent the home;
- The presence of any chronic or severe abuse, neglect or abandonment or of multiple maltreatments;
- Prior reports of abuse, neglect or abandonment involving the family or household and the findings of the investigation(s); and
- A history of non-compliance or non-cooperation during any previous interventions. Fla. Admin. Code R. 65C-30.010(2)(a)-(f).

If a determination is made that the child is not at high risk and his or her safety is ensured without court involvement, the CPI may refer the family to their contracted service provider for protective supervision services on a voluntary basis. Fla. Admin. Code R. 65C-30.010(5). In this situation, the department and parent(s) must agree that the family will be offered a case plan to alleviate the concerns facing the family. Prior to accepting a family for VPS, the CPI shall obtain a written agreement signed by the parents or legal custodians stating that they understand the nature of the services; their obligation to participate in the development and carrying out of the case plan requirements and the potential consequences if progress is not made in ameliorating the conditions that led to the abuse, neglect or abandonment report. This agreement shall be signed by any adults who provide any level of child care or supervision, including any parent who does not reside in the home but who will be involved in developing and complying with the case plan. Fla. Admin. Code R. 65C-30.010(6)(a)-(b). Nonetheless, the parents or legal custodians shall be informed of the right to refuse services, as well as the responsibility of the department to protect the child regardless of the acceptance or refusal of services. Thereafter, if services are refused and the department deems that the child's need for protection requires services, the department shall take the child into protective custody or petition the court. § 39.301(14)(b).

Subsequent noncompliance with a VPS agreement might be an argument point used by the department should judicial intervention be required at a later time. The department might argue that judicial intervention is warranted based upon the abuse report allegations plus the additional risk factor that the parents have not complied with the services provided under the agreement. The family has the right to request closure of its VPS case at any time. However, if at that time it is determined that the case closure is not in the child's best interest or that court ordered services are necessary, a staffing shall be held with a Child Welfare Legal Services attorney to determine if there is legal sufficiency to file a shelter or dependency petition. If it is not possible to establish legal sufficiency under these circumstances and a family has requested that its VPS case be closed, the case shall be closed. Fla. Admin. Code R. 65C-30.010(8)(a)-(b).

Removal of the Alleged Perpetrator. Sometimes a possible alternative to the child's removal may be the removal of the alleged perpetrator from the home. For example, if the father is alleged to have committed domestic violence and is removed from the home, the department may determine the children are safe in the home. This permits the department to offer VPS if warranted, or to seek judicial action to protect the children while not removing them from their home. In this fact pattern, the additional protections offered by an injunction may further support the children remaining in the home, with or without further dependency action. A similar arrangement may be considered where one parent is alleged to have physically or sexually abused the child(ren). As applicable, child protective investigators must inform parents and caregivers how and when to use the injunction process under § 741.30 to remove a perpetrator of domestic violence from the home as an intervention to protect the child. § 39.301(9)(b).

REMOVAL OF CHILDREN

Chapter 39 provides two ways in which a child may be taken into custody. Specifically, § 39.401 enumerates the basis upon which the department is authorized to take a child into custody. A child may only be taken into custody:

- Based upon sworn testimony, either before or after a petition is filed; or
- By a law enforcement officer, or an authorized agent of the department (typically a CPI) based on probable cause. § 39.401(1).

PROBABLE CAUSE MUST EXIST:

1. That the child has been abused, abandoned or neglected or that the child is suffering from or is in imminent danger of illness or injury as a result of abuse, abandonment or neglect.

Hypothetical: If a child has been physically abused and the department wishes to shelter the child and his sibling, the department must show probable cause exists to remove each child individually. The target child falls into the category of having been “abused”, therefore, probable cause may exist (subject to later findings the court must make which will be discussed further). The department may have physical findings of abuse (marks, bruises, welts, etc.) and perhaps a Child Protection Team (CPT) report or other doctor’s findings that the injuries are consistent with abuse or are indicative of non-accidental injury. Or, the department may have the target child’s statements or eyewitnesses to the abuse, or perhaps even hearsay statements of persons who heard the child discuss the abuse (hearsay is permissible at a probable cause hearing; the rules of evidence are not applicable as with an adjudicatory hearing). In fact, the department is obligated to provide all relevant law enforcement, medical or other professional reports as well as copies of any abuse hotline reports, subject to confidentiality requirements. § 39.402(8)(e).

The department may argue the sibling child, who is not considered the target child, is at risk of “imminent illness or injury” as a result of the abuse perpetrated upon the target child

Some Examples May Include:

- the parents have stated that this is their acceptable form of discipline and have stated their refusal to use alternative methods;
- the sibling, although not physically abused, witnessed the incident and suffered emotional trauma; or
- previous incidents have been reported where the sibling was the target, although not subject of the abuse in this report.

Without establishing a nexus, the court may find probable cause exists as to the target child, but not as to the sibling.

2. That a parent or legal custodian of the child has materially violated a condition of placement imposed by the court.

This situation may arise where the child has been adjudicated dependent and the child is under the protective supervision of the court. For example, the risk to the children may not have risen to the level requiring the removal, but an adjudication was obtained to ensure the safety of the children in the home; the children may have been returned to the parents upon their substantial compliance with the case plan while remaining under protective supervision for six months following return of the children; or the children may have been placed with a non-offending parent upon removal from the alleged perpetrator of abuse, abandonment or neglect. In all of these examples, the family is still operating under a case plan and their failure to comply, if it places the child at risk of, or results in, abuse, abandonment or neglect can be a basis for removal of the child. In addition, once protective supervision is terminated, if the court maintains jurisdiction over the child, a violation of court imposed conditions may result in removal if it places the child at risk of, or results in, abuse, abandonment or neglect. For example, if the father has failed to complete his case plan and the children is placed with the mother (or other relative, non-relative) and jurisdiction is maintained upon closing of protective supervision, and the custodian permits contact with the father when a no contact order has been entered, this may be a basis for removal.

3. That the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.

Cases typically fall into this category when a parent passes away and leaves underage children. In these situations, a family may have difficulty obtaining a court order placing the child in their custody due to the unavailability of the parent to consent to the placement (which is typically required in family court proceedings when a relative wants to obtain custody). The family needs a court order of placement to permit the family to enroll the child in school, obtain medical care, place the child on the family's medical insurance, etc. Therefore, this portion of the statute is a helpful tool in quickly obtaining a court order to assist the family in these needs. An additional benefit is that the family is entitled to relative caregiver funds once the child is adjudicated dependent.

When a child is taken into custody by, or is delivered to, an authorized agent of the department, the agent (typically a CPI) shall review the facts supporting the removal with an attorney representing the department to determine whether there is probable cause for the filing of a shelter petition. If the facts are not legally sufficient to support probable cause for filing a petition the child shall immediately be returned to the custody of the parent or legal custodian. However, if the facts are legally sufficient and the child has not been returned to the custody of the parent or legal custodian, the department shall file a shelter petition and request that a shelter hearing be held within 24 hours after the removal of the child. § 39.401(3)(a)-(b). Upon taking a child into custody and considering placement while awaiting the shelter hearing, the authorized agent of the department may:

- place the child in licensed shelter care;
- release the child to a parent or legal custodian;
- release the child to a responsible adult relative;
- release the child to the adoptive parent of the child's sibling who shall be given priority consideration over a licensed placement; or
- release the child to a responsible adult approved by the department if this is in the best interests of the child. § 39.401(3)(b).

In addition, the department may authorize placement of a housekeeper/homemaker in the home of a child alleged to be dependent until the parent or legal custodian assumes care of the child. Any placement not in a licensed shelter must be preceded by a criminal history records check as required under § 39.0138. Id. The department must conduct a background check and a home study on any proposed or actual placement. This includes a safety check of the home (the availability of sleeping arrangements, fire alarms, financial ability of the home to support the additional children, etc.) and a background check on every adult and child residing in the home. The background check includes a criminal history and abuse registry check to determine if the proposed custodian has any criminal or abuse registry record which would be a risk to the child. Further, a check on children in the home is conducted to determine whether they have been victims of abuse, abandonment or neglect and the identity of alleged perpetrators. The department is obliged to run these checks on any relatives or non-relatives named by the parents as proposed placements. Relatives or non-relatives are preferred for placement over a shelter placement and all possibilities should be immediately investigated by the department.

The CPI shall assess the child's needs for immediate services and accommodations upon removal and prior to placement, and take steps to ensure those immediate needs are met. When a child is removed from the home, the CPI shall maintain the child in the current school setting unless it is determined that

continuing attendance is not in the child's best interest, or ongoing safety issues require transfer to a new school. Fla. Admin. Code R. 65C-29.003(3)(b). Unless a child is exhibiting signs or symptoms of illness, an initial health care assessment by a licensed health care professional shall be completed for every child placed with a relative, non-relative, or in licensed care within five (5) working days of the removal. A child who appears to be sick or in physical discomfort shall be examined by a licensed health care professional within 24 hours. Fla. Admin. Code R. 65C-29.008(1).

When a child protective investigator takes a child into custody they must determine whether the child is taking psychotropic medications. If so, the child protective investigator must ascertain the purpose of the medication, the name and phone number of the prescribing physician, the dosage, instructions regarding administration (e.g., timing, whether to administer with food), and any other information. Thereafter, the child protective investigator must seek written authorization from the parent or legal guardian to continue administration of currently prescribed psychotropic medications. This authorization is good for the first 28 calendar days the child is in shelter. Fla. Admin. Code R. 65C-35.006(1)(a). See Psychotropic Medication chapter.

The child protective investigator must take the following actions:

- If the medication is in its original container, and clearly marked as a current prescription for the child, the medication must continue to be provided to the child. The protective investigator must notify or cause to be notified the parent or legal guardian that the medication is being provided to the child.
- If the medication is not in the original container, is not clearly marked and current, a physician or pharmacist must confirm that the medication is the child's prescription and that the prescription is current. Current means the child is or should be taking the medication at the time the child is taken into custody, according to the prescription information.
- If there is a pre-existing prescription and the other conditions regarding the medication's container, labeling, and current date above are met, the psychotropic medication must be provided to the child as prescribed, but only until the emergency shelter hearing is held as required by Section 39.407(3)(b)1., F.S.
- The child protective investigator may determine that the medication does not meet the conditions of being "in the original container, clearly marked, and current." In this case, the medication provided by the parent or legal guardian will not be administered to the child until the identity of the medication is confirmed by a physician or pharmacist.
- If a physician or pharmacist is unable to confirm the identity of any provided medications, the child will be evaluated by a physician at the child health check-up (within 72 hours). The physician will determine the on-going need for a currently prescribed psychotropic medication. Fla. Admin. Code R. 65C-35.006(1)(b).

In some cases, a child may be held in a hospital. Any person in charge of a hospital or similar institution, or any physician or licensed health care professional treating a child may detain that child without the consent of the parents, caregiver, or legal custodian, whether or not additional medical treatment is required, if the circumstances are such, or if the condition of the child is such that returning the child to the care or custody of the parents, caregiver, or legal custodian presents an imminent danger to the child's life or physical or mental health. Any such person detaining a child shall immediately notify the department. The department shall immediately begin a child protective investigation and make every reasonable effort to immediately notify the parents or legal custodian that the child has been detained. If the department determines that the

child should be detained longer than 24 hours, it shall petition the court for an order authorizing such custody in the same manner as if the child were placed in a shelter. § 39.395.

Whenever a child is taken into custody, the department shall immediately notify the parents or legal custodians, shall provide the parents or legal custodians with a statement setting forth a summary of procedures involved in dependency cases, and shall notify them of their right to obtain their own attorney. § 39.402(3).

PRIOR TO THE SHELTER HEARING

A child who has been removed may not be held longer than 24 hours without a shelter order. § 39.402(8)(a). When a child has been or is to be removed from the home and maintained in an out-of-home placement for more than 24 hours, the person requesting placement shall file a written petition that shall:

- specify the name, address, date of birth, and sex of the child or, if unknown, designate the child by any name or description by which he or she can be identified with reasonable certainty;
- specify the name and address, if known, of the child's parents or legal custodian and how each was notified of the shelter hearing;
- if the child has been removed from the home, state the date and time of the removal;
- specify that the child is of an age subject to the jurisdiction of the court;
- state the reasons the child needs to be placed in a shelter;
- list the reasonable efforts, if any, that were made by the department to prevent or eliminate the need for the removal or continued removal of the child from the home or, if no such efforts were made, a description of the emergency that prevented these efforts;
- recommend where the child is to be placed or the agency to be responsible for placement;
- if the children are currently not placed together, specify the reasonable efforts of the department to keep the siblings together after the removal from the home, why a foster home is not available to place the siblings, or why it is not in the best interest of the child that all the siblings be placed together in out of home care;
- specify ongoing visitation or interaction between the siblings or if sibling visitation or interaction is not recommended, specify why visitation or interaction would be contrary to the safety or well-being of the child; and
- be signed by the petitioner and, if represented by counsel, by the petitioner's attorney. Rule 8.305(a).

Thereafter, the department shall file the petition and schedule a hearing, and the attorney representing the department shall request that the shelter hearing be held within 24 hours after the removal of the child. § 39.401(3)(b).

Notice of the hearing on the shelter petition must be given to the parents or legal custodians of the child as to best ensure their actual knowledge of the date, time, and location of the hearing. When parents or legal custodians are outside the jurisdiction of the court, are not known, or cannot be located or refuse or evade service, they shall be given such notice as best ensures their actual knowledge of the date, time, and location of the shelter hearing. If the parents or legal custodians do not appear at the hearing, the person providing or attempting to provide notice to the parents or legal custodians shall advise the court either in

person or by sworn affidavit of the attempts made to provide notice and the results of those attempts. § 39.402(5)(a). Further, the parents or legal custodians shall be given written notice that:

- They will be given an opportunity to be heard and to present evidence at the shelter hearing; and
- They have the right to be represented by counsel, and, if indigent, the parents have the right to be represented by appointed counsel, at the shelter hearing and at each subsequent hearing or proceeding. § 39.402(5)(b).

The department's efforts must include speaking with any parent who can be located, relatives, and the children if they are age appropriate. However, the failure to provide notice does not invalidate the shelter order if the court finds that the petitioner has made a good faith effort to provide such notice. § 39.402(8)(b).

SHELTER HEARING

The shelter hearing is the first court appearance after a child has been removed from a home and/or a shelter petition has been filed. It is a hearing at which the court determines if probable cause exists to remove a child or keep a child in shelter status pending further investigation of the case and whether removal can be avoided through reasonable efforts by the department. §§ 39.01(71), 39.402(1). A child may not be removed from the home or continued out of the home pending disposition if, with the provision of appropriate and available early intervention or preventive services, including services provided in the home, the child could safely remain at home. In other words, if the court finds that prevention efforts of the department will allow the child to remain safely at home, the court shall allow the child to remain in or be returned to the home. § 39.402(7). Within 24 hours of the removal, the department must come before the court to establish probable cause for the removal. § 39.402(8)(a).

The shelter hearing is somewhat comparable to a first appearance in criminal court, except that at the shelter hearing the parents have the right to be heard and present testimony and evidence. § 39.402(5)(b)(1). See K.G. v. Florida Department of Children and Families, 66 So. 3d 366 (Fla. 1st DCA 2011); L.M.B. v. Department of Children and Families, 28 So. 3d 217 (Fla. 4th DCA 2010); L.M.C. v. Florida Department of Children and Families, 935 So. 2d 47 (Fla. 5th DCA 2006). The probable cause standard is the same by which a court determines sufficiency for an arrest warrant. Rule 8.305(b)(3). The circuit court, or the county court if previously designated by the chief judge of the circuit court for such purpose, shall hold the shelter hearing. § 39.402(6)(a). If a judge other than the juvenile court judge conducts the hearing, the juvenile court judge must conduct a shelter review on the status of the child within 2 working days after the shelter hearing. § 39.402(12); Rule 8.305(b)(14).

THE DEPARTMENT MUST ESTABLISH PROBABLE CAUSE THAT:

- the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment;
- the parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or
- the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care. § 39.402(1)(a)–(c); Rule 8.305(b)(2).

The court may base its determination on a sworn complaint, testimony, or an affidavit and may hear and review all relevant and material evidence, including oral and written reports. Evidence may be considered to the extent of its probative value even though it would not be competent at an adjudicatory hearing. Rule 8.305(b)(5). In other words, hearsay is permitted to be considered at a shelter hearing.

IN ORDER TO CONTINUE THE CHILD IN SHELTER CARE, AT THE SHELTER HEARING:

- The department must establish probable cause that reasonable grounds for removal exist and that the provision of appropriate and available services will not eliminate the need for placement; or
- The court must determine that additional time is necessary, which may not exceed 72 hours, in which to obtain and review documents pertaining to the family in order to appropriately determine the risk to the child during which time the child shall remain in the department's custody, if so ordered by the court. § 39.402(8)(d)(1)–(2); Rule 8.305(b)(2)(B).
- All parties should be sworn in to testify and should identify themselves and relationship to the case.
- The court shall appoint a guardian ad litem, unless the court finds that such representation is unnecessary. § 39.402(8)(c)1; Rule 8.255(b)(7)(A).
- The court shall inform the parents or legal custodians of their right to be represented by counsel and will provide counsel to indigent parents. § 39.402(8)(c)2; A.G. v. Department of Children and Families, 65 So. 3d 1180 (Fla. 1st DCA 2011). If the parents or legal custodians appear at the shelter hearing without legal counsel, then, at their request, the shelter hearing may be continued up to 72 hours to enable the parents or legal custodians to consult legal counsel. If a continuance is requested by the parents or legal custodians, the child shall be continued in shelter care for the length of the continuance, if granted by the court. § 39.402(5)(b)2.

PRACTICE TIP: Interpreters should be provided for non-English speaking parents.

- The court shall give the parents or legal custodians an opportunity to be heard and to present evidence. § 39.402(8)(c)3.
- The child has a right to be present at all hearings. Rule 8.255(b)(1).
- The department shall provide the court with copies of any available law enforcement, medical, or other professional reports, and shall also provide copies of abuse hotline reports pursuant to state and federal confidentiality requirements. § 39.402(8)(e).
- The parents or legal custodians must provide the names of all parents, prospective parents and next of kin to the court. § 39.402(8)(b).
- Parents or legal custodians must provide a permanent mailing address where future notice will be provided. § 39.402(8)(g).
- The court shall request that the parents' consent to provide access to the child's medical and educational records and provide information to the court, the department or its contracted agencies, the guardian ad litem or attorney ad litem for the child. If a parent is unavailable or unable to consent or withholds consent and the court determines access to the records and information is necessary to provide services to the child, the court shall issue an order granting access. § 39.402(11)(b)-(c).

THE DEPARTMENT SHALL INFORM THE COURT OF:

- Any identified current or previous case plans negotiated in any district with the parents or caregivers under this chapter and problems associated with compliance;

- Any adjudication of the parents or caregivers of delinquency;
- Any past or current injunction for protection from domestic violence; and
- All of the child’s places of residence during the prior 12 months. § 39.402(8)(f)1-4.

In a view towards achieving timely permanency, it is very important to identify and locate parents as early in the case as possible and include them in the dependency process. A late arriving parent into a dependency case has the potential to slow down any potential permanency. Therefore, the court shall inquire into the identity and whereabouts of any unknown parent if any parent, relative or non-relative is present at the shelter hearing. Additionally, if the identity or location of a parent is unknown, the court shall inquire of the parent or legal custodian who is present, or, if no parent or legal custodian is available, of any relative or custodian of the child who is present and likely to have the information:

- (a) Whether the mother of the child was married at the probable time of conception of the child or at the time of birth of the child.
- (b) Whether the mother was cohabiting with a male at the probable time of conception of the child.
- (c) Whether the mother has received payments or promises of support with respect to the child or because of her pregnancy from a man who claims to be the father.
- (d) Whether the mother has named any man as the father on the birth certificate of the child or in connection with applying for or receiving public assistance.
- (e) Whether any man has acknowledged or claimed paternity of the child in a jurisdiction in which the mother resided at the time of or since conception of the child, or in which the child has resided or resides.

§ 39.503(1).

Also, as a best practice towards achieving timely permanency, the court may order the department to conduct any necessary diligent searches and pre-adoptive home studies on all (relative and non-relative) placement possibilities identified by the parents. The court may also order the department to initiate the Interstate Compact on the Placement of Children (ICPC) process on all out-of-state prospective placements within 24 hours of shelter hearing and/or initiate out of town inquiries on prospective placements within Florida.

ISSUES TO BE CONSIDERED AT THE SHELTER HEARING

PLACEMENT

If the court grants the shelter petition, the court then must determine placement. The health and safety of the child is the paramount consideration in making placement decisions. 42 U.S.C. § 671(a)15(A). At the hearing, all interested persons present shall have an opportunity to be heard and present evidence on the criteria for placement provided by law. Rule 8.305(b)(4). The placement should be the least disruptive and most family-like setting that meets the needs of the child. The court should inquire of the parents as to the identity of any relative or non-relative placements in lieu of shelter with the department. § 39.402(17). Also, the court shall advise the parents that they have a continuing duty to inform the department of any relative who should be considered for placement for the child. Id.; Rule 8.305(b)(9). The term “shelter” means a placement with a relative or a nonrelative, or in a licensed home or facility, for the temporary care of a child

who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication. § 39.01(70).

Placement options may include:

- Any appropriate adult relative or nonrelative adult for whom the department has a positive home study including abuse registry and criminal background checks;
- Custody to the department with *permission to release without further hearing to court specified person* upon positive home study including abuse registry and criminal background checks;
- Custody to the department with *permission to release without further hearing to person selected by the department* upon positive home study including abuse registry and criminal background checks;
- Custody to the department for placement in licensed foster care, if no parent or family member or other approved adult placement is available; or
- Non-Offending Parent – also known as a “parent without allegations.” If there is a parent without allegations, the court must place the child with that parent if the child was not residing with the parent at the time the conditions arose, that parent is currently seeking custody of the child, there is a completed home study, and the placement does not endanger the safety, well-being or physical, mental or emotional health of the child. See § 39.521(3).

A responsible adult relative or the adoptive parent of the child’s sibling shall be given priority consideration over a licensed placement. § 39.401(3)(b).

PRACTICE TIP: The local GAL Program should obtain the placement information to assure that a guardian ad litem, when assigned, has accurate information to conduct the first visit. Placement may be with a relative, in which case the address will be in the order. However, if the child is placed with the department, the address will not be in the order and the local GAL Program should be sure to obtain the address off the record or at least the phone number of a department representative from whom that information may be obtained at a later date.

VISITATION

- The department shall provide to the court a recommendation for scheduled contact between the child and parents, if appropriate. This recommendation is normally specified within the shelter petition. Visitation should be ordered unless there is a clear and convincing showing that visitation is not in the best interests of the child. § 39.402(9)(a).
- If siblings who are removed from the home cannot be placed together, the department shall provide to the court a recommendation for frequent visitation or other ongoing interaction between the siblings unless this interaction would be contrary to a sibling’s safety or well-being. § 39.402(9)(b). Visitation between siblings should occur at least once a week and visitation with parents should occur at least once a month, unless the court orders otherwise. §§ 39.4085(15), 39.4085(16). See § 39.001(1)(k); In Interest of C.G., 612 So. 2d 602, 603-4, (Fla. 4th DCA 1992).
- All court ordered visitation should begin within 72 hours of the shelter hearing. § 39.402(9).
- Visitation with grandparents. See § 39.509.
- Review the “Keeping Children Safe Act (KCSA)” regarding limitations involving visitation for cases involving sexual abuse, certain sex crimes and improper influence of children’s testimony. § 39.0139.

See Department of Children and Families v. P.F., 107 So. 3d 1123 (Fla. 5th DCA 2012). See KCSA Chapter.

- Parents must be given an opportunity to be heard on visitation issues. See § 39.402(5)(b)1; O.M. v. Department and Children Family Services, 932 So. 2d 561 (Fla. 3rd DCA 2006).

CHILD SUPPORT

The court shall order the parents to pay child support if the child is placed outside of the home. The Parents shall be required to provide to the department and any other state agency or party designated by the court, within 28 days after entry of the shelter order, the financial information necessary to accurately calculate child support pursuant to section 61.30. § 39.402(11)(a). See R.M. v. Department of Children and Families, 877 So. 2d 797 (Fla. 5th DCA 2004); D.W. v. Department of Children and Families, 882 So. 2d 491 (Fla. 5th DCA 2004).

ATTORNEY FOR THE CHILD

If applicable with information known at the time of shelter or thereafter, an attorney shall be appointed for a dependent child who:

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed a psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability as defined in § 393.063;
- Is being placed in a residential treatment center or being considered for placement in a residential Treatment center; or
- Is a victim of human trafficking as defined in § 787.06(2)(d).

§ 39.01305(3)(a)-(e). See Appointment of Attorney for Children with Certain Special Needs chapter.

SERVICES/COUNSELING

- Service needs for the children and parents should be discussed at the shelter hearing as appropriate.
- The department shall make available to parents or legal custodians seeking voluntary services any referral information necessary to participate in such services. § 39.402(15).
- Counseling may be appropriate and necessary and can begin immediately. § 39.402(15).
- Appropriate evaluations should be ordered, including a Comprehensive Behavioral Health Assessment (CBHA). § 39.407.
- A party who is identified as a person who has a mental illness or a developmental disability must be informed by the court of the availability of advocacy services through the department, the Arc of Florida, or other appropriate mental health or developmental disability advocacy groups and encouraged to seek such services. § 39.502(15).
- When a child has or is suspected of having a disability and the parent is unavailable pursuant to § 39.0016(3)(b), the court may appoint a surrogate parent or may refer the child to the district school superintendent for appointment of a surrogate parent. § 39.402(11)(d). The guardian ad litem may be appointed as the surrogate parent and in such a role acts in the place of a parent in educational decision making and in safeguarding a child's rights under the Individuals with Disabilities Education Act (IDEA) and Chapter 39. § 39.0016(1)(c).

PRACTICE TIP: Education

Consideration should be given to location of child's previous school and new school if necessary.

If it appears that the child's placement out of his or her previous school district will be limited or temporary, the Program may consider asking the court to order the department or other approved person to provide transportation to maintain continuity for the child.

The department, the Department of Education and local district school boards are required to enter into interagency agreements to keep foster children in their home schools, stabilize their education and improve planning for their educational goals.

PSYCHOTROPIC MEDICATION

- Upon removal of a child, the department may continue administration if the medication is in its original container and it is a current prescription for the child. § 39.407(3)(b)1.
- The department must seek court approval for the continued administration of the medication to the child at the shelter hearing. § 39.407(3)(a)1; Rule 8.355(c)(1). See Psychotropic Medication chapter.

OTHER CONSIDERATIONS BY THE COURT

- Determine the potential need to impose restrictions (no-contact orders) or consideration of any other court orders.
- Substance abuse assessments can be ordered for anyone with custody or anyone requesting custody of the child, upon good cause. § 39.407(16).
- When the mental or physical condition of a parent, caregiver, legal custodian, or other person who has custody or is requesting custody of a child is in controversy, the court may order the person to submit to a physical or mental examination upon good cause shown and pursuant to notice and procedures as set forth by the Florida Rules of Juvenile Procedure. § 39.407(15).
- Interstate Compact on the Placement of Children (ICPC). § 409.401-409.409.
- Indian Child Welfare Act (ICWA)—inquire if the child is a member of, or eligible for, membership in an Indian tribe. § 39.0137 and 25 U.S.C. ss. 1901 et seq.
- Review the Rilya Wilson Act if the child is age three (3) years old to school entry. § 39.604.
- Developmental Disabilities Issues. § 39.407(4)(b) and Chapter 393, Florida Statutes. Review Disabilities Chapter.
- Diligent Search. § 39.503.
- Paternity. § 39.503. Review Parentage and Paternity chapter.

PRACTICE TIP: At the shelter hearing, in order to avoid conflicting orders, the program attorney should inquire about any other court orders or restrictions and conditions arising from other cases involving the family (delinquency, domestic relations, or domestic violence).

SHELTER ORDER

REQUIRED FINDINGS

Under § 39.402(8)(h), the court order must contain an identification of all persons present at the hearing and must include written findings of the following:

- Placement in shelter is necessary because:
 - the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment;
 - a parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or
 - the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.
- That the removal from the home is necessary and the provision of appropriate and available services will not eliminate the need for placement.
- That placement in shelter care is in the best interest of the child. § 39.402(8)(h)2.
- That continuation in the home is “contrary to the welfare” of the child because the home situation presents a substantial and immediate danger to the child’s physical, mental or emotional health or safety which cannot be mitigated by the provision of preventive services. § 39.402(8)(h)3. Under the Adoption and Safe Families Act (ASFA), the “contrary to welfare” findings must be detailed and must be made in the shelter order on the child’s removal. 45 C.F.R. § 1356.21(c). If the court does not make this finding, the child’s stay in foster care will be ineligible for Title IV-E funding. 45 C.F.R. § 1356.21(c).
- Based upon the allegations in the shelter petition, that there is probable cause to believe that the child is dependent or that the court needs additional time, not to exceed 72 hours, in which to obtain and review documents pertaining to the family in order to appropriately determine the risk to the child. § 39.402(8)(h)4.
- That the department has made “reasonable efforts” to prevent or eliminate the need for removal of the child from the home. § 39.402(8)(h)5. This determination must include a description of which specific services, if available, could prevent or eliminate the need for removal or continued removal from the home and the date by which the services are expected to become available. § 39.402(10)(a).
 - If the services are not available, the written determination must also contain an explanation describing why the services are not available for the child. § 39.402(10)(b).
 - If the department has not made a reasonable effort to prevent or eliminate the need for removal, the court shall order the department to provide appropriate and available services to ensure the protection of the child in the home when the services are necessary for the child’s health and safety. § 39.402(10)(c).

If the finding that the department has made reasonable efforts to prevent or eliminate the need for removal of the child from the home is not made within 60 days of the child’s actual removal from the home, then the child is not eligible under the title IV-E foster care maintenance payments program for the duration of that stay in care. 45 C.F.R. § 1356.21(b)(1)(ii). However, under certain circumstances, the ASFA does not require reasonable efforts. Florida law deems the department to have made reasonable efforts as opposed to not

requiring such efforts. The department is deemed to have made reasonable efforts to prevent or eliminate the need for removal of the child from the home if:

- the first contact with the department occurred during an emergency;
- the home situation presents a substantial and immediate danger to the child's physical, mental or emotional health or safety which cannot be mitigated by the provision of preventive services;
- the child cannot remain in the home because there are no preventive services that can ensure the child's safety and health, or even with appropriate and available services, the health and safety of the child cannot be assured; or
- the parent or legal custodian is alleged to have committed any of the grounds listed for expedited termination of parental rights listed in § 39.806(1)(f)-(i).

§ 39.402(8)(h)5.a.-d. *See also* 45 C.F.R. § 1356.21(b)(3).

Further, the written findings must show that the department has made reasonable efforts to keep siblings together if they are removed and placed in out-of-home care unless such placement is not in the best interest of each child. The department shall report to the court its efforts to place siblings together unless the court finds that such placement is not in the best interest of a child or his or her sibling. § 39.402(8)(h)6.

- That the court notified the parents, relatives providing out of home care, or legal custodians of the time, date and location of the next dependency hearing and the importance of their active participation in the dependency proceedings. § 39.402(8)(h)7.
- That the court notified the parents or legal custodians of their right to counsel to represent them at the shelter hearing and at each subsequent hearing or proceeding, and the right of the parents to appointed counsel. § 39.402(8)(h)8.
- That the court notified relatives who are providing out-of-home care for a child as a result of the shelter petition being granted that they have the right to attend all subsequent hearings, to submit reports to the court, and to speak to the court regarding the child, if they so desire. § 39.402(8)(h)9.
- The court shall advise the parents that, if the parents fail to substantially comply with the case plan, their parental rights may be terminated and that the child's out-of-home placement may become permanent. § 39.402(18).

No child shall be released from shelter care after a shelter order has been entered except on order of the court, unless the shelter order authorized release by the department. Rule 8.305(d).

PRACTICE TIP: The order may contain a direction to the department to conduct a home study and background check on potential placements. In addition, there may be a self-executing order permitting placement with a person who passes a home study and background check, without further court order. Without the self-executing order, the child may have to remain in shelter until the arraignment which is the next scheduled hearing (28 days later).

IF PROBABLE CAUSE IS NOT ESTABLISHED

If probable cause is not established, the court may dismiss the petition and order the child be returned to the custody of the parents. If the court finds probable cause only as to one parent, the non-offending parent must be given custody of his/her child. That parent has a right to custody of his/her child(ren) and the child(ren) has the right not to be placed in shelter when a fit parent is available to take custody. If that

parent refuses or is unable to take custody, that parent may no longer be considered a non-offending parent because the parent is abandoning the child.

OTHER CONSIDERATIONS

- Request 72 hours additional time for the department or petitioner to obtain and submit documents pertaining to the family in order to allow the court to appropriately determine the risk to the child. § 39.402(8)(d)2.
- Seek appellate relief. A petition for a writ of common-law certiorari is the most commonly sought relief. See, e.g., Department of Children and Families v. E.G., 939 So. 2d 226 (Fla. 5th DCA 2006); S.M. v. R.M., 82 So.3d 163 (Fla. 4th DCA 2012); K.G. v. Department of Children and Families, 66 So.3d 366 (Fla. 5th DCA 2011); A.G. v. Department of Children and Families, 65 So.3d 1180 (Fla. 1st DCA 2011). But see Department of Children & Families. v. H.M.R., 161 So. 3d 477 (Fla. 5th DCA 2014)(relief sought by appeal instead of review by writ).
- If the allegations rise to the level of a dependency, the department or any other party (including the Guardian ad Litem Program) can file a petition for dependency leaving the children in the home, but requesting judicial oversight and department supervision of the family with services provided.

SHELTER HEARING CHECKLIST

TAKING CHILDREN INTO CUSTODY § 39.401

Probable cause must exist that:

- Child abused, abandoned or neglected or is suffering from or imminent danger of illness or injury as a result of abuse, neglect or abandonment;
- Material violation of a condition of placement imposed by court; or
- No parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care,

PLACEMENT/CONTINUATION IN SHELTER § 39.402(1),(2)

Child may be placed/continued in shelter only if:

- One of the criteria in § 39.401(1) (above) applies and
- Court made specific finding of fact regarding:
 - o necessity for removal; and provision of services will not eliminate need for removal

ALTERNATIVES TO SHELTER

- Voluntary protective services - the child will remain at home and the department shall assist the family
- Removal of alleged perpetrator
- In-home services

PRIOR TO SHELTER HEARING

- Department must file affidavit/petition
 - o Copies to parties prior to hearing
- Identify and locate legal custodians, parents of child
- Parents given actual notice - must at least have good faith effort to give notice - § 39.402(8)(b)
- Background check, home study on proposed or actual placement (criminal records, abuse registry checks)

PLACEMENT

- Placement pending adjudication
- The parent shall notify the court and all parties of possible relative placements (continuing duty of the parents) § 39.402(17)

SHELTER HEARING

- GAL appointed - § 39.402(8)(c)1
- Parents informed of right to counsel - § 39.402(8)(c)2
- Interpreters provided if necessary
- Parents present evidence - § 39.402(8)(c)3
- Parents on going duty to inform court of relative placement.
- Department shall provide the court - § 39.402(8)(e),
 - o Law enforcement, medical reports and abuse hotline reports
 - o Current or previous case plans - § 39.402(8)(f)1
 - o Delinquency adjudications of parents - § 39.402(8)(f)2
 - o Past or current protection order for domestic violence - § 39.402(8)(f)
 - o Anywhere the child has lived in the past 12 months
- Parents must provide permanent mailing address - § 39.402(8)(g)

- Identity/whereabouts of any unknown parent, inquiry under - § 39.503, if needed.

ATTORNEYS FOR CHILDREN WITH CERTAIN SPECIAL NEEDS § 39.01305(3)

- Resides in skilled nursing facility (or considered)
- Psychotropic medication and declines to assent
- Diagnosis of developmental disability as defined in § 393.063
- Placed or considered for placement in RTC
- Victim of human trafficking as defined in §787.06(2)(d)

FINDINGS REQUIRED IN ORDER - § 39.402(8)(H)

- Written findings regarding necessity for placement in shelter. § 39.402(1),(2).
- Removal in best interests of child
- Services will not eliminate need for removal
- Continuation in the home is contrary to the welfare of the child because home situation presents substantial immediate danger to child.
- Probable cause to believe child is dependent or that the court needs additional time – not to exceed 72 hours - § 39.402 (8)(h)4
- Department has made reasonable efforts to prevent the need for removal - § 39.402(10)
 - Written description of services and when available or why services are not available for the child
- Department deemed to have made reasonable efforts - § 39.402(8)(h)5.
- Notified parents of next hearing
- Notified parents of right to counsel

NO PROBABLE CAUSE?

- Dismiss petition
- Permit the department 72 hours to perfect probable cause - § 39.402(8)(d)2
- Non-offending parent given custody

VISITATION

- Recommendation of the department - § 39.402(9)
 - None if clear and convincing that visitation not in the best interests of the child
- Must occur within 72 hours
- Sibling visitation (frequency kind duration)
- Grandparent visitation - § 39.509
- Conform with Keeping Children Safe Act - § 39.0139

OTHER ISSUES

- Establish paternity
- ICPC and/or ICWA - Is the child a member of, or eligible for, membership in an Indian tribe?
- AAL appointed? Special needs attorney appointment
- Other court cases pending – avoid conflicting orders
- Child 3 years to school entry - Rilya Wilson Act - § 39.604
- Developmental disabilities (guardian advocate in place by 18th birthday if appropriate § 393.12(2)(c))

EDUCATION

- If placement requires change in schools review McKinney-Vento
- IEP for child

FINANCIAL

- The court shall order the parents to pay child support - § 39.402(11)

PSYCHOTROPIC MEDICATION - § 39.407(3)(b)

- May continue if the medication is in its original container and it is a current prescription for the child
- The department must seek court approval for the continued administration of the medication

DEPENDENCY PETITION

ELIZABETH DAMSKI, ESQ., SPECIAL COUNSEL, FLORIDA GUARDIAN AD LITEM OFFICE

All proceedings seeking adjudication that a child is dependent must be initiated by filing a petition. The petition can be filed by an attorney for the department, or any other person who has knowledge of the facts alleged, or is informed of the facts and believes them to be true. § 39.501(1). The purpose of filing a dependency petition is not to punish, but to protect the child alleged to be abused. § 39.501(2). There are clear requirements regarding the contents of a dependency petition. Rule 8.310. A petition must be filed within 21 days of a shelter hearing if a child has been placed in shelter status, or within 7 days if a party files a demand for early filing of the petition. § 39.501(4). In all other cases the petition must be filed within a reasonable time after the child was referred to protective investigation. § 39.501(4). No answer to the petition is required. § 39.505.

CONTENTS OF DEPENDENCY PETITION

A DEPENDENCY PETITION SHALL:

- Allege sufficient facts showing the child to be dependent based upon applicable laws. Rule 8.310(a)(1).
- Contain allegations as to the identity and residence of the parents or legal custodians, if known. Rule 8.310(a)(2).
- Identify the age, sex, and name of the child. Two or more children may be the subject of the same petition. Rule 8.310(a)(3).
- Include a statement as to whether, if known:
 - a parent or legal custodian named in the petition has previously unsuccessfully participated in voluntary services offered by the department;
 - a parent or legal custodian named in the petition has participated in mediation and whether a mediation agreement exists;
 - a parent or legal custodian has rejected the voluntary services offered by the department; or
 - the department has determined that voluntary services are not appropriate for the parent or legal custodian and the reasons for such determination. § 39.501(3)(d).
- Contain petitioner's signature, stating under oath the signer's good faith in filing the petition. Rule 8.310(b).

No objection to a petition on the grounds that it was not signed or verified, as herein provided, shall be entertained after a plea to the merits. Rule 8.310(b). Two or more allegations of dependency may appear in the same petition, in separate counts. Rule 8.310(a)(4). The petition need not contain allegations of acts or omissions by both parents. Rule 8.310(a)(4).

AMENDMENTS TO DEPENDENCY PETITION

A dependency petition can be amended any time prior to the conclusion of an adjudicatory hearing. Rule 8.310(c). After a written answer or plan has been filed, amendments shall be permitted only with the permission of the court, unless all parties consent. Rule 8.310(c). Amendments shall be freely permitted in the interest of justice and the welfare of the child. Rule 8.310(c). A continuance may be granted on motion and a showing that the amendment prejudices or materially affects any party. Rule 8.310(c). However, total time allowed for continuances may not exceed 60 days in any 12 month periods. § 39.0136(3).

DEFECTS AND VARIANCES IN THE FORM OF THE DEPENDENCY PETITION

If the court finds that the petition is so vague, indistinct, and indefinite as to mislead the child, parent, or legal custodian and prejudice any of them in the preparation of a defense, the petitioner may be required to furnish a more definite statement. Rule 8.310(d). A petition may not be dismissed, or any judgment vacated, because of a defect in the form or misjoinder of counts. Rule 8.310(d).

VOLUNTARY DISMISSAL OF THE DEPENDENCY PETITION

At any time prior to entry of an order of adjudication, the department may request a voluntary dismissal of the petition by serving a notice requesting dismissal on all parties, or, if during a hearing, by so stating on the record. Rule 8.310(e). The petition shall be dismissed and the court loses jurisdiction unless another party adopts the petition within 72 hours. Rule 8.310(e).

PRACTICE TIP: The program attorney may file a dependency petition when necessary. Before filing, the program attorney should thoroughly review Rule 8.310 and § 39.501. Be sure to comply with the Rules of Juvenile Procedure regarding service of the petition and diligent searches.

DEPENDENCY PETITION CHECKLIST

FORM AND CONTENT: SEE § 39.501; RULE 8.310.

- Petition must be in writing and titled "Petition for Dependency".
- State separate counts for each allegation.
- Identify all parents by name and address, if known.
- If not known, describe all attempts made to obtain the information. (See § 39.503).
- Identify all current legal custodians of the child by name and address, if known.
 - If not known, describe all attempts made to obtain the information.
- Identify the age, sex, and name of the child(ren).
- Specify allegations of a factual basis establishing prima facie abuse, neglect, and/or abandonment.
- Identify the person(s) alleged to have committed the acts or omissions, if known.
 - If not known, describe all attempts made to obtain the information.
 - If the perpetrator is someone other than a parent or legal custodian and the parent or legal custodian is alleged to be culpable, allege those facts.
- State whether:
 - a parent or legal custodian named in the petition has previously unsuccessfully participated in voluntary services offered by the department.
 - a parent or legal custodian named in the petition has participated in mediation and whether a mediation agreement exists.
 - a parent or legal custodian has rejected the voluntary services offered by the department.
 - the department determined voluntary services are not appropriate for the parent or legal custodian and the reasons for such determination.
- Petitioner shall sign under oath stating the petitioner's good faith in filing the petition.
- If filed by the department, it shall be signed by an attorney for the department.

SERVICE

- Parents and legal custodians must be served at least 72 hours before the arraignment hearing.

ARRAIGNMENT & SHELTER REVIEW

At the arraignment hearing the parents/legal custodians will enter pleas in response to the petition for dependency. § 39.506(1). The parent or legal custodian can admit, deny, or consent to findings of dependency alleged in the petition. This hearing is similar to arraignment in criminal court, except the court also reviews issues related to the child such as shelter placement and visitation.

The court should also do the following:

- Conduct a paternity inquiry if paternity has not been established.
- The court must review the necessity for the child's continued placement in shelter. § 39.506(8).
- If the child is in an out-of-home placement, visitation must be ordered absent a showing that it is not in the best interest of the child. § 39.506(6). Any visitation order must conform to § 39.0139, the Keeping Children Safe Act. § 39.506(6).
- If the court has not appointed counsel for the parent at shelter, counsel should be appointed at the arraignment hearing.
- Order substance abuse assessments for anyone with custody or seeking custody of the child.
- Remind the parents of the requirement to notify the court of any suitable relative placements. The department must use due diligence to notify all relatives within 30 days of removal.
- Require all parties to provide a permanent mailing address. § 39.506(4).

REASONABLE EFFORTS

The court shall review whether the department has made a reasonable effort to prevent or eliminate the need for removal or continued removal of the child from the home. § 39.506(7). If the court determines that the department has not made such an effort, the court shall order the department to provide appropriate and available services to assure the protection of the child in the home when such services are necessary for the child's physical, mental, or emotional health and safety. § 39.506(7).

ARRAIGNMENT TIME FRAMES

- Must be held within 28 days of shelter for a child sheltered out of the home. § 39.506(1).
- If a demand for early filing has been made by any party, within 7 days after the date of filing of the dependency petition. § 39.506(1).
- Must be held within a reasonable time for a child not sheltered. § 39.506(2).

OTHER TIME FRAMES

- The court is required to hold a status hearing within 60 days of the petition and every 30 days thereafter until an adjudicatory or disposition hearing begins. Rule 8.315(d).
- If there is a violation of the time requirements for filing a petition the court shall make a written determination regarding the child's continued placement in shelter within 24 hours of such violation. § 39.506(8).
- If a continuance is requested after a parent/legal custodian consents, delaying the date of disposition hearing past 15 days, the court shall make a written determination of the child's continued placement in shelter before granting any such continuances. §§ 39.506(8), 39.506(5).

SERVICE

- The petitioner, typically department, is responsible for serving the parent at least 72 hours before the arraignment hearing. § 39.501(4).
- Initial dependency petition must be served personally or through an affidavit of diligent search. § 39.506(3)-(9).
- Personal appearance eliminates the need for service. § 39.502(2).
- If the parent is served but fails to appear at the arraignment hearing, this constitutes consent to the dependency petition. § 39.506(3). (NOTE: the document containing the notice to respond/appear must contain specific statutory language as cited in § 39.506(3) warning that failure to appear may result in loss of custody of the child.)
- Persons outside the state – service in accordance with §§ 61.509, 39.502(7).

DILIGENT SEARCH

- If a parent's/prospective parent's location is unknown, ask the court to order a diligent search.
- At a minimum, § 39.503(5)and(6) require inquiries of:
 - all known relatives of parent;
 - all program offices of department likely to have information regarding the parent;
 - other relevant state and federal agencies;
 - a thorough search of at least one electronic database specifically designed for locating persons;
 - utility and postal providers; and
 - law enforcement.
- If there is no affidavit of diligent search, or the search is not satisfactory, then the department must continue its efforts to complete a successful search.

PARENT'S PLEA

- The parent may admit, consent or deny the dependency petition. § 39.506(1).

- If the parent enters an admission or consent, the court must make a finding that the plea is made knowingly, voluntarily and intelligently and that the parent/custodian has a full understanding of the nature of the allegations and the possible consequences as well as his or her right to counsel. Rule 8.325(c).
- If the parent enters an admission/consent, disposition should be set within 15 days. § 39.506(1).
- If the parent enters a denial, the adjudicatory hearing should occur within 30 days. § 39.507(1).

ADJUDICATION & ADJUDICATORY HEARING

If the parent enters a denial to the dependency petition, an adjudicatory hearing must be conducted by the court, to determine whether the child is dependent. The petitioner must prove the allegations of the petition for dependency by a preponderance of evidence. § 39.507(1)(b). The court may enter an order stating that the allegations were sustained by clear and convincing evidence. Rule 8.332. The adjudicatory hearing must be held as soon as practicable after the petition for dependency is filed, but no more than 30 days after arraignment. § 39.507(1)(a).

- Rules of evidence in use in civil cases apply at the adjudicatory hearing. § 39.507(1)(b). Rule 8.330(a). Any evidence that is presented that was obtained as the result of an anonymous call must be independently corroborated. § 39.507(1)(b).
- A party may call any person as a witness. Rule 8.330(b). The child and the parents, caregivers or legal custodians may be examined separately and apart from each other. Rule 8.330(b).
- All parties have the right to be present at all hearings. This can be by audio or audiovisual at the court's discretion. Rule 8.330(c).

DEPENDENCY ADJUDICATION REQUIREMENTS

Adjudication Requirements:

- The child has been abandoned, abused, or neglected by a parent or legal custodian § 39.01(15)(a);
- The child has been surrendered to the department or to a licensed child-placing agency for adoption; § 39.01(15)(b)
- There is no parent or legal custodian capable of providing supervision and care § 39.01(15)(e);
- The child is at substantial risk of imminent abuse, abandonment, or neglect by a parent or legal custodian § 39.01(15)(f); or
- The child has been sexually exploited and has no parent, legal custodian, or responsible adult relative currently known and capable of providing the necessary and appropriate supervision and care. § 39.01(15)(g).

ADJUDICATION

- If dependency is proved, the court must decide whether to adjudicate the child dependent or withhold adjudication. § 39.507(5)(b).
- To withhold adjudication, the court must find that no other action other than supervision in the child's home is required, i.e., the child must be placed in the home with the parent. § 39.507(5).

- If adjudication is withheld and the parents do not comply with the conditions of supervision, the court may adjudicate without further evidence regarding dependency after a hearing to establish the parents' non-compliance. § 39.507(5).
- If a court adjudicates a child dependent and the child is in out-of-home care, the court shall inquire of the parent or parents whether the parents have relatives who might be considered as a placement for the child and the parent or parents shall provide to the court and all parties identification and location information of the relatives. § 39.507(7).
- The court must notify the parents that if the parents fail to substantially comply with the case plan, their parental rights may be terminated and that the child's out-of-home placement may become permanent. § 39.507(7).
- The parent or parents shall provide to the court and all parties identification and location information of the relatives. § 39.507(7).
- The court may order a person who has custody or seeks custody to submit to a substance abuse assessment or evaluation. The court may also require that person to submit to necessary treatment and services – including a treatment based drug court program. The court may impose appropriate available sanctions for noncompliance. § 39.507(10).
- The court shall schedule the disposition hearing within 30 days after the last day of the adjudicatory hearing.

FINDINGS AND ORDERS

In all cases in which dependency is established the court shall enter a written order stating:

- legal basis for the dependency finding;
- facts upon which the dependency is based; and
- whether the court made the finding by the *preponderance of the evidence* or *clear and convincing evidence*. Rule 8.332.

PRACTICE TIP: Relative caregiver monies will not go into effect until the child is adjudicated dependent. The program attorney should ensure the case moves forward as quickly as possible. For more information on subsidies, visit www.GuardianadLitem.org.

DISPOSITIONS

JENNIFER L. LAYTON, ESQ., CHILD'S BEST INTEREST SUPERVISING ATTORNEY, FLORIDA GUARDIAN AD LITEM PROGRAM

The purpose of the disposition hearing is for the court to determine what tasks need to be done by the parent(s) and the department and/or what services need to be provided to the child to ensure the safety of the child and to move the parties toward the stated goal of the case plan. The court will make determinations about placement and visitation upon considering the Pre-Disposition Study (PDS), reports by the department, and recommendations of guardian ad litem and other professionals. The court may consider any relevant and material evidence helpful in reaching a proper disposition, even if the information would not be competent at an adjudicatory hearing. Rule 8.340(a). The court will determine if the tasks in any existing case plan address the problems that resulted in the dependency.

WHEN A DISPOSITION HEARING IS REQUIRED

A Disposition Hearing shall be conducted by the court when:

- court finds that the allegations in the dependency petition were proven at an adjudicatory hearing;
- parent consents to the finding of dependency;
- parent default by failing to appear for arraignment after notice; or
- parent not located after an Affidavit of Diligent Search (ADS) § 39.521(1).

ISSUES TO CONSIDER PRIOR TO THE HEARING

- Has a case plan been developed? Review Case Plan Chapter for a further discussion of case plan development (§ 39.6011).
- Are all tasks necessary to remedy the reason the children came into care in the case plan?
- Has anything new arisen that was not previously known or considered in developing the case plan?
- Is the child in the most appropriate placement?
- Can the child be safely returned home? What would this involve, i.e., what services need to be in place?
- What has the department done to ascertain the identity and location of any relatives or non-relatives willing to care for the child?
- If there are siblings, are they placed together? If not, what has the department done to locate a placement for all the siblings? If no such placement is available, what contact do the siblings have?
- What is the visitation plan for the child and his parents? Is it sufficient to meet the child's needs and to facilitate the goal of the case plan?
- What else does the child need – be specific, i.e., developmental screening, eye exam, behavior management therapy?

- Are the child's needs being met – medically, developmentally, educationally, etc.?

Prior to the disposition hearing, the court can make any orders necessary for the protection of the child. If there are any such orders, the guardian ad litem should know if the parties are complying with the orders.

Example. At a shelter review, the court ordered a relative who is seeking custody to have a substance abuse evaluation § 39.521(1)(b)1). The guardian ad litem should know if the relative has submitted to an evaluation and the results and if not, why not.

TIME FRAMES FOR DISPOSITION

If an admission is entered and no denial is entered by any other parent – the disposition hearing must be held within 15 days, “unless a continuance is necessary.” § 39.506(5); Rule 8.315(a).

NOTE: If one parent consents and the other enters a denial, it is a denial of due process to proceed to disposition without an adjudicatory hearing. See Amendments to the Florida Rules of Juvenile Procedure, 894 So. 2d 875, 884 (Fla. 2005) (citing Monteiro v. State, 477 So. 2d 45, 45-46 (Fla. 3d DCA 1985)).

- If a parent fails to appear for arraignment or trial after proper notice, this constitutes a consent and the disposition hearing must be held within 15 days. § 39.506(3) and (5).
- If a parent is not located and an affidavit of diligent search is completed, this has the same effect as failing to appear at arraignment, constitutes consent and the disposition hearing must be held within 15 days. § 39.506(3) and (5); § 39.521(1).
- After a trial, child found to be dependent – the disposition hearing must be held within 30 days. § 39.507(8).

The court may allow the parties to waive the Pre-Disposition Study and if the case plan is available, proceed immediately to disposition.

WHAT REPORTS SHOULD YOU EXPECT?

PRE-DISPOSITION STUDY (PDS)

The PDS is prepared by an authorized representative of the department and furnished to all parties 72 hours prior to the hearing. Pursuant to § 39.521(2), it must contain the following:

- The capacity of the parents to provide the child with food, clothing, etc., and other material needs;
- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- The mental and physical health of the parents;
- Home, school and community record of the child;
- The reasonable preference of the child if the court finds the child of sufficient intelligence, understanding, and experience to express a preference;
- Evidence of domestic violence or child abuse;

- An assessment of the risks of returning the child home, including a description of any changes in or resolution of the initial risks;
- A description of what risks are still present and what resources are available and will be provided for the protection and safety of the child;
- A description of the benefits of returning the child to his home;
- A description of all unresolved issues;
- An abuse history and criminal background check for all caregivers, family members and others residing in the home from which the child was removed;
- Child protection team report or a statement that none was made;
- All opinions or recommendations of other professionals that provided any evaluations or services to the family;
- A listing of appropriate and available services for the parent and child which would either have prevented the removal or allowed the child to be reunified after removal and an explanation of the following:
 - if the services were or were not provided;
 - if provided, the outcome;
 - if not provided, why not?; and
 - if the services are currently being provided, do they need to continue?
- A listing of other prevention and reunification services that were available, but were determined to be inappropriate and why;
- Whether dependency mediation was provided;
- If there is another parent who could be considered for custody, would placement with that parent be detrimental to the child?
- If the child is placed with a relative or other approved non-relative, a copy of a proper home study must be attached. See § 39.521(2)(r)1-7 for what, at a minimum, must be included in the home study;
 - **NOTE.** If the results of the home study are not favorable, the department shall not place the child or continue placement of the child in that home, UNLESS the court finds that such placement is in the best interests of the child. § 39.521(2)(r).
- A determination of the amount of child support to be paid; and
- A statement regarding a specific length of time before return of the child to the parent will be considered.

GUARDIAN AD LITEM REPORT

If the guardian ad litem prepares a report in consultation with the Child Advocate Manager (CAM) and the program attorney, the report should be filed with the court and furnished to all parties 72 hours prior to the hearing. § 39.521(1)(a).

PRACTICE TIP: The record at every hearing is much better preserved with written reports. Any additional information can be relayed to the court by oral testimony.

Because the Program is charged with advocating for the best interests of the child, the report should focus on case plan issues specific to the child. The report should consider the following:

- Is the child in the best possible placement?
- Is there a possible relative placement and has the department taken prompt steps to evaluate same? Are there any concerns about the relative?
- What services does the child need?
- What services do the parents need to remedy the reason for the dependency?
- What are the terms of the child’s visitation with his parents and/or siblings (if not placed together) and are they adequate for the child’s best interests? Why are siblings not placed together?
- Is there anyone else with whom the child should visit?
- Is a no contact order necessary to protect the child?

CASE PLAN

The case plan is prepared by the department (in conjunction with the guardian ad litem, parent and, if appropriate, the child and temporary custodian of the child), filed with the court and served on all parties 72 hours prior to the hearing.

PRACTICE TIP: The case plan should be meaningful and designed to address facts and circumstances upon which the court based the findings of dependency. Further, remember that the **case plan must be** developed within 60 days of removal. See 45 CFR § 1356.21(g)(2); § 39.6011(6)(b)2. See Case Plan chapter for more detailed information.

ANY OTHER DOCUMENT FILED WITH THE COURT

The Program should be served with any documents filed for the disposition hearing and should review them prior to the hearing, i.e., comprehensive assessment for the child, psychological evaluation for the parent.

PRIMARY ISSUES AT THE DISPOSITION HEARING

REASONABLE EFFORTS

The court must make a determination whether the reasonable efforts have been made by the department to reunify the parent and child, if reasonable efforts are required. § 39.521(1)(f).

“Reasonable Efforts” means the exercise of reasonable diligence and care by the department to provide the services ordered by the court or delineated in the case plan.

When the department is required to exercise reasonable efforts to prevent or eliminate the need for removal and to reunify the child with the parent, the department has the burden of demonstrating that it has made those efforts. See § 39.521(1)(f) for the statutory language, but consider:

- Was the removal situation an emergency and no services could be provided prior to the removal?
- If not an emergency, were preventive services available, and even if available, would the implementation of the services ensure the safety of the child?
- At the time of disposition, even if the removal was warranted, are there now services in place that would allow the child to go home?

See also 42 U.S.C. § 671(a)(15)(B)(i), (ii); 45 CFR § 1356.21(b).

PLACEMENT

In-home

If the court finds that the child can remain safely in the home or be safely returned home, the court shall so order after making a specific finding of fact that the reasons for removal have been remedied to the extent that the child is not endangered. § 39.521(1)(e).

- **Withhold adjudication.** If the court finds the child dependent, but finds that no further action other than supervision is required, it may enter an order withholding adjudication and placing the home under the supervision of the department. § 39.507(5).
- **Adjudication.** If the child can safely remain in the home with the parent with whom he was residing at the time the events arose AND remaining in the home is in the best interests of the child, the court can adjudicate the child dependent and order conditions under which the child may remain in the home under the protective supervision of the department for no less than 6 months. § 39.521(3)(a).

Out-of-home

The court may place the child out of the home if the child cannot remain safely in the home and removal of the child is necessary to protect the child.

Foster care should be the last placement option. The child is committed to the temporary legal custody of the department and the department.

The department must make reasonable efforts to keep siblings together unless not in the best interest of the children. The department must report its efforts to place siblings together. § 39.402(8)(h)6

PRACTICE TIP: The guardian ad litem should be advocating at every hearing for siblings to be placed together, unless it is not in a child's best interest to do so.

Parent without allegations – if there is a parent with whom the child was not residing at the time of the events which resulted in the dependency and that parent desires to obtain custody, the court shall place with that parent upon completion of a home study unless the court finds that such placement would endanger the child. § 39.521(3)(b).

NOTE. If a parent prevails at trial and the child did not reside with that parent prior to the dependency that parent now falls under the provisions of this section and may be entitled to placement.

- The court may order that the parent without allegations assume sole custodial responsibilities, which will result in the termination of supervision and jurisdiction. § 39.521(3)(b) 1.
- The court may retain jurisdiction and order reunification services be provided to either or both parents. If custody of the child is to change at a later date, the standard to change custody from one parent to another shall be the best interests of the child. §§ 39.521(3)(b) 2; § 39.522(3).

Relatives and Non-Relatives

- If the child cannot be placed with a parent, the court should consider a relative or non-relative. If one is not available, the court must say why and must determine if the department made reasonable efforts to locate a relative or non-relative willing to care for the child. § 39.521(1)(d)8.a.

- If no relative is located and the child is placed elsewhere, the court shall consider placing with a relative at a later date, but the court is not obligated to place the child with the relative if it is in the child's best interests to remain in his current placement. § 39.521(1)(d)8.b.
- Any adult relative or non-relative interested in placement of the child must submit to background checks and a home study. Generally, if the home study is unfavorable the placement will not be approved. However, the court may approve the placement if it is in the best interests of the child. § 39.521(2)(r).
- Often a relative is not a resident of Florida and an Interstate Compact on the Placement of Children (ICPC) placement will need to be done.
- The department must supervise the relative or non-relative placement until the child reaches permanency. The department's supervision must be for no less than 6 months. § 39.521(3)(c).
- If the court terminates supervision, leaving the child with the relative or non-relative, the court must enter an order setting forth the powers of the custodian of the child and shall include those powers ordinarily granted to a guardian of the person of a minor. § 39.521(1)(b)3.

PRACTICE TIP: The guardian ad litem should be advocating for early identification of relatives, beginning at shelter, but should raise the issue again at disposition, especially if the child is placed in foster care. The parents have a continuing obligation to identify possible relative placements. If an ICPC must be done, the earlier in the case this is done, the better. §§ 39.402(17); 39.507(7).

PRACTICE TIP: The guardian ad litem should know where the child is placed and should be ready to address any issues regarding this placement – does placement require a school change; is the child having any particular difficulty in the foster home?

VISITATION

- The stated goal of the Legislature is that children will “enjoy regular visitation with their parents, at least once a month, unless the court orders otherwise,” § 39.4085(16), and visitation with their siblings once a week. § 39.4085(15).
 - The department must provide a recommendation to court for frequent visitation between siblings (unless contrary to siblings safety or well-being). Visitation should start within 72 hours of shelter hearing. § 39.402(9)(b).
- The court has likely previously ordered a visitation schedule at the shelter hearing. See § 39.402(9). The court is obligated to order visitation absent clear and convincing evidence that visitation is not in the best interests of the child.
- Visitation must be consistent with § 39.0139, the "Keeping Children Safe Act." Section 39.0139 provides a rebuttable presumption of detriment to a child if certain offenses related to sexual abuse or sex-related crimes have been committed or alleged. If a person meets the criteria listed, they may visit or have contact with a child only after a hearing and order by the court. § 39.0139(3). See the Keeping Children Safe Act chapter.

PRACTICE TIP: Questions for the guardian ad litem to consider regarding visitation:

- If there is a visitation order, is it appropriate and is it in the best interests of the child?
- Should it be modified?
- If so, in what way, i.e., increased frequency, moving to unsupervised, terminating visits?

- If the siblings are separated, the guardian ad litem must consider the needs of each of the children.
- If for some reason the parents are not visiting, the siblings must still visit – are they?
- Does the best interest of the child require the child visit with someone other than a parent or sibling? If so, the guardian ad litem should be prepared to present this information to the court?

Grandparents. Grandparents as well as step-grandparents are entitled to reasonable visitation with their grandchild who has been adjudicated a dependent as long as the court does not find it is not in the child's best interests or such visitation would interfere with the case plan goals. § 39.509. Any visitation with grandparents must conform to § 39.0139, the Keeping Children Safe Act. § 39.509.

THE ORDER OF THE COURT

The court shall, in its written Order of Disposition, include ALL of the following:

- Placement or custody determination;
- Any special conditions of placement or visitation;
- Evaluation, counseling, treatment activities, and other actions to be taken by the parties, if ordered (these issues may be addressed in the CP which the court may approve at the disposition hearing);
- Who is responsible to monitor the services to the child and the parent;
- Continuation or discharge of the guardian ad litem (unless the court is terminating supervision, the guardian ad litem should seek to remain appointed);
- The date, time, and location of the next hearing which must be the earlier of:
 - 90 days from the disposition hearing;
 - 90 days from the CP acceptance hearing;
 - 6 months from the last review; OR
 - if there has not been a review, 6 months from the date the child was removed;
- Child support to be paid by the parent (NOTE: Counties vary on how this issue is dealt with – some include the child support obligation in this order and some include a child support task in the CP which usually requires the parent to sign up with the Department of Revenue.);
- If the child is committed to the department, i.e., placed in foster care, and NOT with a relative or non-relative, the court must explain the reasons the child was not placed with a relative or non-relative and include a determination of whether diligent efforts were made by the department to locate relatives;
- Approval of the CP or set a CP hearing within 30 days; and
- Any other requirements necessary to protect the child, to preserve the stability of the child's educational placement and to promote family preservation or reunification – the court may require the parents, custodian and/or child to participate in necessary treatment. § 39.521(1).

When the disposition hearing is completed and the case plan has been approved, everyone should have a clear picture of how the case should proceed.

CASE PLANS

JORGE TORMES, ESQ., SENIOR CHILD'S BEST INTERESTS ATTORNEY, FLORIDA GUARDIAN AD LITEM PROGRAM

Federal law requires the department to develop a case plan for every child in out-of-home care. 42 U.S.C. § 671(a)(16); 45 C.F.R. § 1356.21(g)(2). Florida law goes further and requires a case plan in every dependency case. § 39.6011. At their most basic, case plans outline the services or treatments that will be offered to the parents and child, and explain what parents must do to achieve reunification – outlining the plan for the case. Good case plans, however, are much more than that. They provide information to the parties about the health and education needs of the child. They provide contact information for service providers, educators, and doctors. They are a tool to evaluate the child's temporary placement. They provide legal notice to parties of their rights and obligations. They explain the deficits in the home that led to the child's dependency. They detail the steps the department plans to take to achieve permanency options, including independent living and adoption, and describe a permanency goal. They outline long-term and short-range goals. They are, in essence, the backbone of the case.

Federal law requires the case plan to be developed within 60 days of the child's removal from home. 45 C.F.R. § 1356.21(g)(2). A case plan must be prepared, but need not be submitted to the court, for a child who will be in care no longer than 30 days unless that child is placed in out-of-home care a second time within a 12-month period. § 39.6011(6)(b)1. In each case in which a child has been placed in out-of-home care the plan must be submitted to the court before the disposition hearing for the court to review and approve. § 39.6011(6)(b)2. Parents have the right to seek assistance from anyone in the development of the case plan, and the department must inform the parents of this right. § 39.6011(1)(b).

Florida's statutes contain provisions to facilitate case planning early in the case and allow parents to begin completion of tasks as soon as possible. If the parent's substantial compliance with the case plan requires the department to provide services to the parents or the child and the parents agree to begin prior to the case plan's acceptance by the court, the department must make appropriate referrals for services immediately. § 39.6011(6)(a). Participation in the development of a case plan is not an admission to any allegation of abuse, abandonment, or neglect, and it is not a consent to a finding of dependency or termination of parental rights. § 39.6011(1); *See also* § 39.402(15)(requiring the department, at the shelter hearing, to make available to parents or legal custodians seeking voluntary services, any referral information necessary for participation in such services and clarifying that such participation shall not be considered an admission or other acknowledgement of the allegations in the shelter petition).

THE CASE PLAN BELONGS TO THE CHILD

States are required to provide for the development of a case plan for each child. 42 U.S.C. § 671(a)(16)(2000). The department shall prepare a draft of the case plan for **each child** receiving services under this chapter. § 39.6011 (1).

CASE PLANS EXPIRE AFTER 12 MONTHS

The case plan must be as short as possible. § 39.6011(2)(d). The plan's compliance period expires no later than 12 months after the date the child was initially removed from the home or the date the case plan was

accepted by the court, whichever occurs sooner. § 39.6011(2)(d). When the case plan expires, a new case plan must be developed. § 39.6013 (articulating permissible grounds for amendment of case plan, which do not include amending to provide additional time), and compare Chapter 2006-86, Laws of Florida affirmatively deleting statutory authority to extend case plans from former §§ 39.601(7) and 39.701(9)(f).

ALL THE PARTIES ARE ENTITLED TO A COPY OF THE CASE PLAN

The department must provide copies to the parties including the child, if appropriate, immediately after the parties sign the case plan. § 39.6011(6)(b). Additionally, the department must serve a copy to all parties not less than 3 business days prior to the disposition hearing. § 39.6011(7). In the case of an amended case plan, a copy must immediately be given to the parties. § 39.6013(7).

DRAFTING EFFECTIVE CASE PLANS

The case plan must be a written document that assures the child receives safe and proper care. 42 U.S.C. §§ 675(1), 675(1)(B). It must describe services that will be offered to the child, the parents, and the foster parents. § 39.6012. The services must be designed to improve the conditions in the home and aid in maintaining the child in the home, facilitate the child's safe return to the home, ensure proper care of the child, or facilitate the child's permanent placement. § 39.6012(1)(a).

PRACTICE TIP: Florida law holds that parental rights constitute a fundamental liberty interest. Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 571 (Fla. 1991). Before a parent's rights to a child may be terminated, the state must show termination of parental rights is the least restrictive means to protect the child. *Id.* In Padgett, the Florida Supreme Court held that, in ordinary cases, to meet this burden the state had to prove it made a good faith effort to rehabilitate the parent and reunite the family by offering the parents a case plan and an opportunity to comply with it. To ensure the case plan complies with the statute; is designed to meet the family's needs; and is enforced (through advocating for necessary referrals and services) it is critical to determine whether the family should be reunified. The case plan may be the foundation for terminating parental rights.

- The case plan must be developed in a face-to-face conference with the parent of the child, the guardian ad litem, and if appropriate, the child and the temporary custodian of the child. § 39.6011(1)(a). *See also* § 409.145(2)(a)(1) (Requiring the caregiver to participate in the development of the case plan).
- The case plan must be written simply and clearly in English, and if English is not the parents' principal language, in the principal language of the parent, if possible. § 39.6011(2).
- The case plan must be limited to as short a period as possible for accomplishing its provisions and expires no later than 12 months after the date of the child's initial removal or the date of case plan acceptance by the court, whichever occurs sooner. § 39.6011(2)(d).
- When approving the case plan, the court will determine whether the plan is meaningful and designed to address facts and circumstances upon which the court based the finding of dependency in involuntary placements or whether the plan is meaningful and designed to address facts and circumstances upon which the child was placed in out-of-home care voluntarily. § 39.603(1)(f).
- The case plan must list the tasks necessary to finalize the permanency placement and shall be updated at the permanency hearing if necessary. § 39.621(8).

CASE PLAN GOAL

The case plan must include at least one permanency goal. § 39.6011(2)(b). The 5 permanency goals in order of preference are reunification, adoption, permanent guardianship, permanent placement with a fit and willing relative, and another planned permanent living arrangement (APPLA). § 39.01(52). In addition to the five goals listed in § 39.01(52) there are three other possible permanency options.

MAINTAINING AND STRENGTHENING PLACEMENT

If a child has not been removed from a parent, been reunified with a parent, or placed with a parent from whom the child was not removed - maintaining and strengthening the placement may be used as a permanency option. § 39.6011(c)1-3.

TRANSITION FROM LICENSED CARE TO INDEPENDENT LIVING

The permanency goal for a young adult who chooses to remain in care after turning 18 is to transition from licensed care to independent living. § 39.6251(3).

TERMINATION OF PARENTAL RIGHTS

When the department decides to file a termination of parental rights petition against a parent without offering the parent a case plan the department may file with the court a case plan with a goal of termination of parental rights. § 39.802(5).

OTHER ISSUES REGARDING DRAFTING CASE PLANS

PARTICIPATION OF THE CHILD IN THE CASE PLANNING PROCESS

Section 39.6011(1)(a) specifies that the child is to participate in case plan development if appropriate and subsection (3) requires the child's signature on the case plan. *See also* Rule 8.255(b), Rule (The child has a right to be present at hearings unless the court finds the child's mental or physical condition or age is such that a court appearance is not in the child's best interests).

SIGNATURE ON THE CASE PLAN

The case plan must be signed by all parties, except the child's signature may be waived due to age or incapacity to participate. § 39.6011(3). Participating in the development of a case plan is not an admission to any allegation of abuse, abandonment, or neglect, and it is not a consent to a finding of dependency or termination of parental rights. § 39.6011(1). Signing the case plan constitutes an acknowledgement that the case plan has been developed by the parties and that they are in agreement as to the terms and conditions contained in the case plan. § 39.6011(3). Signing the case plan does not constitute an admission to any allegation of abuse, abandonment, or neglect and does not constitute consent to a finding of dependency or termination of parental rights. § 39.6011(3). The refusal of a parent to sign the case plan does not prevent the court from accepting it. § 39.6011(3).

FAILURE/INABILITY OF PARENTS TO PARTICIPATE

Although parents are entitled to participate in case plan development, if they refuse or are unable to participate, the department must develop the plan without them and document the reasons for the parent's

lack of participation. § 39.6011(1)(c); 65 Fed. Reg. 4057 (Jan. 25, 2000). A parent who has not participated in the development of a case plan must be served with a copy of the plan developed by the department, if the parent can be located, at least 72 hours prior to the court hearing. § 39.603(3). The refusal of a parent to sign the case plan does not prevent the court from accepting it. § 39.6011(3). The parent is entitled to a court review of the plan prior to the initial judicial review and must be informed of this right by the department when served with a copy of the plan. § 39.603(3). If the location of an absent parent becomes known to the department, the department shall inform the parent of the right to a court review at the time the department serves the parent with a copy of the case plan. § 39.603(3).

ADOPTION

When the permanency goal for a child is adoption, the case plan must include documentation of the steps being taken to find an adoptive family or other permanent living arrangement for the child. § 39.6011(5). At a minimum, the documentation must include child-specific recruitment efforts, such as the use of state, regional and national adoption exchanges, including electronic exchange systems. § 39.6011(5).

CASE PLANS FOR 17 YEAR OLD CHILDREN

- At the first judicial review hearing after the child's 17th birthday, the department must file an updated case plan that includes specific information related to independent living services provided since the child's 13th birthday, or since the date the child came into foster care, whichever came later. § 39.701(3)(b).
- **Appointment of Guardian Advocate Before Child Turns 18.** For any child that may meet the requirements for appointment of a guardian pursuant to Chapter 744, or a guardian advocate pursuant to § 393.12, the updated case plan must be developed in a face-to-face conference with the child, if appropriate, the child's attorney; any court appointed guardian ad litem; the temporary custodian of the child and the parent, if the parent's rights have not been terminated. § 39.701(3)(b)1.
- For dependent children who are 16 and in out-of-home placements consideration should be given as to whether the youth should have the disability of non-age removed for purposes of securing depository services, such as checking and savings accounts, under § 743.044. The youth must complete a financial literacy class prior to getting such an order from the court. § 743.044.
- For dependent youth who are 17 and in foster care or subsidized independent living, the court must enter an order removing the disability of non-age for the purpose of executing contracts for residential leases under § 743.045, to ensure the youth can obtain housing upon their 18th birthdays. § 39.701(6)(a).
- Other motions for removal of disability of non-age for: utility services § 743.046; motor vehicle insurance § 743.047 and borrowing money for educational purposes § 743.05

CASE PLANS FOR YOUNG ADULTS

- The term "young adult" means an individual who is at least 18 years old but is less than 21 years old. § 39.6251(1).
- A child who is living in licensed care on his or her 18th birthday may choose to extend foster care up until they reach the age of 21, if they meet the eligibility requirements set forth in § 39.6251(2). If the young adult has a disability he or she may extend foster care until they reach the age of 22. § 39.6251(5)

- If a young adult chooses to extend foster care the court shall hold review hearings at least every six months and must hold a permanency review at least once a year. § 39.701(4). The department must prepare and submit to the court a report which addresses the young adult's progress in meeting the goals of the case plan. § 39.701(4)(a).
- The primary case plan goal for a young adult who extends foster care is "transition from licensed care to independent living." § 39.6251(3).
- "The case plan must be developed in a face-to-face conference with the young adult, the guardian ad litem, attorney ad litem and when appropriate the legal guardian of the young adult, if the young adult is not of the capacity to participate in the case planning process." Rule 8.401(a).
- "The case plan must be written simply and clearly in English and the principal language of the young adult." Juv. R. Pro. 8.401(b). Compare with Rule 8.400(b) which requires a case plan be in the parents' principal language, *if possible*.
- The case plan must include a description of the services to be provide to the young adult, a copy of the young adult's transition plan, the goal of transition from licensed care to independent living and the date the compliance period expires. Rule 8.401(b)
- The case plan must be signed by all the parties including the young adult, and when appropriate the legal guardian if the young adult is not of the capacity to participate in the case planning process. Juv. R. Pro. 8.401(d). "The department must immediately provide the young adult a signed copy of the agreed-upon case plan". Rule 8.401(c)(3). The department must make all appropriate referrals for services, after the case plan has been developed and before court acceptance, so the young adult may begin receiving agreed upon services immediately. Rule 8.401(c)(2).
- Guardian advocate in place by 18th birthday if appropriate § 393.12(2)(c)

SERVICE OF CASE PLAN

The case plan must be filed with the court at least three business days before a judicial review or permanency hearing. Rule 8.401(c)(4). The case plan must be served on all the parties at least three business days before the judicial review hearing. Rule 8.401(e). If the young adult's whereabouts are unknown that fact must be documented in writing and filed with the court. Rule 8.401(e).

RE-ADMITTED TO CARE

If a young adult opts out extended foster care and then is re-admitted into extended foster care, the department must assign a case manager to update the case plan and the transition plan and arrange for required services within 30 days of the young adult being re-admitted. § 39.6251(6)(b).

TRANSITION PLAN

The department must assist the child in developing a transition plan within the 180 day period after a child turns 17. § 39.6035(1). The transition plan must address specific options for the child to use in obtaining services, including housing, health insurance, education, and workforce support and employment services. § 39.6035(1). The plan must also consider establishing and maintaining naturally occurring mentoring relationships and other personal support services.

TRANSITION PLAN MEETING

The department and the child shall schedule a meeting to assist the child in drafting the transition plan. The meeting must be conducted in the child's primary language. § 39.6035(2). The transition plan is to be drafted in collaboration with the caregiver and any other individual whom the child would like to include. The meeting must be scheduled in a time, date and place that is most convenient for the child and any individual whom the child would like to include. § 39.6035(2). In developing the transition plan the department must provide the child with documentation required pursuant to § 39.701(7) and coordinate the transition plan with the independent living provisions in the case plan. § 39.6035(1).

The transition plan is to be reviewed periodically and updated when necessary before each judicial review. § 39.6035(3). "If a the child is planning to leave care upon reaching 18 years of age, the transition plan must be approved by the court before the child leaves care and the court terminates jurisdiction." § 39.6035(4).

AMENDING CASE PLANS

After the case plan has been developed under § 39.6011, the tasks and services agreed upon can only be changed or altered as provided in § 39.6013. Case plans should be amended whenever changes are appropriate. 65 Fed. Reg. 4052 (Jan. 25, 2000).

- The **case plan** can be amended by the court or motion of any party with a showing of **preponderance of the evidence** to: change the goal; use concurrent planning; or add or remove tasks for the parents. § 39.6013(4).
- To amend services **for the child**, party must show **competent evidence** showing need for amendment. § 39.6013(5).
- The need to amend the case plan may be based on information discovered or circumstances arising after approval of the case plan for:
 - a previously unaddressed condition;
 - the child's need for permanency;
 - the failure of a party to substantially comply with a task in the original case plan, including the ineffectiveness of a previously offered service; or
 - an error or oversight in the case plan. § 39.6013(4).

OTHER ISSUES REGARDING AMENDING THE CASE PLAN

Enforcement. Ensure that any new obligation of any party is amended into the case plan. H.G. v. Department of Children and Families, 916 So. 2d 1006 (Fla. 4th DCA 2006)(holding that when determining the parent's substantial compliance with the case plan, the fact that the judge ordered the parent to take part in certain services could not be considered because the ordered services were never incorporated into the case plan).

No extension of case plans. The list of grounds for amendment of a case plan in § 39.6013 does not include extension of time for completion of tasks as a permissible reason to amend a case plan. Compare § 39.6013, Fla. Stat. (2007) with Chapter 2006-86, Laws of Florida, (affirmatively deleting statutory authority to extend case plans from §§ 39.601(7) and 39.701(9)(f)).

CONCURRENT CASE PLANS

A concurrent case plan is a plan with two permanency goals in which efforts to reunify are made at the same time another permanency goal is pursued. § 39.01(19). Federal and Florida law specifically permit concurrent planning. 42 U.S.C. § 671 (a)(15)(F); 45 C.F.R. § 1356.21(b)(4); § 39.6011(2). Each family should be evaluated to determine the appropriateness of concurrent planning. See 45 Fed. Reg. 4054 (Jan. 25, 2000).

- If concurrent planning is being used, the case plan must include a description of the goal of reunification and a description of one of the remaining permanency goals described in § 39.01(52). § 39.01(19).
- The case plan can be amended at any time to employ the use of concurrent planning. § 39.6013(4).
- At the six-month judicial review, the court must make findings regarding the likelihood of the child's reunification with the parent or legal custodian within 12 months after the removal of the child from the home. If the court finds reunification is not likely, the court must make written finding and the department must file a motion to amend the case plan to use concurrent planning within 10 business days of the court's written finding. § 39.701(9)(e).
- If concurrent planning is in place at the six-month judicial review, the case plan must document the efforts the department is taking to complete the concurrent goal. § 39.701(2)(d)(5).
- If a concurrent case plan is in place at the permanency hearing, the court may choose between the permanency goal options presented and shall approve the goal that is in the child's best interests. § 39.621(8).

PRACTICE TIP: Advocate for the use of concurrent planning early in the case when appropriate. Advocate for adoption of a single goal when a parent has acted in a way that makes reunification impossible. See § 39.806(1)(e)2 (authorizing termination of parental rights prior to expiration of the case plan when a parent materially breaches the plan).

CONCURRENT PLANNING - CASE PLAN TASK EXAMPLES

Services for the Children in All Case Plans

- **Counseling.** The department will provide a referral to be evaluated/receive counseling etc. within 72 hours of case plan acceptance.
- **Disability Services** for the child, if applicable.
 - The department will apply for SSI on the child's behalf within 3 months of child coming into care.
 - The department will immediately establish a Master Trust Account once disability benefits are received.
 - The department will provide a quarterly Master Trust accounting/notice of the child's right to request a waiver.
 - The department will refer the child to APD or other appropriate agency for purposes of ensuring the child is enrolled in the Medicaid waiver program within one month of the child coming into care.
- **Visitation.** The department will facilitate sibling/parental visitation.
- **Education.** The department will ensure the child's educational needs are being met.

- The department will ensure the child has an updated IEP (if the child has a disability) and a surrogate parent through the school.
- **Medical.** The department will ensure the child's medical needs are being met.
 - The department will ensure all child's prescriptions are current and that the child's medications are continued should the child's placement change.

Adoption

- The department will obtain certified copy of child's birth certificate within 30 days of case plan filing.
- The department will refer the case to the appropriate adoption counselor within 5 days of the filing of the case plan filing.
- If adoptive placement has been identified, the department will complete initial adoptive home study on prospective placement 14 days prior to TPR trial.
- The department will report to the court every 30 days what efforts they are making to identify, recruit, process and approve a qualified family for at risk adoption. This should include at a minimum recruitment efforts that are specific to the child, such as the use of state, regional, and national adoption exchanges, including electronic exchange systems. § 39.6011(5).

Another Planned Permanent Living Arrangement (APPLA): Independent Living

- The department will file an Amended Independent Living Case Plan within 14 days of the completion of the Independent Living Assessment.
- The department will refer the child to the appropriate Independent Living Counselor within five days of the filing of the case plan.
- The department will complete an Independent Living Assessment.
- The department will conduct an Independent Living Staffing, giving timely notice to the child, the child's guardian ad litem and the child's attorney (if applicable). *But see* Preventing Sex Trafficking and Strengthening Families Act of 2014 (Federal Legislation chapter).

Permanent Guardianship

- The department counselor will complete the necessary paperwork for relative caregiver funds to be distributed within 5 days of disposition.
- The department counselor will obtain a certified copy of the child's birth certificate, Medicaid card and social security within 30 days of acceptance of case plan.

COMPLIANCE/NON-COMPLIANCE BY PARENTS

Parents must be given notice that failure to substantially comply with the case plan may result in termination of parental rights and that any material breach may result in filing for TPR sooner than the stated compliance period. § 39.402(18); § 39.6011(2)(e) "Substantial compliance" means that the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered by the child's remaining with or being returned to the child's parent. § 39.01(76).

- In determining whether to reunify a family post-adjudication, the court must determine whether the parent has substantially complied with the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home. § 39.522(2).
- Case plan compliance is relevant to the determination of reunification with a parent if a permanency order has been entered placing the child in a permanent guardianship, placed with a fit and willing relative or in an APPLA. §§ 39.621(9), (10).
- Compliance/non-compliance should be documented in the Judicial Review Social Study Report (JRSSR). § 39.701(2)(a)2.(requiring documentation of the diligent efforts made by all parties to the case plan); § 39.701(2)(a)5.(mandating that the JRSSR contain a statement regarding the parent's compliance); § 39.701(2)(a)4.(requiring information regarding services provided to the foster family or legal custodian in an effort to address the needs of the child as indicated in the case plan).
- Compliance/non-compliance will be reviewed at all judicial review hearings. § 39.701(2). If the court finds the prevention or reunification efforts of the department will allow the child to remain safely at home or be safely returned to the home, the court shall allow the child to remain in or return to the home *after making a specific finding of fact that the reasons for the creation of the case plan have been remedied to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered.* § 39.701(2)(d)1 (emphasis added). The court must return a child to his parent's custody any time it determines the parents have substantially complied with the case plan, if the court is satisfied that reunification will not be detrimental to the child's safety, well-being, and physical, mental, and emotional health. § 39.701(2)(d)2.
- If at any judicial review, the court finds the parents have failed to substantially comply with the case plan to the degree that further reunification efforts are without merit and not in the best interests of the child, the court may order the filing of a petition for termination of parental rights, whether or not the time period for substantial compliance has expired. § 39.701(2)(d)4.
- Failure of the parents to substantially comply for 12 months after the child is adjudicated or the child's placement into shelter care, whichever came first, constitutes evidence of continuing abuse, neglect, or abandonment unless the failure to substantially comply with the case plan was due either to the lack of financial resources of the parents or to the failure of the department to make reasonable efforts to reunify the parent and child. § 39.806(1)(e)1.
- If the parent materially breaches the case plan by making it unlikely that he or she will be able to substantially comply with the case plan before the time for compliance expires, this can constitute grounds for TPR. § 39.806(1)(e)2.

OTHER ISSUES REGARDING CASE PLAN COMPLIANCE

Compliance by the department. At the judicial review hearing if the court finds the department has not complied with its obligations in the case plan or in the provision of independent living services as required by law, the court shall issue a show cause order. If cause is shown for failure to comply, the court shall give the department 30 days to comply and, on failure to comply the department may be held in contempt. § 39.701(3)(c); *see also* § 39.701(2)(d)3 (allowing the court to find the department in contempt, order the department to submit plans for compliance with the case plan, and require the department to show why the child could not safely be returned to the home of the parents if, in the opinion of the court, the department has not complied with its obligations as specified in the written case plan).

CASE PLAN CHECKLIST

The department shall prepare a draft of the case plan for each child receiving services under chapter 39

PARTICIPANTS IN FACE-TO-FACE MEETING

- Department
- Child's parent
 - If parent(s) unwilling or unable to participate must have documentation § 39.6011(1)(c)
- Guardian ad Litem
- Attorney ad Litem, if appointed
- Child, if appropriate
- Child's temporary custodian

EACH CASE PLAN MUST CONTAIN

- Parent's behavior or acts, resulting in risk to child, to be addressed – the behavior /act must match service § 39.6011(2)(a)
- The Permanency Goal - Permanency Goal is also the Case Plan Goal §§ 39.6011(2)(b), 39.01(52)
 - Reunification
 - Adoption when a petition for termination of parental rights has been or will be filed
 - Permanent guardianship of a dependent child § 39.6221
 - Permanent placement with a fit and willing relative § 39.6231), or
 - Placement in another planned permanent living arrangement § 39.6241
- If concurrent planning, then a description of the goal of reunification in addition to a description of one of the remaining permanency goals § 39.6011(2)(c)
- Date the compliance period expires: no later than 12 months after the child initially removed, or date the court accepted the case plan (whichever sooner) § 39.6011(2)(d)
- Description of each of the parent's tasks and services §39.6012(1)(b)
 - type of services or treatment
 - date the department will provide each service or referral date by which the parent must complete each task
 - frequency of services or treatment provided (determined by professionals on a case-by-case basis)
 - location of the delivery of the services
 - accountable staff or service provider
 - measurable objectives, timeframes
- Description of the child's identified needs while in care § 39.6012(2)(a)
 - plan for ensuring that the child receives safe and proper care
- A written notice that:
 - Failure to substantially comply with case plan may result in TPR
 - Material breach of case plan may result in filing for TPR sooner than stated compliance period § 39.6011(2)(e)
- For children thirteen and over who are in an out-of-home placement, the case plan shall include a description of the independent living services identified regardless of the goal of the plan
- Description of role of foster parents § 39.6011(4)(a)
- The responsibility of the case manager to forward a relative's request to receive notification of all proceedings and hearings submitted pursuant to § 39.301(15)(b) to the attorney for the department. § 39.6011(4)(b)
- Minimum number of face-to-face meetings to be held each month; § 39.6011(4)(c)

- Parent's financial responsibilities § 39.6011(4)(d). Must list cost associated with services of parent and child, which are the financial responsibility of parent(s)
- If the goal is adoption, then case plan must document steps the department is taking to find adoptive or permanent placement § 39.6011(5)
- If the child is in an out-of-home placement the case plan must contain the following: § 39.6012(3)
 - description of the type of placement § 39.6012(3)(a)
 - parent's visitation rights and obligations § 39.6012(3)(b)
 - sibling visitation § 39.6012(3)(b)
 - if 13 or older must meet Independent Living requirements of § 409.1451, § 39.6012(3)(c)
 - A discussion of the safety and the appropriateness of the child's placement § 39.6012(3)(d)
- Guardian advocate to be appointed by 18th birthday, if appropriate. §§ 393.12(2)(c), 39.6251(8).

CHILD'S RECORDS THAT MUST BE ATTACHED TO CASE PLAN

- The names and addresses of the child's health, mental health, and educational providers;
- The child's grade level performance;
- The child's school record;
- Assurances that the child's placement takes into account proximity to the school in which the child is enrolled at the time of placement;
- A record of the child's immunizations;
- The child's known medical history, including any known problems;
- The child's medications, if any; and
- Any other relevant health, mental health, and education information concerning the child.

AMENDING THE CASE PLAN

- The case plan may be amended by the court or upon motion of any party at any hearing in order to change the goal of the plan or to employ the use of concurrent planning § 39.6013(2)(4), Rule 8.420(a)(1)(3)

CASE PLAN MUST BE EXPLAINED, SIGNED AND DELIVERED

- Case plan must be explained to parties including child, if appropriate §39.6011(3)
- Case plan must immediately be given to all parties, including the child, if appropriate § 39.6011(6)(b).
- Signed by all parties -- signature of a child may be waived if the child is not of an age or capacity to participate in the case-planning process § 39.6011(3)

TIME LIMITATIONS ARE THE RIGHT OF THE CHILD – TOTAL TIME ALLOWED FOR CONTINUANCES MAY NOT EXCEED 60 DAYS IN ANY 12 MONTH PERIOD § 39.0136(3)

CASE PLAN WORKSHEET

PARENT'S TREATMENT AND SERVICES

Behavior / act that led to risk	Service and Frequency	Date department will provide service or referral	Completion date	Accountable Staff or service provider	Location of service delivery

CHILD'S SERVICES

Issue	Service	Date department will provide service or referral	Accountable Staff or service provider	Location of service

PARTICIPANTS

- Department
- Child, if appropriate
- Child's parent(s)
- Guardian ad Litem
- Attorney ad Litem, if appointed
- Child's temporary custodian

CHILD'S RECORDS THAT MUST BE ATTACHED TO CASE PLAN:

- The names and addresses of the child's health, mental health, and educational providers;
- The child's grade level performance;
- The child's school record;
- Assurances that the child's placement takes into account proximity to the school in which the child is enrolled at the time of placement;
- A record of the child's immunizations;
- The child's known medical history, including any known problems;
- The child's medications, if any; and
- Any other relevant health, mental health, and education information concerning the child.

WHEN CHILD IS IN OUT-OF-HOME PLACEMENT

- Description of the type of placement
- Parent's visitation rights and obligations _____
- Sibling visitation (frequency kind duration) _____
- If 13 or older must meet independent living requirements of § 409.1451; § 39.6012(3)c
- A discussion of the safety and the appropriateness of the child's placement

ADDITIONAL INFORMATION

- Permanency Goal _____
- Concurrent Planning Reunification + _____
 - o Tasks for both goals
- Date the compliance period ends _____
- Is notice given that failure to substantially comply may result in TPR
- Parent(s) told that material breach may mean TPR if filed sooner
- Case plan signed by all parties, including child if appropriate
- Received copy of plan

PLAN FOR FOLLOW-UP

JUDICIAL REVIEWS

BY MELIZA FRIAS, ESQ., CHILD’S BEST INTEREST ATTORNEY FLORIDA GUARDIAN AD LITEM PROGRAM

Judicial review hearings are crucial hearings in a dependency proceeding because they provide an opportunity for the court and the parties to review all aspects of the case. These hearings are “an important part of the ‘checks and balances’ process and serve to ensure accountability from the department.” I.B. v. Dep’t of Children & Families, 876 So. 2d 581, 587 (Fla. 5th DCA 2004). During a judicial review hearing, the court reviews the status of a child including, but not limited to, the child’s medical and dental records, educational records, status of services, and placement. The court will also review the parents’ compliance with the case plan, and often amend the case plan if necessary. Judicial reviews apply to *all* children, except “[m]inors who have been placed in adoptive homes by a licensed child-placing agency; or [m]inors who are refugees or entrants to whom federal regulations apply and who are in the care of a social service agency.” § 39.704. While judicial review hearings are considered evidentiary hearings, the court may consider “any relevant and material evidence submitted to the court, including written and oral reports to the extent of their probative value. These reports and evidence may be . . . relied upon to the extent of their probative value, *even though not competent in an adjudicatory hearing.*” § 39.701(2)(c) (emphasis added). The court makes specific findings regarding the parents’ compliance, the agency’s compliance, and the child’s placement. The court will also use this opportunity to enter any orders that are needed to ensure the child’s safety and further permanency. Most significantly, the court can change the goal of the case at the judicial review hearing.

JURISDICTION & EXTENDING JURISDICTION

The court retains jurisdiction throughout the dependency proceedings until and unless the court relinquishes jurisdiction via court order. If a child is reunified with his or her parents, “[t]he court shall retain jurisdiction . . . for a minimum period of 6 months following the reunification.” § 39.701 (1)(b). After the six-month supervision period, the court will review the social service agency report, the guardian ad litem report, and other factors to determine whether to terminate the court’s jurisdiction and supervision by the department. *Id.*

The court has continuing jurisdiction until the child turns 21 years old (22 if they have a documented disability) unless the court terminates jurisdiction; the youth chooses to leave foster care upon reaching the age of 18 and does not seek readmission into foster care; a petition for special immigrant juvenile status and an application for adjustment of status have been filed, or the youth is not eligible to remain in foster care. § 39.013(2).

A young adult, regardless of any disability or mental health need, may apply for readmission into extended foster care at any time before the youth turns 21 years old so long as the youth meets the eligibility requirements set out in § 39.6251. It is vital that readmission applications be made available to all foster care youth. Moreover, community care agencies have designated staff members tasked with assisting young adults in complementing these applications and gathering any necessary paperwork, as well as helping the youth enroll in a “qualifying activity” that will allow the youth to qualify for extended foster care. Once an application has been submitted, the youth will be notified with 10 days regarding eligibility.

Once the youth is admitted into extended foster care, the case manager has three (3) business days to request that the department petition the court to reinstate jurisdiction. If the youth's application is denied, the youth must receive a "notice of denial." The youth may also appeal the decision. Alternatively, if there is information missing from the youth's application, the youth shall receive notice thereof and has ten (10) days to submit the needed paperwork.

See Extended Foster Care and Independent Living chapter.

Moreover, the court may retain jurisdiction until a youth reaches the age of 22 if a "petition for special immigrant juvenile status and an application for adjustment of status have been filed on behalf of a foster child and the petition and application have not been granted by the time the child reaches 18 years of age." § 39.013(2)(d). However, in these cases, the court will *only* review matters relating to youth's immigration status. *Id.*

See Special Immigrant Juvenile Status chapter.

TIMING

The initial judicial review hearing must be held no later than ninety (90) days after the disposition hearing or after the court approves the case plan, whichever comes first, but in no event may it be held more than six (6) months after the child was removed from home. § 39.701(1)(d). Thereafter, judicial review hearings are conducted every six (6) months until the child reaches permanency, regardless of whether the parents' rights have been terminated. § 39.701(1)(c)(1). At each judicial review hearing, the court shall schedule the date, time, and location of the next judicial review. § 39.701(1)(e).

Once a child turns 17 years old the court holds a judicial review hearing within 90 days and continues to hold judicial hearings at least every six (6) months, or more frequently, if necessary. During these review hearings, the child shall have the opportunity to address the court and advocate for his or her own best interests, particularly as it relates to independent living services. § 39.701(3)(a).

SIX-MONTH REVIEW HEARING

Within six (6) months after the child is placed in shelter care, the court conducts a judicial review hearing. One of the main reasons for this hearing is to determine whether the permanency goal established in the case plan is still appropriate. The court reviews the parents' compliance with case plan tasks and determines whether it is likely that the child will achieve reunification within 12 months from the date the child was removed from home. If the court finds that reunification is *not* likely, then within ten (10) business days from that written finding "the department must file with the court, and serve on all parties, a motion to amend the case plan under § 39.6013 and declare that it will use concurrent planning." § 39.701(2)(d)(5). The new proposed case plan must also be attached the motion. *Id.* If concurrent planning is already in place, the department must provide documentation to show how the department is effectuating the concurrent goal. *Id.*

At the judicial review hearing, the court shall also ensure that the child is experiencing "normalcy" despite being in the dependency system. "Normalcy" refers to the child being engaged in age-appropriate activities that allow the child to grow and experience the world just as other community children do. These activities

may include: sports, teams, clubs, choir, dance, volunteer opportunities, spending time with friends, having sleepovers, taking trips, learning how to drive or working a part-time job.

See Normalcy chapter and Independent Living chapter.

During the judicial review hearing, and at every stage of the dependency proceeding, the parents must be advised of their right to counsel. § 39.013(1). The department shall also be represented by an attorney. Rule 8.255(a). Furthermore, the court often requests that the child be present during a judicial review hearing, and the child has a right to be present unless the court finds that it is not in the child's the best interests. Rule 8.255(b)(2). Any party may file a motion to require or exclude the presence of the child. Rule 8.255(b)(4).

CITIZEN REVIEW PANEL

In lieu of a circuit judge conducting the judicial review hearing, circuit courts may refer a case to the citizen review panel. § 39.701(1)(c)(2). A party may object to the court referring the case to the citizen review panel, at which time the court must determine whether it will maintain the referral or conduct the review itself. *Id.* However, citizen review panels may not conduct more than two consecutive reviews without the child and the parties coming before the *court* for a judicial review. § 39.701(1)(d)(1).

The citizen review panel is composed of trained volunteers who review the case and provide the court with recommendations regarding compliance, placement, and the child's welfare. At the conclusion of the judicial review hearing, the citizen review panel composes a report for the court that contains its proposed recommended orders. § 39.701(1)(c)(3). Also, "[e]ach party may propose a recommended order to the chairperson of the panel." *Id.* The citizen review panel makes the same determinations that the circuit court does; however, it is up to the court to issue a judicial review order adopting the findings of the citizen review panel. *Id.* If the citizen review panel recommends extending a case plan goal of reunification beyond 12 months from the date the child was removed from the home or the case plan was adopted (whichever came first), then the court should schedule a judicial review hearing within 30 days after receiving the recommendation. § 39.701(1) (d)(2). Additionally, any party can make exceptions to the citizen review panel report pursuant to Fla. R. Civ. P. 1.490(h), § 39.701(1)(c)(3).

GENERAL MAGISTRATES

The court may also refer a judicial review hearing to the general magistrate. Rule 8.257(b) and in most areas of the state, magistrates preside over judicial review hearings. A party may object to a case being referred to the general magistrate by filing a written objection within ten (10) days from the service of the order of referral. Rule 8.257(b)(2).

If the general magistrate conducts the judicial review hearing, then the general magistrate files a report that includes its findings of facts, conclusions of law, and recommendations. Rule 8.257(e). The parties may then file exceptions to the general magistrate's report within ten (10) days from the time the report is served on them. Rule 8.257(f). Any party can file a cross-exception within five (5) days; however the filing of cross-exceptions may not delay the hearing on the exceptions unless there is good cause. *Id.* If no exceptions are filed, the court can take appropriate action on the report and determine whether to issue an order adopting the recommendations of the general magistrate. Rule 8.257(f). It is important to note that the court is bound

by the general magistrate's *factual* findings unless they are not supported by "competent, substantial evidence or are clearly erroneous." Carls v. Carls, 890 So. 2d 1135, 1138 (Fla. 2d DCA 2004).

NOTICE

The court clerk is responsible for scheduling judicial review hearings and providing all parties with written notice of the date, time, and location of the next hearing. § 39.701(1)(f). The notice should include whether the circuit judge, the general magistrate, or a citizen review panel will conduct the hearing. This information shall also be listed in the judicial review order. § 39.701(1)(e). The clerk shall also provide notice of the hearing and a copy of the motion for judicial review (if any) to the following persons, regardless of whether the person was present at the previous hearing:

- The related social service agency, if that agency is not the movant.
- The foster parent or legal custodian in whose home the child resides.
- The parents.
- The representative of the guardian ad litem program if appointed.
- The attorney for the child, if appointed.
- The child, if the child is 13 years of age or older.
- Any pre-adoptive parent.
- Such other persons as the court may direct.

§ 39.701(1)(f).

PRACTICE TIP: The program attorney should be aware of the date, time, and location of the judicial review hearing and carefully review the guardian ad litem's report. If necessary, the program attorney should prepare the guardian ad litem for testimony and cross-examination. If the child is going to attend court, the program attorney should also make sure the guardian ad litem is prepared to support the child during the proceeding.

JUDICIAL REVIEW SOCIAL STUDY REPORT (JRSSR)

Prior to a judicial review hearing, the department must file a social study report (known as the JRSSR) that contains information regarding the child's welfare and the parents' progress with the case plan tasks. The guardian ad litem is also required to submit a report.

See Guardian ad Litem Report Writing Chapter.

These reports shall be submitted 72 hours before the hearing to: all parties whose whereabouts are known, the foster parents or legal custodians, and to the citizens of the review panel, if applicable. § 39.701(2)(b)(1). If the parents' rights have been terminated, then the parents are no longer parties to the case and a copy of the report does *not* need to be served on them. *Id.*

PRACTICE TIP: If the Program did not receive the judicial review social study report within the 72 hours prior to the hearing, the program attorney should consider requesting that the matter be

continued if the guardian has not had sufficient time to review the report and it would be in the best interest of the child to reset the hearing. See Rule 8.240(d).

JRSSR CONTENTS

THE JUDICIAL REVIEW SOCIAL STUDY REPORT SHALL CONTAIN, BUT NOT BE LIMITED TO, THE FOLLOWING INFORMATION:

- Facts showing the court to have jurisdiction of the cause as a dependency case;
- The identity and residence of the parent, if known, and the legal custodian;
- The dates of the original dependency adjudication and any subsequent judicial review proceedings;
- A description of the child's placement at the time of the hearing, including the safety of the child and the continuing necessity for and appropriateness of the placement;
- Documentation of the diligent efforts made by all parties to the case plan to comply with each applicable provision of the plan;
- The amount of fees assessed and collected during the period of time being reported;
- The services provided to the foster family or legal custodian in an effort to address the needs of the child as indicated in the case plan;
- A statement that either:
 - The parent, though able to do so, did *not comply substantially* with the case plan, and the agency recommendations;
 - The parent did *substantially comply* with the case plan; or
 - The parent has *partially complied* with the case plan, with a summary of additional progress needed and the agency recommendations.
- A statement from the foster parent or legal custodian providing any material evidence concerning the return of the child to the parent(s);
- A statement concerning the frequency, duration, and results of the parent-child visitation, if any, and the agency recommendations for an expansion or restriction of future visitation;
- The number of times a child has been removed from his or her home and placed elsewhere, the number and types of placements that have occurred, and the reason for the changes in placement;
- The number of times a child's educational placement has been changed, the number and types of educational placements which have occurred, and the reason for any change in placement;
- If the child has reached 13 years of age but is not yet 18 years of age, a statement from the caregiver on the progress the child has made in acquiring independent living skills;
- Copies of all medical, psychological, and educational records that support the terms of the case plan and that have been produced concerning the parents or any caregiver since the last judicial review hearing; and
- Copies of the child's current health, mental health, and education records as identified in § 39.6012.

§ 39.701(2)(a).

In addition, the report should also contain whether the department recommends that the child's placement be changed, that the case plan be continued, or that proceedings be initiated to terminate the parents' rights. See Rule 8.415 (c).

If the child has been permanently placed with a social service agency, then the agency must show the court documentation of its efforts to place the child for adoption or efforts to achieve the appropriate permanency goal. § 39.701(2)(b)(2).

JUDICIAL REVIEW HEARINGS FOR CHILDREN 17 YEARS OF AGE AND OLDER

If the child is 17 or older, the department must include all the information outlined above in JRSSR and must **also** provide:

- A current **Medicaid card** and all necessary information concerning the Medicaid program sufficient to prepare the child to apply for coverage upon reaching the age of 18, if such application is appropriate.
- A certified copy of the child's **birth certificate** and, if the child does not have a valid driver license, a Florida **identification card** issued under § 322.051.
- A **social security card** and information relating to social security insurance benefits if the child is eligible for those benefits. If the child has received such benefits and they are being held in trust for the child, a full accounting of these funds must be provided and the child must be informed as to how to access those funds.
- All relevant information related to the Road-to-Independence Program, including, but not limited to, eligibility requirements, information on participation, and assistance in gaining admission to the program. If the child is eligible for the Road-to-Independence Program, the youth must be advised that the youth may continue to reside with the licensed family home or group care provider with whom the child was residing at the time the child attained his or her 18th birthday, in another licensed family home, or with a group care provider arranged by the department.
- An open **bank account** or the identification necessary to open a bank account and to acquire essential banking and budgeting skills.
- Information on public assistance and **how to apply for public assistance**.
- A clear understanding of where the youth will be living on his or her 18th birthday, how living expenses will be paid, and the educational program or school in which the youth will be enrolled.
- Information related to the ability of the child to **remain in care** until the youth reaches 21 years of age under § 39.013.
- A letter providing the dates that the child is under the jurisdiction of the court.
- A letter stating that the child is in compliance with financial aid documentation requirements.
- The child's **educational records**.
- The child's **entire health and mental health records**.
- The process for accessing his or her case file.
- A statement encouraging the child to attend all judicial review hearings occurring after the child's 17th birthday.

§ 39.701(3)(a).

PRACTICE TIP: The guardian ad litem should review the listed items with the young adult, and if the guardian ad litem is aware any missing information, the guardian should alert the program attorney. The program attorney may question the independent living specialist on these matters and request that the court order the department to provide the pending services.

APPOINTMENT OF A GUARDIAN ADVOCATE

If child qualifies for guardian advocate pursuant to chapter 744, the appointment of a must be in a separate proceeding. § 39.701(3)(b)4.

Case Planning

For any child that may meet the requirements for appointment of a guardian pursuant to Chapter 744, or a guardian advocate pursuant to § 393.12, the updated case plan must be developed in a face-to-face conference with the child, if appropriate, the child's attorney; any court appointed guardian ad litem; the temporary custodian of the child and the parent, if the parent's rights have not been terminated. § 39.701(3)(b)1.

Report

The department shall complete a multidisciplinary report which must include, but is not limited to: a psychosocial evaluation, and educational report (if more than 2 years have passed since last report). § 39.7013(b)2a.

Who Can Be a Guardian Advocate?

The department shall identify a possible guardian advocate § 393.12.

The child's biological family members and adoptive family members cannot be guardian advocate unless the court enters a written order finding that such an appointment is in the child's best interests.

CITIZENSHIP OR RESIDENCY STATUS

The initial judicial review shall also contain information regarding the child's citizenship status. If the child is not a citizen of the United States, then steps must be taken to address the citizenship or residency status of the child. § 39.5075(2). Regardless of the child's citizenship status, the child shall be provided with services, "except where alienage or immigration status is explicitly set forth as a statutory condition of coverage or eligibility" *Id.* During the judicial review hearing the department or community-based care provider shall state whether the permanency plan for the child is to remain in the United States. § 39.5075(3). If so, then the court shall review the efforts being made to address the child's citizenship. *Id.* The court may also retain jurisdiction until the youth's 22nd birthday for purposes of reviewing the youth's immigration status.

See Special Immigrant Juvenile Status chapter.

INDIAN CHILD WELFARE ACT (ICWA)

The Indian Child Welfare Act (ICWA) is a federal statute that was enacted to protect Indian families and children, as defined under 25 U.S.C. § 1903(4)(2015). The ICWA contains different burdens of proof and requires specific findings that only apply to Indian children. The ICWA also requires review hearings, however, the findings, termination of rights proceedings, and placement options differ from non-Indian children. Thus, it is important to immediately identify whether a child qualifies under the ICWA and refer to the ICWA for all further proceedings.

See Indian Child Welfare Act Information in the Federal Legislation chapter.

DETERMINATIONS AND FINDINGS

DETERMINATIONS

Based on the JRSSR, the guardian ad litem report, testimony and written reports from any relevant persons, including foster parents or pre-adoptive parents, and all other supporting documentation to the extent of their probative value, the court must make specific determinations. These include, but are not limited to:

- If the parent was advised of the right to receive assistance from any person or social service agency in the preparation of the case plan.
- If the parent has been advised of the right to have counsel present at the judicial review or citizen review hearings. If not so advised, the court or citizen review panel shall advise the parent of such right.
- If a guardian ad litem needs to be appointed for the child in a case in which a guardian ad litem has not previously been appointed or if there is a need to continue a guardian ad litem in a case in which a guardian ad litem has been appointed.
- Who holds the rights to make educational decisions for the child? If appropriate, the court may refer the child to the district school superintendent for appointment of a surrogate parent or may itself appoint a surrogate parent under the Individuals with Disabilities Education Act and § 39.0016.
- The compliance or lack of compliance of all parties with applicable items of the case plan, including the parents' compliance with child support orders.
- The compliance or lack of compliance with a visitation contract between the parent and the social service agency for contact with the child, including the frequency, duration, and results of the parent-child visitation and the reason for any noncompliance.
- The frequency, kind, and duration of contacts among siblings who have been separated during placement, as well as any efforts undertaken to reunite separated siblings if doing so is in the best interest of the child.
- The compliance or lack of compliance of the parent in meeting specified financial obligations pertaining to the care of the child, including the reason for failure to comply, if applicable.
- Whether the child is receiving safe and proper care according to § 39.6012, including, but not limited to, the appropriateness of the child's current placement, including whether the child is in a setting that is as family-like and as close to the parent's home as possible, consistent with the child's best interests and special needs, and including maintaining stability in the child's educational placement, as documented by assurances from the community-based care provider that:

- The placement of the child takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement.
- The community-based care agency has coordinated with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement.
- A projected date likely for the child’s return home or other permanent placement.
- When appropriate, the basis for the unwillingness or inability of the parent to become a party to a case plan. The court and the citizen review panel shall determine if the efforts of the social service agency to secure party participation in a case plan were sufficient.
- For a child who has reached 13 years of age but is not yet 18 years of age, the adequacy of the child’s preparation for adulthood and independent living.
- If amendments to the case plan are required. Amendments to the case plan must be made under § 39.6013.

§ 39.701(2)(c)(1)-(13)

PRACTICE TIP: The case plan must be amended to reflect changes made at the judicial review hearing pursuant to § 39.6013.

JUDICIAL ACTION

The judicial review hearing is also important because it provides the court and the parties with an opportunity to further the child’s permanency. As explained above, during the hearing the court determines the parents’ and the department’s compliance. Based on its determinations, the court can then issue orders to ensure compliance and thereby promote permanency.

Compliance by the Department

If the court determines that the department has not complied with its obligations, the court may find the department in contempt and issue an order to show cause, and allow the department an opportunity to comply. § 39.701(3)(c); Rule 8.415(f)(4). However, if the department still fails to comply the department may be held in contempt. Rule 8.415 (4). *See also* Rule 8.285 and 8.286. The court may also find the social service agency in non-compliance and order that the agency submit its plans for compliance with the case plan and show why the child may not safely return home with the parents. § 39.701(2)(d)(3); Rule 8.415(f)(3).

Compliance by the Parents

At judicial review hearings the court also determines whether the parents have complied with the case plan and if the child may safely return home. The court may determine, at any time, that it is safe for the child to return home if the court makes a specific finding that the parent has substantially complied with the case plan in that “the reasons for the creation of the case plan have been remedied to the extent that the child’s safety, well-being, and physical, mental and emotional health will not be endangered.” § 39.701(2)(d)(1).

If the court determines that the child *cannot* return home, the court may extend the case plan, but for no more than 6 months to allow the parent and/or social service agency to complete the necessary case plan tasks. Rule 8.415 (f)(3)-(4). If the court does not believe that extending the case plan is in the child’s best interest, even if the case plan has not expired, the court may authorize the filing of a termination of rights petition.

There are **three ways** in which a termination of parental rights proceeding may be initiated during the judicial review hearing:

1. The first is by order of the court when the court finds at the judicial review hearing that the parents **failed to substantially comply with the case plan** to the degree that further reunification efforts are without merit and not in the best interests of the child. § 39.701(2)(d)(4).
2. The second is if the **department decides to file the petition for termination of parental rights** upon the department's good faith belief that the parents have not complied with the case plan, despite their ability to do so. § 39.701. If the department intends to file a petition for termination of parental rights, it must do so no later than three (3) months from the previous judicial review hearing or it must advise the court of the reasons for the delay and the progress made towards filing the petition. *Id.* If the department does not intend to file a petition for termination of parental rights, despite the parents' being in non-compliance, then the department must demonstrate why filing a petition to terminate parental rights is not in the child's best interests. *Id.*
3. Lastly, the department is mandated to initiate termination of parental rights if at the **12 month judicial review hearing, the child has not been returned to the parents within 30 days.** § 39.703(2). By evaluating parents' compliance during the judicial review hearing and determining whether to reunify a child, initiate termination of rights proceedings, or take another course of action, the court ensures that all parties are working towards achieving the appropriate permanency goal in a timely fashion. See Termination of Parental Rights chapter.

JUDICIAL REVIEW CHECKLIST

JUDICIAL REVIEW CHECKLIST REPORTS

- GAL Report Received (72 hours) § 39.701(2)(b)-(c)
- JR Report Received (72 hours) § 39.701(2)(b)-(c)
- Report of Agency (if applicable)
- Report of Citizen Review Panel (if applicable)
- Master Trust
 - Quarterly Accounting Attached to Each JR
- Medical, Psychological, and Educational Records
- Independent Living 13+
- Transition Plan
- Missing Child – Child’s Status & Efforts to Locate – Weekly Documentation for the First 3 Months; then Monthly Documentation 65C30.013(2)(c) F.A.C.

JUDICIAL REVIEW PREPARATION

- Permanency Goal Change
- Review Permanency Goal Options § 39.01(52)
- Clarify any Issues or Questions with GAL & Staff
- Recommendations of GAL Program
- Encourage Child’s Presence at Hearing
- Clothing Allotment
 - Initial
 - Annual
- Understand the Child’s Wishes
- Subpoena Witnesses / Gather Documents
- Child Prescribed Psychotropic Medication §39.407(3)(a)

CASE PLAN

- Parent’s Tasks / Referrals Made/Compliance
 - No Substantial Compliance – File TPR
 - Material Breach – File TPR Earlier than 12 Months
- Child’s Services ~ Referrals Made
- Services Provided to Foster Parents / Placement
- Department Compliance
- Case Plan Amendments § 39.6013
 - **Preponderance of the Evidence.** Goal Changes, Concurrent Planning, Add or Remove Parent’s Tasks § 39.6013(4).
 - **Competent Evidence.** Amend Services for the Child
- Adoption – Documentation of Steps for Permanent Placement (the department)
- IL Needs, Tasks & Referrals
- Concurrent Planning ~ Appropriate Tasks

PSYCHOTROPIC MEDICATION § 39.407(3)(A)

- Prescribing Physicians Signed Medical Report
- Motion for More Frequent Reviews?

- See *Psychotropic Medication Chapter*

NORMALCY § 39.409.1451(3)(A)

Caregivers must use a **reasonable prudent parent** standard to determine if child can participate in **age-appropriate** activity considering the child's:

- Age, maturity and developmental level
- Risks of activity
- Best interest of child
- Importance of child's growth
- Importance most family-like living experience
- Behavior

Caregiver is not liable for harm caused to child, provided decision was reasonable and prudent.

Remove barriers by ensuring:

- CBCs / department not required to approve age-appropriate activity
- There is an identified caregiver (a *person*) making normalcy decisions (even if child placed in group home or shelter)

VISITATION

- Parents ~ Frequency, Duration, Results, Recommendations, Agency Report?
- Siblings (Frequency kind duration)
- Grandparents § 39.509

PLACEMENT

- Current Placement, "Family-Like", Stability; with Siblings (if not, why?)
- Supervised Independent Living Considered (16+)

CONCURRENT PLANNING § 39.01(19)

- Case Plan May be Amended at any Time to Employ Concurrent Planning § 39.6013(2)
- If Court Finds Reunification Unlikely @ 6 Month Review, Then Must Change Goal to Concurrent Planning § 39.701(9)(e)
 - Department to File Motion 10 Days from Court's Finding

EDUCATION

- Placed in Same School / Stability / Efforts Made
- Educational Needs & Services Considered
- Child has Appropriate Clothing & Supplies
- Transportation
- Attendance Issues
- Performance Level (Educational Evaluation, GPA, etc.)
- Educational Advocate
- Individual Education Plan (IEP)
- Child has Physical, Mental Health Issues -Services

FINANCIAL

- Master Trust ~Quarterly Accounting Attached to JR
 - Personal Allowance – No Less Than \$15 a Month

- Notice of Ability to Request Fee Waiver or Change in Foster Care or Personal Allowance 65C-17.005 F.A.C.
- Funds Distributed?
- Plan for Achieving Self-Sufficiency (PASS) Sub-Account for SSI beneficiaries. 65C-17.003(2) F.A.C.
- Foster Care Allowance - Part of Board Rate Sent to Foster Parents
- Removal of Disability of Non-Age for Banking (16). Requires Financial Literacy Course

DEVELOPMENTAL DISABILITY

- Disability Services Applied for / Receiving Before 18
- Appointment of Guardian Advocate if Appropriate under chapter 744. §§ 39.6251, 39.701(3)

MINOR PARENTS

- Access To Services, IL Services, Plan for Future, Child Placed with Minor (Unless at “Significant Risk”) 65C-28.010(1) F.A.C.

COURT ORDER

- Review the Court Order / Identify Issues

FOLLOW-UP

- Discuss Follow-Up Issues with GAL Team & Develop Plan
- Appellate Issues

ATTORNEYS FOR CHILDREN WITH CERTAIN SPECIAL NEEDS § 39.01305(3)

- Resides in skilled nursing facility (or considered)
- Psychotropic medication and declines to assent
- Diagnosis of developmental disability as defined in § 393.063
- Placed or considered for placement in RTC
- Victim of human trafficking as defined in §787.06(2)(d)
- GAL must recommend within 15 days a pro bono attorney before court assigns registry attorney.

PERMANENCY HEARING

JESSICA L. YATES, ESQ., CHILD'S BEST INTEREST ATTORNEY FLORIDA GUARDIAN AD LITEM PROGRAM

Permanency is paramount to children, especially the children that are part of the dependency system. Permanency is the difference between having a family and a place to call your own, having no one to help you address trauma and/or health challenges, or being cared for by multiple different caregivers over a period of time wandering through the system.

Time is of the essence for children in the dependency system. As child advocates, it is important to think about the permanency hearing and formulating a plan at the shelter hearing. § 39.6011(2). The purpose of the permanency hearing is for the court to determine when the child will achieve the current permanency goal of the case plan or whether it is in the child's best interest for the goal to be modified.

A permanency hearing must be held at least once every 12 months. § 39.621. For judicial economy, permanency hearings may often be set with judicial reviews and/or case plan hearings as the testimony required is typically the same. Additionally, cases may also be set for permanency hearings more often than once every 12 months as circumstances change in order to expedite permanency for the child.

BEFORE THE PERMANENCY HEARING

Prior to the permanency hearing, the department must file a Judicial Review Social Study Report (JRSSR) at least three days prior to the hearing and serve it on all parties. § 39.621(3)(a). The report must contain the child's recommended permanency goal, suggested changes to the case plan, and why the recommended goal is in the child's best interests. The department is required to explain the permanency goals and related financial assistance to the child and child's placement. § 39.621(3)(b).

The guardian ad litem must also file a permanency report at least three days prior to the hearing. Rule 8.215(c).

TIMING

A permanency hearing may be held at any time, including in conjunction with judicial reviews. § 39.621(1). However, a permanency hearing is required:

- Within 12 months of the child's removal; or within 30 days of a judicial determination that reasonable efforts to reunify are not required. 42 U.S.C. § 671(a)(15)(E), whichever occurs first § 39.621(1);
- at least every 12 months while the child is in care. 45 C.F.R. § 1355.20(a), § 39.621(1).

AT THE PERMANENCY HEARING, THE COURT SHALL DETERMINE

- Whether the current permanency goal for the child is appropriate or should be changed;
- when the child will achieve one of the permanency goals; and

- whether the department has made reasonable efforts to finalize the permanency plan currently in effect § 39.621(1)(2015); 45 C.F.R. § 1356.21. The court's findings must be explicitly documented, made on a case-by-case basis, and stated in the court order. § 39.621(7).

TIMEFRAMES TO PERMANENCY

It is a primary goal of Florida's dependency system that all children achieve permanency "as soon as possible." § 39.001(1)(h). No child should remain in foster care longer than one year. *Id.*

REASONABLE EFFORTS

In order for federal funding to continue for a dependent child, the court must make a finding that the department made reasonable efforts to achieve the case plan goal within 12 months after the child is removed, and at least every 12 months thereafter. 45 C.F.R. § 1356.21(b)(2)(i).

The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child; and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible...In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety must be the State's paramount concern.

REASONABLE EFFORTS FINDINGS

- Must be "as meaningful as possible and child specific." 45 C.F.R. § 1356.21(d)(3).
- Must reference specific facts of the case. 45 C.F.R. § 1356.21(d)(3).
- May reference a report to the court, but must also reference specific facts from the report to be legally sufficient. 65 Fed. Reg. 4020, 4056 (Jan. 25, 2000).
- Need only be made regarding the case plan in effect at the time of the hearing; previous, abandoned plans need not be addressed. 65 Fed. Reg. 4020, 4052 (Jan. 25, 2000).

If the court finds that reasonable efforts to achieve the permanency goal were not made, the child is ineligible for federal funding from the end of the month in which the finding was made. Funding may be restored as soon as the court makes a finding that reasonable efforts were made.

PRACTICE TIP: Should the case go on to a Termination of Parental Rights trial, a solid and specific reasonable efforts finding that is reflected in the order can be very useful in proving that the parents were offered services and yet failed to comply with their case plan.

DETERMINING THE PERMANENCY PLAN

If the court determines that reunification is not appropriate, the court must determine another permanency plan. Under § 39.621(2), the following permanency goals are available – listed in the order of preference.

- Reunification
- Adoption

- Permanent Guardianship
- Permanency Placement with a Fit and Willing Relative
- Placement in Another Planned Permanent Living Arrangement (APPLA). *But see* Preventing Sex Trafficking and Strengthening Families Act of 2014 in Federal Legislation chapter.

The best interests of the child are the primary consideration in determining the permanency goal for the child. § 39.621(5). However, the court must also consider the child's wishes and the recommendation of the guardian ad litem. § 39.621(5).

Reunification. Reunification with parent(s) is the preferred permanency goal under Chapter 39 and the Adoption and Safe Families Act. Reunification can be accomplished once a parent(s) have substantially complied with the terms of the case plan to the extent that the safety, well-being, physical, mental, and emotional health of the child(ren) would not be endangered by being returned to the parent(s) home. § 39.522(2).

PRACTICE TIP: Depending on the housing, employment, and social resources in your area, housing and employment may be impediments to reunification. Be sure to raise these issues early on in the case so that they can be addressed in advance in order not to delay permanency.

PRACTICE TIP: If housing or employment will be an issue for a parent, try to have children placed with relatives or non-relatives who are willing to maintain custody of the children while parents obtain housing and financial stability as some courts will not leave the case open for these issues alone.

Adoption. If reunification is not a feasible goal, the second preferred goal is adoption under Chapter 63. § 39.621(6). Before the court can order a permanency goal other than adoption, the court must make findings regarding why adoption is not in the child's best interest and why the permanent placement can be accomplished without adoption. § 39.621(6) and § 39.6221(1). The court retains jurisdiction over children placed with the department until they are adopted. The court also addresses all issues relating to the child's adoption under Chapter 63. The guardian ad litem can petition the court to consider the appropriateness of a child's placement for good cause. § 39.812(4) and § 39.813.

Permanent Guardianship. A permanent guardianship is "a legal relationship that a court creates under § 39.6221 between a child and a relative or other adult approved by the court which is intended to be permanent and self-sustaining through transfer of parental rights with respect to the child relating to protection, education, care and control of the person, custody of the person, and the decision-making on behalf of the child." § 39.01(55).

If the court has determined that reunification and adoption are not in the children's best interest, the court can place the children in a permanent guardianship with a relative or other court approved adult if:

- The child(ren) has been in the placement for not less than the preceding six (6) months;
- The permanent guardian is suitable and able to provide a safe and permanent home for the child(ren);
- The court determines that the child(ren) and the proposed custodian are not likely to need supervision or services of the department or the court to ensure the stability of the permanent guardianship;
- The permanent guardian has made a commitment to provide for the child(ren) until the child reaches the age of majority and to prepare the child for adulthood and independency; and

- The permanent guardian agrees to give notice of any change of their residential address or the residence of the child by filing a written document in the dependency file of the child(ren) with the clerk of courts.

Permanent guardianship does NOT sever parental rights. The children still have the right to have visitation with their parents and inherit from their parents. The parents are still responsible for providing financial, medical, and any other court ordered support. Additionally, parents retain the right to consent to the child's adoption.

The written order establishing the permanent guardianship pursuant to § 39.6221(2) MUST contain the following:

- An enumeration of the circumstances and/or reasons why the parents are not fit to care for the child and why reunification is not possible referring to specific findings of fact made its order adjudicated the child dependent or by making separate findings of fact
- A statement of the reasons why a permanent guardian ship is being established instead of adoption
- The frequency and nature of visitation or contact between the child(ren) and the parent(s)
- The frequency and nature of the visitation or contact between the child(ren) and their grandparents
- The frequency and nature of the visitation or contact between the child(ren) and any siblings; and
- The requirement that the permanent guardian no return the child to the physical care and custody of the person from whom the child(ren) was/were removed without approval of the court.

The court retains jurisdiction over the case and the child but regular review hearings and supervision by the department are discontinued.

PRACTICE TIP: When considering permanent guardianship, remember that it is seldom permanent as the parents' rights remain intact. Consider the age of the child, the relationship between the parents and the permanent guardian, any special needs of the child, and financial considerations when exploring this goal. Note also that foster parents are not permitted to be act as permanent guardians as they are extensions of the department.

Permanent Placement with a Fit and Willing Relative. Permanent placement is a faux permanency alternative that is seldom used. The child remains placed with a relative but the court continues to review the case and conduct permanency hearings to reevaluate the possibility of adoption, permanent guardianship, and even reunification. §§ 39.6231(6) and 39.6231(7). The department also continues to supervise the placement until relieved of that obligation by court order.

If the court has determined that reunification and adoption are not in the children's best interest, the court can place the children with a fit and willing relative if:

- The child(ren) has been in the placement for not less than the preceding six (6) months;
- The relative has made a commitment to provide for the child(ren) until the age of majority and to prepare the child(ren) for adulthood and independency;
- The relative is suitable and able to provide a safe and permanent home for the child(ren); and
- The relative agrees to give notice of any change of their residential address or the residence of the child by filing a written document with the clerk of courts.

The department and the guardian ad litem shall provide the court with a recommended list with descriptions of services necessary for the child and the family to ensure the permanency of the placement. § 39.6231(2).

The written order placing the child with a fit and willing relative pursuant to § 39.6231(3) MUST contain the following:

- An enumeration of the circumstances and/or reasons why the parents are not fit to care for the child and why reunification is not possible referring to specific findings of fact made its order adjudicated the child dependent or by making separate findings of fact;
- A statement of the reasons why permanent placement with a fit and willing relative is being established instead of adoption;
- The frequency and nature of visitation or contact between the child(ren) and the parent(s);
- The frequency and nature of the visitation or contact between the child(ren) and their grandparents;
- The frequency and nature of the visitation or contact between the child(ren) and any siblings; and
- The requirement that the permanent guardian no return the child to the physical care and custody of the person from whom the child(ren) was/were removed without approval of the court.

The court shall also enter a separate order establishing the relative's authority to care for the child and providing other information the court deems proper which can be provided to entities and individuals who are not parties to the proceeding as necessary notwithstanding the confidentiality of § 39.202.

Another Planned Permanent Living Arrangement (APPLA). APPLA is a catch all permanency goal for children who have reached the age of 16 and the court has determined that neither reunification, adoption, permanent guardianship, or placement with a fit and willing relative are in the child's best interest. APPLA can be quite flexible regarding how it is accomplished. Some children are placed with foster parents who are helping to keep them until 18 or beyond, some children want to simply age out and attend school, or move with relatives after graduation. *But see* Preventing Sex Trafficking and Strengthening Families Act of 2014 in the Federal Legislation chapter.

The court may approve an APPLA case plan goal if:

- All other permanency options (reunification, permanent guardianship, placement with fit and willing relative, and adoption) have been determined not to be in the child's best interests;
- The department documents reasons why the placement will endure and how the proposed arrangement will be more stable and secure than ordinary foster care.
- The court finds that the health, safety, and well-being of the child will not be jeopardized by such an arrangement; and
- There are compelling reasons to show that placement in another planned permanent living arrangement is the most appropriate permanency goal. Compelling reasons for such placement may include but are not limited to:
 - The case of a parent and child who have a significant bond but the parent is unable to care for the child(ren) because of an emotional or physical disability, and the child's foster parents have committed to raising the child until majority and will facilitate visitation with the disabled parent;
 - The case of a child for whom an Indian tribe has identified another planned permanent living arrangement for the child; or

- The case of a foster child who is 16 years or older who chooses to remain in foster care until age 18 and the foster parents are willing to care for the child.

The department and the guardian ad litem must provide the court with a recommended list and description of services need by the child, such as independent living services, medical, dental, educational, or psychological referrals as well as any recommended services needed for the caregiver.

MODIFYING A PERMANENCY ORDER

The permanency placement is intended to continue until the child reaches the age of majority and may not be disturbed absent a finding by the court that the circumstances of the permanency placement are no longer in the best interest of the child. If a parent who has not had their parental rights terminated makes a motion for reunification or increased contact with the child, the court shall hold a hearing to determine whether the dependency case should be reopened and whether there should be a modification of the order. At the hearing, the parent must demonstrate that the safety, well-being, physical, mental, and emotional health of the child is not endangered by the modification. § 39.621(9).

PRACTICE TIP: Make sure the judge has a hearing BEFORE a case is re-opened and/or a permanency order is modified.

TERMINATION OF PARENTAL RIGHTS

CAMILLE FRAZER ESQ., CENTRAL REGIONAL LEGAL COUNSEL, FLORIDA GUARDIAN AD LITEM PROGRAM

The Termination of Parental Rights (TPR) proceeding begins with the filing of a TPR petition to terminate parental rights which must contain allegations that at least one of the grounds listed in § 39.806, exists; that termination is in the manifest best interests of the child, and the TPR is the least restrictive means of protecting the child from harm. § 39.802(4).

The petition may be filed by the department, the guardian ad litem, or “any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.” § 39.802(1).

POST-PERMANENCY HEARING PETITIONS

The most common TPR proceeding involves a post-permanency hearing petition. This occurs when the petition is filed at or after twelve-months from the date of shelter or adjudication and the child is not returned to the physical custody of the parent(s). § 39.8055(1).

PRE-PERMANENCY HEARING PETITIONS

Chapter 39 of the Florida Statutes does provide for the filing of termination petitions before the twelve month period has expired under several circumstances. For example:

- If the court determines that the child(ren) has been adjudicated dependent, the parent(s) have been offered a case plan with services and they have **materially breached the case plan** before the time for the compliance expires. In order to prove that the parent has materially breached the case plan, the court must find by clear and convincing evidence that the parent is unlikely or unable to substantially comply with the case plan before the time expires to comply with the case plan. § 39.806(1)(e)2.
- When the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services. Often used with § 39.806(1)(e) an adjudication of dependency is not needed, nor is it necessary to wait until the 12 month duration period of the case plan. § 39.806(1)(c).
- In extraordinary circumstances such as cases involving egregious abuse, a prior involuntary TPR, or incarceration for a significant portion of the child’s remaining minority, a TPR petition can be filed before the 12 month mark. § 39.806(1)(d),(f)-(n).

ADVISORY HEARING

Before the circuit court can hear a TPR petition, the parents (or if deceased, a living relative), the legal custodians, any person who has physical custody of the child, a grandparent entitled to priority for adoption pursuant to statute, any presumptive parent and the guardian ad litem or representative of the child, must be served to attend an advisory hearing. § 39.801(3)(a).

CONTENTS OF NOTICE

The notice must contain the date, time and place of the advisory hearing as well as a copy of the petition. It must further inform the parent(s) that “failure to personally appear at the advisory hearing constitutes consent to the termination of parental rights . . .” § 39.801(3)(a).

The advisory hearing must be held as soon as possible after all parties have been served with a copy of the petition. § 39.808(1). The TPR trial must be held within forty-five (45) days of the advisory hearing, but reasonable continuances may be granted. § 39.809(2).

CONSENT TO TERMINATION OF PARENTAL RIGHTS

If the parents appear at the advisory hearing, the court will provide them with a date, time and place for the termination hearing. If such notice is provided and the parent(s) fails to appear at the termination proceeding, such failure constitutes consent to termination of parental rights. § 39.801(3)(d).

If the parents were properly notified of the advisory hearing but failed to appear on the date, time and location of the hearing, such failure also constitutes consent to the termination of their parental rights. § 39.801(3)(d).

The finding that a parent consented to the petition either by failing to appear at an advisory hearing, termination of parental rights trial (or portion thereof), should comport with principles of justice and fair play. For example, the Fourth District Court of Appeal found that the trial court abused its discretion in denying the parent’s motion to set aside a default after they failed to appear at the scheduled time on the third day of trial. The parents previously attended the first two days of trial, and had attended numerous court hearings in the past. The court opined that the purpose of the statute is not to inject “gotcha” practices into the dependency process. See A.J. v Department of Children and Families, 845 So.2d 973 (Fla. 4th DCA 2003). See also, E.A. v Department of Children and Families, 894 So.2d 1049 (Fla. 5th DCA 2005) termination of parental rights reversed where father was only twenty two (22) minutes late for his trial and had called the court to inform them he was delayed due to traffic congestion on Interstate 4 between Polk County and the City of Kissimmee, of which the court took judicial notice at a hearing opposing the department’s proposed termination order.

The Fourth DCA has also reversed a consent judgment where the father made reasonable effort to be present at his advisory hearing and was delayed by circumstances beyond his control. See R.P. v Department of Children and Families, 835 So.2d 1212 (Fla. 4th DCA 2003). The father persistently called his attorney the day before the advisory hearing and informed him of his plans to attend, though he lived 200-240 miles from the hearing location. The court reasoned that “so important is the parent-child relationship that the termination of it may be accomplished by the state only with a punctilious regard for the

due process rights of the parent,” R.P. v. Department and Children and Families at 1213, citing (Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

PRACTICE TIP: Be prepared to present testimony regarding manifest best interest on the day the court enters a finding of consent to the termination of parental rights petition due to failure to attend, or schedule one soon thereafter.

The Supreme Court of Florida resolved the conflict among the Second, Third and Fifth Courts of Appeal when it found that no additional evidence on the grounds alleged in the petition is needed after consent judgment. See Department of Children and Family Services v. P.E., 14 So.3d 228 (Fla. S. Ct. 2009).

MOTIONS TO SET ASIDE CONSENT

Due process considerations must also factor into decisions regarding “implied consent” judgments. Hence, properly filed motions to vacate a consent by default should be liberally granted as Florida public policy favors an adjudication on the merits over the entry of a default. See A.N.D., v Department of Children and Family Services, 883 So.2d 910, 915 (Fla. 2d DCA 2004). In the A.N.D., decision the court used a three pronged test formerly espoused by the Third District Court of Appeals. In reversing the trial court’s termination of the mother’s (T.L.D.) parental rights, the Second DCA stated that the party seeking to vacate the consent must act with due diligence, demonstrate excusable neglect, and demonstrate the existence of a meritorious defense. *Id.* (citing E.S. v. Department of Children & Family Services, 878 So.2d 493 (Fla. 3d DCA 2004)). Additionally, when seeking to establish the existence of the third element, the movant “should include any meritorious arguments regarding the grounds for termination, the manifest best interest of the child, and the least restrictive means of protecting the child.” See *id.* at 914.

APPOINTMENT OF GUARDIAN AD LITEM

At the advisory hearing, if a guardian ad litem has not been appointed, the court shall appoint a guardian ad litem to represent the child’s best interests. § 39.808(2).

THE TPR PETITION

The first step in addressing a TPR case is to review the petition and determine the following:

- Which TPR grounds are alleged?
- Do additional grounds exist that should be pled?
- Does each element of the ground exist?
- What additional information or evidence is required?
- What and whose testimony is needed?
- What source of information is needed to prove the TPR grounds?
- What will be testified to regarding Manifest Best Interests and Least Restrictive Means?

The TPR petition can be amended any time before the conclusion of the adjudicatory hearing. However, after a written answer has been filed or the trial has commenced, amendments (which shall be freely permitted in the interest of justice and the welfare of the child), shall be allowed only with the permission of the court unless all parties consent. Rule 8.500(d). The court cannot terminate on grounds that are not alleged in the petition, as it is a violation of the parents' right of due process and right to notice and a fair hearing to consider grounds not pled in the petition.

CASE EXAMPLES

See D.W.Q. v A.B., 2015 WL 4429328 (Fla. 5th DCA 2015) the trial court's decision was reversed as it terminated the father's (D.W.Q.'s) parental rights on a ground (§ 39.806(1)(f)(2)), not alleged by the mother (A.B.) in the petition, and because the ground was not tried by consent as it was not mentioned in opening statements or during the presentation of Mother's evidence at trial. Id. at 1. The trial court's decision was akin to violations of due process noted in other cases. Id. (citing Z.M. v. Dep't of Child. & Fam. Servs., 981 So.2d 1267, 1268 (Fla. 1st DCA 2008) (reversing order terminating parental rights on ground not pled in the petition where the court indicated for the first time after the department's case in chief that the unpled ground supported termination).

See also L.A.G. v. Department of Children and Family Services, 963 So.2d 725 (Fla. 3d DCA 2007) termination of parental rights violated a mother's due process rights as termination was based on grounds not alleged in the department's petition (the department petitioned for termination of L.A.G.'s parental rights based on abandonment and failure to comply with the case plan pursuant to Florida Statutes, §§ 39.806(1)(b) and (e)). The trial court terminated the mother's rights based on parental conduct that threatens the children's life or safety, citing § 39.806(1)(c). The department did not cite § 39.806(1)(c) in the petition or refer to it at the hearing; nor did it present any evidence that the mother's continued involvement with the children posed a threat to their health or safety. The first time § 39.806(1)(c) appeared in this case was in the written termination order. Id. at 726. The order terminating L.A.G.'s parental rights was reversed.

PRACTICE TIP: Review the TPR petition when first received, or soon thereafter, to ensure all possible grounds are pled. This will allow ample time to seek an amendment of the petition to add additional grounds and avoid delays in permanency for the child, where for example, the court grants a continuance of the trial in the interest of fairness to a party that would be materially affected by a late amendment of the petition. Rule 8.500(d).

TPR PETITION MUST CONTAIN FACTS SUPPORTING THE FOLLOWING ALLEGATIONS

- At least one of the grounds for TPR has been met (See Grounds for TPR).
- The parents were informed of their right to counsel at all hearings they attended.
- A dispositional order adjudicating the child dependent was entered (if required).
- That the parents of the child will be informed of the availability of private placement of the child with an adoption entity, as defined in § 39.802(4)(d).
- The manifest best interests of the child would be served by the granting of the petition - § 39.802(4).
- TPR is the least restrictive means of protecting the child from harm. Least restrictive means is not required for TPR ground § 39.806(1)(b-d), and §39.806(1)(f-m).

THE PETITION SHALL ALSO CONTAIN

- allegations as to the identity and residence of the parents, if known; and

- the child’s name, age, and sex; and
- a certified copy of the birth certificate of each child named in the petition; and
- when required by law, a showing that the parents were offered a case plan and have not substantially complied with it. See Rule 8.500(b)(4).

CLEAR AND CONVINCING EVIDENCE

The judge acts as the trier of fact and must make its findings by **clear and convincing evidence**. § 39.809(1).

- **Clear and Convincing Evidence** is an intermediate standard which requires that the evidence be credible, clear, and lacking in confusion such that the trier of fact is convinced of the matter’s truthfulness without hesitancy.
 - Clear and convincing is - “highly probable” “most likely” “will”.
 - Clear and convincing is not - “may” “might” “could” “possible” “ideal”.

MANIFEST BEST INTERESTS (MBI)

The court must consider the eleven statutory issues in determining Manifest Best Interests. See below for further explanation. § 39.810.

LEAST RESTRICTIVE MEANS (LRM)

- Balances the parent’s fundamental liberty interest and the state’s compelling interest to protect the child. This is a strict scrutiny analysis.
- Least restrictive means does not involve consideration of relatives or any other type of placement. Least restrictive means only evaluates whether reasonable efforts in the form of services that would eliminate the need for TPR, were provided by the department. § 39.810(1).

GROUNDINGS FOR TPR

VOLUNTARY SURRENDER - § 39.806(1)(A)

When a parent has voluntarily signed a written surrender: § 39.806(1)(a).

- The surrender document must be written and signed before two witnesses and a notary.
- The parent must consent to the entry of the order giving custody to the department.
- The department must be willing to take custody of the child.
- The surrender can only be withdrawn if the court finds the surrender and consent were made under fraud or duress.

- The court must still consider manifest best interests. Even when a parent voluntarily surrenders the child for adoption, the court must determine that termination of parental rights is in the best interests of the child.

Case Examples

T.H. v. Department of Children and Families, 56 So.3d 150 (Fla. 4th DCA 2011) The appellate court reversed the order terminating the mother's parental rights as the surrender documents were not filed with the court, nor in the possession of the department and as such it could not be confirmed whether the documents were properly executed and notarized in accordance with § 39.806(1)(a).

Rathburn v. Department of Children and Families, 826 So. 2d 521 (Fla. 4th DCA 2002) refusal to terminate father's parental rights, although father had voluntarily surrendered his rights, was not unreasonable as matter of law where there was no proof that termination was in manifest best interests of child. In considering manifest best interests of child, court expressed its concern that termination of father's rights would cut off any responsibility for financial support and would leave child without father.

The termination of a mother's parental rights was affirmed as there was no evidence she was under duress when she made the decision to surrender. As expressed in the opinion, duress is "a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition." T.G. v. Department of Children and Families, 9 So.3d 48 (Fla. 4th DCA 2009) (citing Herald v. Hardin, 95 Fla. 889, 116 So. 863, 864 (1928)). In order to prove duress, "it must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side." City of Miami v. Kory, 394 So.2d 494 (Fla. 3d DCA 1981). The court concluded that the mother's responses to its questions during the colloquy and her unique inquiries to the court demonstrated the voluntariness of her consent and the absence of fraud and duress. T.G. v. Department of Children and Families, at 49.

ABANDONMENT - § 39.806(1)(B)

A situation when the parent, legal custodian or caregiver, while being able, made no significant contribution to the child's care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both, evidenced by, for example, frequent and regular visitation or communication to or with the child. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child, and may result in a finding of abandonment. The incarceration, repeated incarceration, or extended incarceration of a parent, legal custodian, or caregiver responsible for a child's welfare may support a finding of abandonment. § 39.01(1). A court may also find grounds of abandonment if the location of the parent is unknown and cannot be ascertained within 60 days. § 39.806(1)(b). See *also* § 39.803 (procedures when parent's location unknown).

Abandoned newborn infants, as defined in § 383.50, are not included in this definition. § 39.01(1). Section 383.50(2) creates a presumption that the parent who leaves a newborn infant in accordance with that statute intends to leave the infant and consents to termination of parental rights.

Case Examples

Williams v. Department of Health and Rehabilitative Services, 589 So. 2d 359 (Fla. 5th DCA 1991) Mother's conduct in not contacting children did not constitute abandonment where court had ordered

mother to have no contact with children and, prior to order, mother had visited children as often as she was allowed to and had attempted to give children gifts.

In re R.D.D., 518 So. 2d 412 (Fla. 2d DCA 1988) Child abandoned who had been left on porch of husband's relatives and that mother made no effort to communicate with child for one and one-half years.

Diligent Search and Publication

If the identity or location of a parent is unknown and a petition for termination of parental rights is filed, the court shall conduct an inquiry to determine the identity or location of the parent(s). If the inquiry fails to identify any person as a parent or prospective parent, the court shall so find and may proceed without further notice. If the inquiry identifies any person as a parent or prospective parent, the court shall require notice of the hearing to be provided to that person. However, if such parent or prospective parent's, location is unknown, the court shall direct the petitioner to conduct a diligent search for that person before scheduling an adjudicatory hearing regarding the petition for termination of parental rights to the child. § 39.803(1)-(5).

The diligent search must include, at a minimum, inquiries of all known relatives of the parent or prospective parent, inquiries of all offices of program areas of the department likely to have information about the parent or prospective parent, inquiries of other state and federal agencies likely to have information about the parent or prospective parent, inquiries of appropriate utility and postal providers, and inquiries of appropriate law enforcement agencies. § 39.803(6).

If the inquiry and diligent search identifies a prospective parent, that person must be given the opportunity to become a party to the proceedings by completing a sworn affidavit of parenthood and filing it with the court or the department. § 39.803(8).

However, if the location of the parent or prospective parent cannot be ascertained through the process of the diligent search for the purpose of service of the petition, the petitioner must file a sworn affidavit attesting to same, and seek to terminate parental rights by publication. See Department of Children and Families, 953 So.2d 659 (Fla. 5th DCA 2007). If a party to a proceeding for termination of parental rights is known but his or her whereabouts are not, § 39.803(5) requires a court to direct the petitioner to conduct a diligent search to locate the party, unless it would be in the best interest of the child to proceed without actual notice. If a party entitled to personal service cannot be so served, § 39.801(3)(b) thereafter compels notice to be given as required by the rules of civil procedure. Accordingly, when personal service cannot be made on an affected parent, service by publication may be made on any known party for proceedings to terminate parental rights. Id. at 661.

Case Examples

The appellate court affirmed the decision of the trial court to overturn a former judgment terminating a father's rights that were terminated by service of process by publication. The trial court found that it never obtained jurisdiction over the father prior to terminating his parental rights because a *diligent* (emphasis added), search had not been completed. In affirming the trial court's decision, the Fifth DCA reasoned that simply searching the phone book and a driver's license check was not adequate. Department of Children and Families v. J.J.E., 953 So.2d 659 (Fla. 5th DCA 2007).

ABANDONMENT – INCARCERATION PLUS ADDITIONAL FACTORS

Incarceration may be evidence of abandonment § 39.01(1). However, alone, it is usually insufficient evidence to terminate parental rights. Other “additional factors” for abandonment include: not visiting the child or sending communication, interfering with the child’s placement, and not participating in services if offered.

- J.G. v. Department of Children and Families, 22 So.3d 774 (Fla. 4th DCA 2009) the parents engaged in episodic abandonment of their child due to committing multiple crimes for which they were incarcerated, over the six years they were involved in dependency court.
- In re J.B., 923 So. 2d 1201 (Fla. 2d DCA 2006) Department failed to provide clear and convincing evidence that incarcerated father abandoned child, as necessary to support termination of parental rights. Before his incarceration, father actively sought custody of child, bought supplies for the child’s care and visited him on a weekly basis. The father attempted to maintain contact with the child after imprisonment, even though the child’s young age made it difficult for him to establish any kind of bond with him, and father had nearly completed his term of incarceration.
- D.B. v. Dept. of Children & Families, 791 So. 2d 1225 (Fla. 5th DCA 2001) holding that incarceration plus the nature of the crime committed should be considered at termination proceedings.
- M.S. v. D.C., Jr., 763 So. 2d 1051 (Fla. 4th DCA 1999) Incarceration is a fact which the trial court may consider along with other factors, such as the father’s willful commission of a crime, the foreseeable consequence of which is the father’s incarceration during a majority of the children’s lives, in determining whether clear and convincing evidence of abandonment exists.

Multiple and Habitual

- In re E.F., 639 So. 2d 639 (Fla. 2d DCA 1994) The court rejected the mother’s contention that her incarceration was not a basis to terminate her parental rights, as she was not incarcerated on a single occasion, but returned to prison repeatedly.

Heinous Nature of the Crime

- Turner v. Adoption of Turner, 352 So. 2d 957 (1st DCA 1977), the added circumstance that such is the result of [the father] having murdered the child’s mother . . . demonstrated his unfitness to have any further parental relationship with this child.

Long Incarceration Foreseeable

- M.S. v. D.C., Jr., 763 So. 2d 1051 (Fla. 4th DCA 1999) Father’s murder of children’s “mother figure” in their home, which resulted in father’s incarceration well past children’s age of majority, demonstrated egregious abuse and abandonment such that continuation of father’s parental relationship with children would be harmful and against their best interests.

THREATENS LIFE, SAFETY, WELL-BEING - § 39.806(1)(C).

When the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child irrespective of the provision of services. The petitioner must show the demonstrated behavior harms or will prospectively harm the child. This is proven with “before and after” testimony from the guardian ad litem, caseworker and therapist (expert testimony).

Irrespective of the Provision of Services

Irrespective of the provision of services means there is no reasonable basis to believe the parent would improve. The court must find any provision of services would be futile or that the child would be threatened with harm despite any services provided to the parent. See M.H. v. Department of Children and Families, 866 So. 2d 200 (Fla.1st DCA 2004).

- **Futile:** A parent participating in services but their behavior that caused the removal of their child continues, or a therapist testifies to no foreseeable improvement even with services (i.e., character disorders).
- **Not Futile:** Father stated that he had discontinued his substance abuse, (evidenced by his negative urinalysis tests), and that he had ceased resorting to criminal activity to earn a living or to supply his drug habit, and father stated that he was taking whatever self-improvement courses he could in prison, and that he was determined to provide for his child's needs. In re J.B., 923 So. 2d 1201 (Fla. 2d DCA 2006).

INCARCERATION - § 39.806(1)(D)

Incarceration may serve as a ground for TPR when the parent of a child is incarcerated in a state or federal correctional institution and either:

- The period of time for which the parent is expected to be incarcerated will constitute a significant portion of the child's minority. Factors such as the child's age and need for a permanent and stable home must be a part of the analysis of whether the parent's rights should be terminated;
- The incarcerated parent has been determined by the court to be:
 - a violent career criminal as defined in § 775.084;
 - a habitual violent felony offender as defined in § 775.084;
 - a sexual predator as defined in § 775.21;
 - convicted of first degree or second degree murder in violation of § 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation of § 794.011; or convicted of an offense in another jurisdiction which is substantially similar to one of the offenses listed in this paragraph.
- As used in this section, the term "substantially similar offense" means any offense that is substantially similar in elements and penalties to one of those listed in this subparagraph, and that is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction; or
- The court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, termination of the parental rights of the incarcerated parent is in the best interest of the child. When determining harm, the court shall consider factors such as the (a) age of the child, (b) the relationship between the child and the parent, (c) the nature of the parent's current and past provision for the child's developmental, cognitive, psychological and physical needs, (d) the parent's history of criminal behavior, and (e) any other factor the court deems relevant. § 39.806(1)(d)(1) – (3).

Significant Portion of Child's Remaining Minority § 39.806(1)(d)1

Prior to the statutory amendment in 2012, the question was not whether the expected incarceration period constituted a significant portion of the child's remaining minority, but rather, whether it would be a *substantial* portion of the remaining time until the child attained the age of eighteen years. See e.g. In re

J.D.C., 819 So. 2d 264 (Fla. 2d DCA 2002) the court must consider whether the time for which a parent is expected to be incarcerated in the future constitutes a substantial portion of the time before the child reaches eighteen, not whether the time the parent has been incarcerated in the past was a substantial portion of the child's life to that point.

Previously, the analysis in determining whether to terminate parental rights pursuant to § 39.806(1)(d)(1), was largely mathematical in nature, rather than the qualitative analysis incorporated since July 2012. See e.g., W.W. v. Department of Children and Families, 811 So. 2d 791 (Fla. 4th DCA 2002) holding that incarceration for a period constituting twenty-five percent of the child's minority was not a substantial portion of the child's minority. See also B.C. v. Department of Children and Families, 887 So. 2d 1046 (Fla. 2004), and In re A.W. v. Department of Children and Families, 816 So. 2d 1261, 1264 (Fla. 2d DCA 2002) holding that the fifty four months remaining in the father's prison sentence did not constitute a substantial portion of the remaining minority of his children who were four years old and one year old at the time of the termination trial.

Now, the analysis should not only be quantitative, but also qualitative, taking into consideration, the child's age and need for a permanent and stable home. See Department of Children and Families v. J.S., (Fla. 4th DCA 2016).

PRACTICE TIP: If incarceration under § 39.806(1)(b) and § 39.806(1)(d)3 are not alleged, consider adding these grounds as basis for termination of parental rights. Also, the measurement of the child's remaining minority runs from the date the TPR petition is filed.

FAILURE TO SUBSTANTIALLY COMPLY WITH CASE PLAN § 39.806(1)(E)

This ground can be tried when a child has been adjudicated dependent and the parent fails a case plan that was filed with the court and one of the following two conditions exists:

- **Substantial Compliance:** Failure of the parent to substantially comply with filed and approved case plan for 12 months constitutes evidence of continuing abuse, neglect, or abandonment, for purposes of terminating parent's parental rights unless the failure was due to lack of resources or failure of the department to make reasonable efforts. § 39.806(1)(e). Substantial compliance is defined as the "circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the parent". § 39.01(75). The department is required to file a petition to terminate parental rights if the child is not returned to the physical custody of the parents 12 months after the child was sheltered or adjudicated dependent. § 39.8055(1)(a).
- **Material Breach:** The court must find by clear and convincing evidence that the parent is unlikely or unable to substantially comply with the case plan before the time expires to comply. § 39.806 (1)(e)2. The TPR petition can be filed prior to the time the parents were given to comply with the case plan. This subsection of the statute notes that time is of the essence for permanency of children in the dependency system.

The 12-month period begins to run after the child's placement in shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the approval by the court of a case plan with a goal of reunification with the parent, whichever came first. § 39.806(1)(e)(1). However, for material breach, the TPR petition can be filed prior to the time the parents were given to comply with the case plan.

Case Examples

In re A.D.C., 854 So. 2d 720 (Fla. 2d DCA 2003) In proceeding to terminate father's parental rights, inadequate evidence existed to support trial court's finding that the father failed to substantially comply with the case plan. The department could not say whether father had ever been given copy of the case plan, and it had made no effort to contact father while he was incarcerated.

In the Interest of D.R., 812 So. 2d 447 (Fla. 2d DCA 2002) Proper to terminate father's parental rights when, although incarcerated at time of hearing, he failed to comply with terms of case plan by committing additional crimes and violating probation.

In re D.N.O., 820 So. 2d 1064 (Fla. 2d DCA 2002) A court may terminate parental rights when the parent only begins to comply with the case plan just before the termination hearing.

P.O. v. Department of Children and Families, 840 So. 2d 360 (Fla. 4th DCA 2003) Record supported finding that mother failed to substantially comply with her case plan, and thus termination of her parental rights was warranted, even though the department failed to provide any real services to mother; the crux of mother's case plan was the resolution of her drug problem, yet, over the course of her case plan, mother persisted in her drug usage and evidenced resistance to treatment.

Twelve of Twenty-Two months: The child has been in care for any 12 of the last 22 months and the parents have not substantially complied with the case plan so as to permit reunification under § 39.522(2) unless the failure to substantially comply with the case plan was due to the parent's lack of financial resources or to the failure of the department to make reasonable efforts to reunify the parent and child. §39.806(1)(e)(3).

EGREGIOUS CONDUCT - § 39.806(1)(F)

When a parent engaged in egregious conduct or had the opportunity and capability to prevent and knowingly failed to prevent egregious conduct that threatens the life, safety, or physical, mental or emotional health of the child or the child's sibling. Proof of nexus between the egregious conduct to a child and the potential harm to the child's sibling is not required. § 39.806(1)(f).

Reasonable efforts to reunify the family are not required. An egregious conduct can be one incident if so severe as to endanger the life of the child, or may be a failure to protect to protect the child from egregious abuse.

The egregious conduct or failure to protect:

- is conduct by the parent that is deplorable, flagrant or outrageous by a normal standard and can include acts or omissions?
- must threaten life, safety, or physical, mental or emotional health of the child or the child's sibling. § 39.806(1)(f)(2).

Note. The definition of sibling for purposes of this subsection: a child who shares a birth or legal parent with one or more other children, or a child who has lived together in a family with one or more other children whom he or she identifies as siblings. § 39.01(71).

PRACTICE TIP: Expert testimony may be required to prove one or more of these elements depending on the circumstances of the case.

Failure to Protect Can Be Enough for Egregious Conduct

Case Examples

- C.S. v. Department of Children and Families, 178 So.3d 937 (Fla. 4th DCA 2015) evidence supported termination of father's parental rights even though there were periods the child was not in his care for administration of medication to treat her terminal diagnosis. The father's medical neglect of the child was egregious.
- In re K.A., 880 So. 2d 705 (Fla. 2d DCA 2004) A parent who was not present during, or who did not participate in, physical abuse may still have his parental rights terminated if he knowingly failed to protect the child from egregious abuse.
- N.L. v. Department of Children and Family Services, 843 So. 2d 996 (Fla. 1st DCA 2003) Substantial evidence did not support termination of mother's parental rights on ground that mother had engaged in egregious conduct or had the opportunity and ability to prevent egregious conduct detrimental to child and failed to do so. Record contained no evidence that mother was physically present when the child was abused by mother's boyfriend, no evidence in the record showed long-term abuse or a pattern of abuse of child that might have formed a basis for a finding that mother "knowingly failed to prevent" the abuse of child by mother's boyfriend, and there was no evidence in the record that mother's boyfriend was physically abusive or violent in the past with children or with anyone else.
- In re B.J., 737 So. 2d 1227, 1228 (Fla.2d DCA 1999) When there is "evidence that a child suffered abuse by one or both of the parents present, there is clear and convincing evidence of egregious abuse to support termination of parental rights of both parents."

Egregious Conduct Toward Sibling – Nexus No Longer Required

Prior to the amendment of the statute in July 2014, proof of nexus between the egregious conduct toward the child and the potential harm to the child's sibling was required. Although this is no longer a statutory requirement, the Second DCA has questioned the constitutionality of the amendment and cautions the prospective application of the statute, especially in cases where the department seeks termination of a parent's right to a sibling without proof of a nexus. See In re B.F. v. Department of Children and Families, 2016 WL 166669 (Fla. 2d DCA 2016). The court also made clear that the statute cannot be retroactively applied, as the amendment constituted a substantial change to the law. See In re N.W. v. Department of Children and Families, 2015 WL 9258506 (Fla. 2d DCA 2015) citing Smiley v. State, 966 So.2d 330, 336 (Fla.2007).

AGGRAVATED CHILD ABUSE, SEXUAL BATTERY OR SEXUAL ABUSE, CHRONIC ABUSE - § 39.806(1)(G)

The parent has subjected the child to aggravated child abuse, commits sexual battery or sexual abuse, or chronic abuse. § 39.806(1)(g).

Aggravated Child Abuse § 827.03

- Subjects the child to aggravated battery;
- Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
- Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

Chronic Abuse. The Second DCA has defined chronic abuse as: “abuse began shortly after child's birth and continued through the next five years, interrupted only by the father's incarcerations ...” In re D.A.D. II, 903 So. 2d 1034 (Fla. 2d DCA 2005). Does not need to be egregious, but must be chronic.

MURDER OR INVOLUNTARY MANSLAUGHTER - § 39.806(1)(H)

The parent has committed murder or voluntary manslaughter of another child, or a felony assault that results in serious bodily injury to a child, or aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter or felony assault.

Nexus of Harm Not Required

- Prior to the amendment of § 39.806(1)(h) in 2014, nexus of potential harm to the child was required. For example, in order for TPR to be based solely on single act of committing manslaughter or felony assault against another child, the state must prove that, based on totality of circumstances surrounding petition, that the parent currently poses a substantial risk of significant harm to the current child or children and that termination of parental rights is least restrictive means of protecting the current child or children from harm. J.F. v. Department of Children and Families, 890 So. 2d 434 (Fla. 4th DCA 2004).

INVOLUNTARY TPR OF SIBLING - § 39.806(1)(I)

Grounds for TPR exist when the parental rights to a sibling have been involuntarily terminated. However, the parental rights to a subsequent-born child may only be terminated under this section if there is clear and convincing evidence of a prior involuntary TPR for a sibling, a substantial risk of significant harm to the current child, and termination is the least restrictive means of protecting child from harm. The circumstances leading to the prior involuntary termination will be highly relevant to the determination of whether the current child is at risk and whether termination is the least restrictive way to protect child. See Department of Children and Families v. F.L., 880 So. 2d 602 (Fla. 2004). Evidence that nothing has changed in the parent's life to diminish the risk of harm, should be sufficient evidence.

- Note: Conflict among circuits: The Second District Court of Appeal considers terminations of parental rights resulting from consents by nonappearance to be voluntary and, therefore, not a prior involuntary termination of parental rights under § 39.806(1)(I). The Fifth District Court of Appeal holds that prior terminations resulting from a parent's failure to appear are involuntary because the terminations are based on allegations other than a voluntary surrender of parental rights. The Third and Fifth District Courts of Appeal require that trial courts receive clear and convincing evidence sufficient to terminate a parent's parental rights even when the parent fails to appear for arraignment or the adjudicatory hearing. Under the case law of these districts, the failure to appear is treated as a consent to proceed to trial in the parent's absence and not as consent to the termination of parental rights. Moreover, termination cannot occur without clear and convincing evidence that termination serves the child's manifest best interests.

Case Examples

- Department of Children and Families v. A.S., 927 So. 2d 204 (Fla. 5th DCA 2006) - Consent under § 39.801(3)(d) does not end the judicial labor of the trial court. It must then proceed to receive evidence to support the grounds alleged in the petition for termination.
- R.H. v. Department of Children and Family Services, 860 So. 2d 986 (Fla. 3d DCA 2003). The trial court erred when it terminated the father's parental rights without the taking of any evidence in support of such termination.

PRIOR HISTORY OF ALCOHOL OR SUBSTANCE ABUSE § 39.806(1)(J)

Termination of a parent's rights may also be pursued if the parent has a history of extensive, abuse and chronic use of alcohol or controlled substance which renders them incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3 year period immediately preceding the filing of the petition for the termination of parental rights. § 39.806(1)(j). Although this ground that was added to Chapter 39 in 2008, there is scant case law on the matter. The difficulty in prevailing on this ground, as suggested in one opinion, may be that the parent in the three years preceding the filing of the petition, completed available treatments. See P.B. v. Department of Children and Families, 86 So.3d 1290 (Fla. 5th DCA 2012). Hence, it may be prudent to allege additional grounds such as § 39.806(1)(e).

PRESENCE OF ALCOHOL OR CONTROLLED SUBSTANCE IN CHILD AT BIRTH § 39.806(1)(K)

Termination of parental rights may be pursued upon the ground that a test administered at birth indicates that the child's blood, urine or meconium contained any amount of alcohol or a controlled substance, the presence of which was not the result of medical treatment given to the mother or newborn infant, and the biological mother is the same of at least one other child who was adjudicated dependent after a finding of harm due to the exposure of a controlled substance or alcohol, and the biological mother had the opportunity to participate in substance abuse treatment. § 39.806(1)(k).

PRACTICE TIP: Expert testimony is required which should include evidence that proper protocols relating to chain of custody of the evidence were followed.

THREE OR MORE OCCASIONS § 39.806(1)(L)

In order to terminate pursuant to this ground, it must be demonstrated that on three or more occasions the child or another child of the parent or parents has been placed in out of home care, and the conditions that led to the child's out of home placement were caused by the parent(s). § 39.806(1)(l). The ground examines whether the current child or other children of the parent(s) have been removed from the parent(s), by their own action, or inaction. The approach is similar in regard to termination under § 39.806(1)(i)- prior involuntarily termination of the parent's rights. Practitioners must be mindful to consider the (1) remoteness of time between the out of home placements, and (2) change in circumstances since the prior removal. See J.B. v. Department of Children and Families, 107 So.3d 1196 (Fla. 1st DCA 2013).

CHILD WAS CONCEIVED AS A RESULT OF AN ACT OF SEXUAL BATTERY § 39.806(1)(M)

A parent's right may also be terminated if a court determines by clear and convincing evidence that the child was conceived as a result of an act of sexual battery made unlawful pursuant to § 794.011, or to a similar law of another state, territory possession, or Native American tribe where the offense occurred. § 39.806(1)(m),

PARENT IS A REGISTERED SEXUAL PREDATOR § 39.806(1)(N)

The parent is convicted of an offense that requires the parent to register as a sexual predator under § 775.21; § 39.806(1)(n).

SINGLE PARENT TERMINATIONS

SINGLE PARENT TPR GROUNDS § 39.811(6)

The parental rights of one parent may be severed without severing the parental rights of the other parent only under the following circumstances:

- Child has only one surviving parent;
- Identity of prospective parent unknown;
- Parent whose rights are being terminated became a parent through single-parent adoption;
- Protection of the child demands termination of one parent; or
- Parent whose rights are being terminated meet any of the criteria in § 39.806(1)(d) and (f)-(m);

In order to avoid delays in permanency for the child, it must be ensured that where proper, the trial court makes finding of a single parent termination pursuant to § 39.811(6). See In re R.R. v. Department of Children and Family Services, 18 So.3d 26 (Fla. 2d DCA 2009) citing J.T. v. Department of Children and Family Services, 908 So.2d 573 (Fla. 2d DCA 2005), when an appellate court reverses the termination of parental rights as to one parent and the trial court has made no ruling with regard to a single-parent termination under § 39.811(6) concerning the other parent, the appellate court can still affirm the single-parent termination if the actual ground for termination as to that parent stated in the judgment is one of the grounds described in § 39.811(6)(e) and that portion of the judgment is otherwise affirmable. On the other hand, an appellate court will typically be unable to uphold a single-parent termination if one parent's parental rights are terminated for a ground not contained in § 39.811(6)(e), such as failure to complete a case plan. In this situation, the appellate court will normally be constrained to reverse the parent's judgment because the judgment and record will not contain findings of fact required by §§ 39.811(6)(a)-(d) sufficient to affirm the judgment as a matter of law. The court reversed the termination of the mother parental rights as the underlying ground supporting the decision was § 39.806(1)(e), a ground not specified in § 39.811(6)(e). See In re R.R. at 28.

INEFFECTIVE ASSISTANCE OF COUNSEL

On July 9, 2015, the Supreme Court issued its opinion in J.B. v. Department of Children and Families, 170 So.3d 780 (Fla. 2015). Although it previously held that indigent parents have a constitutional right to counsel in TPR proceedings, the court had not expressly recognized a right to the effective assistance of counsel. Id. at 785. By virtue of its 2015 decision, parents now have the right to effective assistance of counsel in termination of parental right proceedings. Id.

A Select Committee on Claims of Ineffective Assistance of Counsel in Termination of Parental Rights Proceedings (hereinafter referred to as the "Committee"), was created to recommend a permanent procedure for claims of ineffective assistance of counsel. Listed below are bulleted findings from the case. The procedure will remain in effect until a new procedure is promulgated by the Committee.

- The indigent parent's right to counsel in TPR proceedings requires that such representation be effective, pursuant to Art. I, sec. 9 of the Florida Constitution (the "due process clause").
- Standard:

- The Court rejected both the Strickland standard and the Geist “fundamental fairness” standard.
- While there is an interest in finality in both criminal and TPR proceedings, the interest in finality in the TPR context is substantially heightened by the very important consideration that must be given to the child’s interest in reaching permanency and the harm that results when permanency is unduly delayed.
- Test:
 - there is a presumption the parent’s attorney provided reasonable, professional representation. To overcome the presumption, the parent must identify specific errors, the commission or omission of which, under the totality of the circumstances, evidence a deficiency in the exercise of reasonable, professional judgment in the case; and,
 - the parent must establish that cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that but for the counsel’s deficient representation the parent’s rights would not have been terminated.
 - If the parent establishes that the result would have been different absent the deficient performance, then the TPR should be vacated for further proceedings.

Temporary Procedure

- The procedure below remains In effect until the special committee promulgates a new, permanent rule.
- Timely disposition is critical in light of the child’s interest in reaching permanency.
- Time frames must be strictly complied with.
- At the conclusion of each adjudicatory hearing, the trial court must orally inform the parents of:
 1. the right to appeal; and
 2. the right to file a motion in the circuit court alleging that appointed counsel provided constitutionally ineffective assistance, if the judge terminated their parental rights.
- The written TPR order must inform the parent of the right to effective assistance of counsel and give a brief description of the procedure.
- The parent must file the motion pro se in the trial court.
- Any appeal of an order denying a motion alleging ineffective assistance of counsel shall be a part of the appeal of the termination order, not a separate appeal.
- The parent, without counsel, has **20 days from the date of the TPR order** to file the motion alleging ineffective assistance of counsel (IAC). The motion must contain the case name, the case number, the date of the TPR order, and allege specific acts or omissions in representation during the TPR proceedings that allegedly constituted a failure to provide reasonable, professional assistance. The parent must explain how the acts or omissions prejudiced the proceedings to the extent the outcome would have been different but for the deficient performance.
- If a motion is filed, the rendition of the TPR order is delayed until the judge issues an order on the pro se ineffective assistance motion.
- Appointed counsel shall discuss with the parent whether they want to appeal and whether they want to file a motion alleging ineffective representation. If they assert they do, then counsel must withdraw immediately. If the parent asserts they don’t but subsequently file a motion, counsel must immediately withdraw. If the parent later appeals, then new, separate appellate counsel should be appointed, after the

disposition of the IAC proceedings. **There is no right to counsel for the ineffective assistance of counsel proceedings.**

- The judge has 25 days to resolve the IAC motion. This includes holding any necessary evidentiary hearings and issuing an order. If no order is filed after 25 days, it is deemed denied.

Note: The Committee has concluded its work and the proposed rules are working their way through the Florida Bar Rules Committees and is anticipated to be presented to the Florida Supreme Court.

MANIFEST BEST INTEREST

The second aspect of the proof required for a TPR, is whether such termination is in the manifest best interests (MBI) of the child. There are eleven listed factors for the court to explicitly consider. The final judgment must contain findings of fact which address the manifest best interest factors or the TPR is subject to reversal. In re A.C., 751 So. 2d 667 (Fla. 2d DCA 2000) (Final judgment terminating mother's parental rights did not satisfy the statutory requirement that the trial court consider and evaluate the manifest best interests of the children where neither the trial court's final judgment nor the transcript of proceedings contained any finding of fact or conclusions of law as to the manifest best interests of the children. There must be evidence and specific findings from the court that termination is in the child's best interests. The final judgment is subject to reversal if it does not contain specific findings as to the manifest best interests of the child). The court should address the factors in all cases, including cases where a parent impliedly consented to the termination by failing to appear at the advisory or adjudicatory hearing.

PRACTICE TIP: The court should make separate findings (with regard to each of the factors) for every child on the petition. It is possible TPR may be in the best interests of one child but not all.

The following is a list of each of the factors in § 39.810 and evidence or testimony which may be relevant to each.

- Any suitable permanent custody arrangement short of adoption with a relative of the child. § 39.810(1).
- The availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor listed in § 39.810 and may not be considered as a factor weighing against TPR.
- If a child has been in a stable or pre-adoptive placement for not less than 6 months, the availability of a different placement, including placement with a relative, may not be considered a ground to terminate parental rights.

PRACTICE TIP: Evidence of the efforts to locate relatives by the department and Guardian ad Litem Program should be presented.

- The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child. § 39.810(2).
 - Guardian ad litem should testify beyond what was gleaned from the documents in the file.
 - Testimony that the guardian ad litem talked to providers and they described continued troubling behavior.
 - Testimony regarding the parent's employment, and housing
 - Guardian ad litem's observations about the parents.

- The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home. § 39.810(3).
 - Testimony of service worker – services offered; services completed; issues that led to dependency resolution; consistency; and concerns about visitation.
 - Expert testimony – psychological evaluations; diagnosis; and opinion if child would be at risk if returned to parents.
- The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child. § 39.810(4).
 - Expert testimony
 - Diagnosis of child
 - How parent's conduct affected child
 - Guardian ad litem testimony that they have observed abilities and needs
 - Testimony regarding services being offered and the need to continue services
- The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties. § 39.810(5).
 - The guardian ad litem's observations during visitation between the child and the parent
 - Behavior before and after visits
 - Behavior before and after placement
 - The child's wishes
- The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child. § 39.810(6).
 - Child is receiving services and the child will continue to receive services
 - Expert testimony – behavioral or emotional needs will or will not continue
- The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties. § 39.810(7).
 - Guardian ad litem testimony
 - Length of time child has been in placement
 - Guardian ad litem witnessed interaction between child and parental substitute
 - Observation of visitation as to each child
 - The home will lead to permanent placement
 - Testimony of foster parent and child, if appropriate
- The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. § 39.810(8).

- Guardian ad litem testimony, service worker testimony
- Length of time in placement – permanency
- Educational stability, stability with therapists, etc.
- The depth of the relationship existing between the child and the present custodian. § 39.810(9).
 - Not a comparison between foster parents and parents – depth of bond and harm to child if placement isn't continued
 - Discuss the difference between the child's behavior/school work/development when he entered foster care and as of the day of trial
 - Guardian ad litem testimony, service worker testimony, expert testimony
 - Child's adjustment to foster care
 - Observation of the child with the present custodian
 - Length of time child been with the present custodian
 - Child's opinion regarding adoption
 - Custodian / Child Testimony
- The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. § 39.810(10).
- The recommendations for the child provided by the child's guardian ad litem or legal representative. § 39.810(11).
 - Guardian ad litem reviewed file, length of time on the case, met with child, discussed with child the possibility of adoption, how guardian ad litem came to his recommendations.

LEAST RESTRICTIVE MEANS

The court must consider whether termination of parental rights is the least restrictive means (LRM) of protecting the child from serious harm. The least restrictive means element is the second prong of the constitutional strict scrutiny analysis. Before a person may be deprived of a fundamental right (e.g., the right to parent), the state must demonstrate the existence of a compelling interest and must further that interest through the least intrusive means available. Thus LRM is a legal issue not something a witness should testify about other than services offered or why service is not required (egregiousness, etc.) In general, the inquiry should be, were the parents offered a case plan and whether they had an opportunity to comply.

The parent(s) may argue that placement of the child(ren) with a relative or in some other arrangement will/should preclude termination. Alternatively, they may argue that if the department failed to investigate a potential relative custodian, the petition should not be granted. Both arguments should fail as they find no support in Florida law and are directly contrary to Padgett v. Department of Health & Rehab. Servs., 577 So. 2d 565 (Fla. 1991).

In Padgett the Florida Supreme Court explained that the state's compelling interest is the protection of children and that least restrictive means requires that, in ordinary cases, the state demonstrate that it made a good faith effort to rehabilitate the parent and reunite the family through provision of a case

plan. Padgett, 577 So. 2d at 570-571. Nowhere does Padgett or subsequent Supreme Court precedent tie the distinct issue of placement to analysis of the constitutional preconditions to termination of parental rights. The Supreme Court recognized a parent's interest in maintaining parental ties is essential, but that the child's entitlement to an environment free of physical and emotional violence at the hands of his or her most trusted caretaker is more so, and that the state has a compelling interest in protecting all citizens, especially a child, against the clear threat of abuse, neglect, and death.

- Padgett v. Dept. of Health & Rehabilitative Services, 577 So. 2d 565, 571 (Fla. 1991). The department "ordinarily must show that it has made a good faith effort to rehabilitate the parent and reunite the family."
- LRM "simply requires that measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond."
- Sometimes LRM does not require a case plan.
 - In re T.M., 641 So. 2d 410 (Fla. 1994), the court held that termination of parental rights without the use of plans or agreements was the least restrictive alternative in cases of severe or continuing abuse or neglect or in cases of egregious abuse.

Despite Padgett, a few opinions have departed from the essential inquiry of least restrictive means, that is, did the department make a good faith effort to rehabilitate the parent and reunite the family through provision of a case plan. Padgett, 577 So. 2d at 570-571. See, e.g., A.H. v. Department of Children and Families, 144 So.3d 662 (Fla. 1st DCA 2014), G.H. v. Department of Children and Families, 145 So.3d 884 (Fla. 1st DCA 2014). However, recent opinions have reiterated the correct application of least restrictive means. See e.g., Guardian ad Litem Program v. A.A., 171 So.3d 174 (Fla. 5th DCA 2015).

MOST COMMON REVERSALS IN TPR

- Evidence is not clear and convincing. For example, the doctor did not see the parent, or testimony was given in form of possibilities and not probabilities.
- Therapist testimony not provided.
- Failure to prove essential elements of statutory basis, i.e., no "proof of conduct towards child" under 1(c) but evidence of futility.
- Incarceration cases.
- Mental illness –There should be a diagnosis and services should be tailored for that mental illness.

PROVING HARM

The act or omission by the parent(s) must result in some type of harm to the child. Thus, for example, substance abuse, alone, without resulting in harm to the child, is not grounds for termination of parental rights.

How Do You Show Harm?

- Before & After Testimony
 - Child had night terrors, bedwetting, poor grades in school, aggressive behavior and no longer has those issues.
- Evidence of developmental delays
- Evidence of medical problems

- Evidence of educational problems
- Therapist Testimony – Expert Testimony

Case Examples

- C.C. v. Department of Children and Family Services, 812 So. 2d 520(Fla. 1st DCA 2002.) - Parent's substance abuse does not alone establish prospective neglect; trial court must determine whether substance abuse will affect a parent's ability to provide the care and support the children need in the future.
- W.N. v. Department of Children and Family Services, 919 So. 2d 589 (Fla. 3d DCA 2006)
Substantial competent evidence in proceeding to terminate father's parental rights established a nexus between father's drug abuse and his ability to provide for child's health and safety; father twice entered substance abuse counseling pursuant to reunification plan and twice relapsed; father repeatedly tested positive for cocaine and other drugs during extended period he was given to complete plan, father appeared for last day of trial on drugs; father lived in same building where child ingested cocaine, with mother who surrendered her parental rights and also abused drugs; and father failed to visit child, pay child support, or acknowledge that his drug use put child at risk.

Criminal conduct must be tied to some discernable harm to the child. See P.S. v. Department of Children and Family Services, 863 So 2d 392 (Fla. 3d DCA 2003) (must connect act of parent to abuse, neglect or specific harm to the child).

Domestic Violence

Florida courts have consistently held that child abuse and neglect can result from being exposed to acts of domestic violence. A.D. v. Department of Children and Families, 837 So. 2d 1078, 1079 (Fla. 5th DCA 2003). See *also*, F.R. v. Dept. of Children & Families, 826 So. 2d 449 (Fla. 5th DCA 2002). When "children witness incidents of domestic violence, *both verbal* and physical abuse between parents, . . . the children are at risk of being 'harmed' -- impaired mentally and emotionally -- if they remain in the custody of the abusive parents . . ." T. R. v. Dept. of Children & Fams., 864 So. 2d 1278 (Fla. 5th DCA 2004)(emphasis added). Moreover, "a court can adjudicate a child dependent on the basis of neglect when the State presents evidence indicating that the child is permitted to live in an environment which causes the child's physical, mental, or emotional health to be significantly impaired." D.D. v. Dept. of Children & Fams., 773 So. 2d 615,617 (Fla. 5th DCA 2000).

TERMINATION OF PARENTAL RIGHTS CHECKLIST

TPR = STATUTORY GROUND (+) MBI (+) LRM

Termination of Parental Rights: Must prove by Clear and Convincing evidence grounds for TPR under § 39.806 and TPR is in the child's Manifest Best Interest (MBI) under § 39.810, and TPR is the Least Restrictive Means (LRM) of protecting the child from harm

CONTENTS OF PETITION

TPR Petition must contain facts supporting the following allegations

- That at least one of the **grounds** for TPR has been met (*See Grounds for TPR*)
- That the parents were informed of their **right to counsel** at all hearings they attended
- That a dispositional order adjudicating the **child dependent** was entered
- That the **manifest best interests** of the child would be served by the granting of the petition; See § 39.802(4); Rule 8.500(b).

The petition shall also contain:

- allegations as to the identity and residence of the parents, if known; and
- the age, sex and child's name; and
- a certified copy of the birth certificate of each child named in the petition; and
- When required by law, a showing that the parents were offered a case plan and have not substantially complied with it; See Rule 8.500(b)

GROUND FOR TERMINATION OF PARENTAL RIGHTS (TPR)

- Voluntary Surrender §39.806 (1)(a)
 - **Written** (2 witnesses & notary), **consented** to order, **department will take custody**, and not under **fraud or duress**
- Abandonment (*Does not include abandoned infants*) § 39.806(1)(b)
 - (While being able) No effort to support + No effort to communicate or "marginal efforts at parenting"= "sufficient to evince a willful rejection of parental obligation" § 39.01(1); OR
 - Location or identity of parent is unknown and cannot be ascertained by diligent search w/in 60 days § 39.806(1)(b)
 - Note: Incarceration does not, as a matter of law, constitute abandonment. However, incarceration is a *factor* to be considered "together with other facts" when determining if abandonment
- When the parent or parents engaged in **conduct** toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship **threatens the life, safety, well-being**, or physical, mental, or emotional health of the child **irrespective of the provision of services** § 39.806(1)(c); often used with § 39.806(1)(e)
 - **Conduct** towards child or other children; AND
 - Provision of services (can be from case plan but doesn't have to be); AND
 - **Harm** to child irrespective of services; AND
 - **No reasonable basis to believe parent would improve**
 - *Do not need dependency adjudication or 12 months*
- Incarceration § 39.806(1)(d)
 - For **significant portion** of child's minority considering child's age and need for stable, permanent home (time starts date of incarceration) § 39.806(1)(d)1; OR
 - Incarcerated for **certain crimes** § 39.806(1)(d)2; OR
 - Court determines the continued parent child **relationship would be harmful to the child** § 39.806(1)(d)3
- A case plan has been filed with the court and approved, and the **child continues to be abused, neglected, or abandoned by the parents** § 39.806(1)(e)

- Adjudicated dependent; AND
- Case plan filed; AND
- 12 or more months (not if material breach); AND
- **Parent failed to substantially comply** (not due to lack of parent's resources or department's failure to make reasonable effort to reunify) Substantial compliance "means circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child" § 39.01(73); **OR**
- **Parent materially breached the case plan** (do not need 12 months) Clear and convincing evidence that parent is unlikely or unable to substantially comply with the case plan before the time expires to comply § 39.806 (1)(e)2
- **The child has been in care for any 12 of the last 22 months** and parents have not substantially complied (failure cannot be due to lack of financial resources of parents or failure of department to make reasonable efforts)
- When a parent engaged in **egregious conduct** or had the opportunity and capability to prevent and knowingly **failed to prevent egregious conduct** that threatens the life, safety, or physical, mental or emotional health of the child **or the child's sibling** § 39.806(1)(f)
 - Egregious conduct – can be an incident if so severe as to endanger the life of the child
 - Harmed child or placed child at imminent risk of harm (proof of nexus not required)
 - Knowingly failed to protect
 - **OR CHILD'S SIBLING –Prospective Risk of Harm** (prior abuse) (proof of nexus not required)
 - No case plan required, can file petition at any time
 - Definitions
 - Sibling means another child who resides with or is cared for by the parent *regardless of whether the child is related.*
 - Egregious conduct means abuse, abandonment, neglect, or any other conduct that is deplorable, flagrant, or outrageous by a normal standard of conduct. Egregious conduct may include an act or omission that occurred only once but was of such intensity, magnitude, or severity as to endanger the life of the child.
- When a parent has subjected the child to **aggravated child abuse** as defined in §827.03, **sexual battery or sexual abuse** as defined in § 39.01, or **chronic abuse** § 39.806(1)(g)
- Committed **murder or voluntary manslaughter** of a child § 39.806(1)(h)
 - Proof of nexus not required
- Involuntary TPR of sibling § 39.806(1)(i)
 - Prior sibling TPR + substantial risk of significant harm + MBI + LRM
- History of substance abuse, parents incapable of caring for child and refused treatment during 3 years prior to TPR § 39.806(1)(j)
- **Child who tests positive at birth for controlled substance/ alcohol** has the **same biological mother** who has had at least one **other child who was adjudicated dependent** after a finding of harm to the child's health or welfare **due to exposure to controlled substance or alcohol** as defined in § 39.01(32)(g). § 39.801(k)
- **On three or more occasions the child or another child of the parent has been placed in out-of-home care**, and the conditions that led to the child's out-of-home placement were caused by the parents. § 39.801(l)
- **Clear and convincing evidence** exists to support a finding that the **child was conceived as the result of a sexual battery**. § 39.801(m)
 - Guilty plea or conviction of unlawful sexual battery is conclusive proof that the child was conceived in this manner
 - The parent is convicted of an offense that requires the **parent to register as a sexual predator** under § 775.21.

SINGLE PARENT TERMINATION REQUIREMENTS

The parental rights of one parent may be severed without severing the parental rights of the other parent only under the following circumstances: § 39.811(6).

- the child has only one surviving parent
- the identity of prospective parent unknown
- the parent whose rights are being terminated became a parent through single-parent adoption
- the protection of the child demands termination of one parent, or
- the parent whose rights are being terminated meet any of the criteria in §§ 39.806(d) and (f)-(m)

MANIFEST BEST INTEREST (MBI)

Court **must** make specific findings that TPR is in child's best interest §§39.810(1)-(11)

- Any suitable permanent custody arrangement short of adoption with a relative of the child. § 39.810(1)
- The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child. §39.810(2)
- The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home. § 39.810(3)
- The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child. § 39.810(4)
- The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties. §39.810(5)
- The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child. § 39.810(6)
- The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties. § 39.810(7)
- The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. § 39.810(8)
- The depth of the relationship existing between the child and the present custodian. § 39.810(9)
- The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. § 39.810(10)
- The recommendations for the child provided by the child's guardian ad litem or legal representative. § 39.810(11)

LEAST RESTRICTIVE MEANS (LRM)

In addition to considering whether termination of parental rights is in the manifest best interest of the child, the court must consider whether termination of parental rights is the least restrictive means of protecting the child from serious harm.

PRESERVING THE RECORD FOR APPEAL

KELLY SWARTZ ESQ., DIRECTOR OF LEGAL SERVICES & LAURA LAWSON ESQ., APPELLATE ATTORNEY, FLORIDA GUARDIAN AD LITEM PROGRAM

It is critical to preserve the record for appellate purposes. Appellate review is not a do-over. It is a review to determine whether a trial court abused its discretion or misinterpreted the law in rendering an opinion. An appellate court can only review what was presented to the trial court in the form of testimony or physical evidence. It is imperative that we ensure that we present competent, substantial evidence to trial courts.

Dependency courts present special challenges to attorneys in that the judges “know this case” and occasionally attempt to restrict testimony on matters that they have prior knowledge of. It’s important to remember that the record transmitted to the appellate court has to include evidence in order to be reviewed. For example, a trial court may know that a parent has a mental health or substance abuse history based on unsworn statements made at other hearings; however that is not evidence and is not subject to review by the appellate court. Dependency courts can also be somewhat informal to say the least. Hearings sometimes take on a town-hall meeting atmosphere where everybody has a chance to address the court. Although the statements made during the free-for-all part of a hearing are recorded, they are not part of the record for appellate purposes unless the speaker was sworn in. They are frequently hearsay, supposition, anecdotal or otherwise of little or no evidentiary value.

PRESENT EVIDENCE

As stated above, appellate courts review the evidence presented to a trial court to determine whether the trial court abused its discretion in rendering an order based on the pleadings and evidence presented. Chatting with the judge is not the same as presenting evidence, nor is making argument. Attorneys frequently present information to dependency courts and make arguments without ever taking any testimony. Similarly, courts tend to entertain and even solicit input from parents, children, providers, guardians ad litem and others without swearing them in. Please note that providing information to a court is fine but it is not competent or substantial evidence. If we are asking the court for some relief, we have to support the request with evidence. As you all know, it is not uncommon for us to determine during a hearing (based on statements made) that we need to ask the court to order something we didn’t realize we would be asking for such as to modify visitation or custody, or order a service for a child.

PRACTICE TIP: Ask the court to swear in anybody who is likely to be providing any information to the court at every hearing. If you find yourself in a situation where witnesses provided information while not sworn, ask the court to swear them and then have them reaffirm their unsworn statement for the record. This is not the best practice because it’s time consuming, it frustrates the court and you will sometimes get different answers once a witness is under oath.

Remember, that the focus is on the best interests of a child. If we are opposed to some action being taken by the court, we will need to present evidence that the action will harm the child. For instance, we presented evidence that a grandparent is allowing parent’s access to a child in violation of a court order; the trial court

denied our motion to change custody of the child. If we failed to demonstrate harm to the child, we would not likely be successful on appeal.

PRACTICE TIP: In order to challenge a trial court's order on appeal, it is often necessary to demonstrate that the proposed action will cause the child harm. Don't forget to present evidence of harm.

JUDICIAL NOTICE

Asking a trial court to take judicial notice of certain prior orders is an effective way of ensuring that the court's "prior knowledge" of the case is transmitted to the appellate court for review. We should be asking the trial court to take judicial notice of orders of adjudication, disposition, case plan acceptance and any other orders that are relevant and establish some element of our pleadings. For example, it can be helpful to ask the court to take judicial notice of judicial review orders that establish the absence of a parent or that include a finding that a parent is not in substantial compliance with the case plan. Taking judicial notice of court orders does not make them stand out for appellate review without further action. Be careful about overusing judicial notice. Do not ask the trial court to take judicial notice of the entire court file. Taking judicial notice of a court document may not be sufficient to establish proof of a fact, and the documents are still subject to evidentiary objections such as relevance, hearsay, etc. See Trial Advocacy chapter.

NOTE: If a document is necessary to prove an element of your case, you will need to have it admitted into evidence. Judicial Notice just allows the court to take notice that an order is entered. It does not allow them to consider it for proof of the findings within the order. Example: a domestic violence order is proof an injunction was entered but to use it for the facts and findings of the actual abuse, it must be entered into evidence.

PRACTICE TIP: Prior to the hearing or trial, provide the court and other parties with a copy of the Notice to Request Judicial Notice and all the documents contained in the notice. This practice ensures that the packet is transmitted to the appellate court for ease of reference and review. If you intend to enter a document into evidence, have it marked ahead of time and get any stipulations necessary.

KNOW, ANTICIPATE AND MAKE PROPER OBJECTIONS

It is extremely important that we make appropriate objections in order to preserve a record for appellate review. Decisions made by a trial court during a hearing are presumed to be correct unless objected to, and failure to object precludes appellate review. Please be aware that if another party makes an objection, even if it's the same objection we would make, it is not preserved for the Program for appellate purposes. We have to join in the objection in order for the Appellate Team to be able to make arguments related to the objection on appeal. Speaking objections are not acceptable so it's critical that you review and are familiar with standard evidentiary objections. It is equally critical that you make ALL objections. For example, a question may be compound and call for an answer that is hearsay and irrelevant. Make all 3 objections in order to preserve our ability to argue those points on appeal.

OBJECTIONS MUST ALSO BE CONTEMPORANEOUS AND SPECIFIC

The objection has to provide the trial court with sufficient information to make a ruling in order for that ruling to be reviewable by an appellate court. If the court overrules an objection that you make, ask if the court will

allow you to make an argument for the record. If the court sustains an objection that you make, ask the court to strike the inadmissible answer.

PRACTICE TIP: Get a ruling on all objections! If the court defers ruling make note, and go back at the end and ask for a ruling.

RESPONSES TO OBJECTIONS

Responses to objections must be made timely also. If another party objects to a question you ask, an answer provided or documentary evidence you are presenting, the court may ask you to respond to the objection. If the court sustains the other party's objection, ask to be heard for the record and respond with your argument as to why the objection should be overruled. In order to be successful in this area, it's very important that you are able to anticipate where the objections are going to come from and be prepared with argument and case law where appropriate. Be familiar with what items are non-hearsay to be prepared for hearsay challenges.

PRACTICE TIP: While preparing your case for trial or a hearing, think like the other party in order to anticipate objections and be prepared to respond to them.

OFFER OF PROOF

If you are attempting to present crucial evidence that is not admitted for some reason, ask to provide an offer of proof. An appellate court cannot review anything that is not in the record. Ask the trial court if you can make a proffer or an offer of proof, which includes an abbreviated presentation of the evidence, the purpose you are seeking to present the evidence and argument supporting its admissibility. It is not enough to summarize the evidence.

PRACTICE TIP: If a court sustains an objection to the admissibility of evidence you are presenting, ask to make an offer of proof. An offer of proof includes a presentation of what the witness would testify to, why the evidence is important to the matter before the court and legal argument as to its admissibility.

SUPPORT YOUR POSITION WITH LEGAL ARGUMENT

It is often not enough to take a position or make a recommendation for or against something to support a challenge in the appellate court. The judge needs to have an opportunity to "do it the right way."

PRACTICE TIP: State on the record what the relevant statute or case law requires the judge to do.

CONSIDER FILING A MEMORANDUM OF LAW

Memoranda work well to preserve arguments for review in matters involving complicated legal issues, especially when the judge is impatient about listening to lengthy argument.

WHEN CAUGHT BY SURPRISE, SAY SO

When no notice was provided that a contested motion was to be raised in court by an opposing party, point that out. Consider requesting a continuance. When evidence, testimony or law in support of the guardian ad litem's position is unavailable due to lack of notice, explain what it is and why the court needs the

opportunity to consider it prior to deciding the issue. Do not be afraid to explain why you need additional time to research a legal issue or to bring witnesses before the court.

PRACTICE TIP: Argue that we have a right to due process through proper notice and how the child will be prejudiced by going forward without the court hearing all the evidence.

CONSIDER A MOTION FOR REHEARING

Dependency cases often involve crowded dockets and late-breaking information. This can make preserving issues for review difficult. When critical arguments or evidence were not brought to the trial court's attention, bring a motion for rehearing. A rehearing should not be used as a second bite at the apple because we just weren't prepared for the initial hearing. A rehearing is appropriate when we are caught off guard with some new evidence or request for relief and are not afforded the opportunity to respond. It is also appropriate when a judge misconstrued or misunderstood a point of law. A motion for rehearing must be filed within 10 days of the order being rendered by the court. In some situations a motion for rehearing is required in order for us to be able to appeal. Don't guess! Ask to staff the case with your supervisor and/or the Director of Appeals.

PRACTICE TIP: If you think a rehearing is appropriate, staff immediately with the Supervising Attorney and/or Regional Legal Counsel.

BE CAREFUL WITH "OFF THE RECORD" DISCUSSIONS

Some judges occasionally invite attorneys to their chambers to discuss a contested matter off the record. This can create significant problems on appeal. A better practice is to always discuss contested matters on the record when possible. However, if a stipulation or understanding about a contested matter occurs off the record, be sure this is put on the record when you are back in court. Also, we occasionally receive communication from the court through emails. Please be aware that emails are not part of the record and cannot form the basis of an appeal.

PRACTICE TIP: Make sure any action taken on a case is on the record and subject to transcription.

WATCH OUT FOR FUNDAMENTAL ERROR

Some errors are so fundamental that they undermine the entire proceeding and will result in a reversal of the trial court's order even if no objection is made. We have all had a situation where the trial court ruled in our favor and we knew it was wrong but nobody objected. Please note that the appellate court will reverse if the error is so fundamental that but for the error, the case would have been decided otherwise. For example, the father is on his way to court for the TPR trial and will be there in an hour but the court enters a default. Even if nobody objects, this case will be reversed on appeal. Failure on our part to object to a court committing a fundamental error such as this delays permanency for the child. Similarly, if a court makes findings of fact wholly based on hearsay and other inadmissible evidence, even if nobody objected, the appellate court is very likely to reverse those findings of fact because they are not based on competent, substantial evidence. Clearly we do not want to put ourselves in the position of making the opponent's arguments, but we can ensure that there is sufficient evidence in addition to the inadmissible evidence to support the court's findings.

PRACTICE TIP: As an officer of the court, be the protector of the record. Point out to the court that the action it is taking is reversible error.

NORMALCY

PATRICK VINCENT, ESQ., CHILD'S BEST INTEREST ATTORNEY, FLORIDA GUARDIAN AD LITEM PROGRAM

WHAT IS NORMALCY?

Normalcy is the idea that children in foster care should be able to participate in the same age-appropriate activities as any other child. These activities are important to a child's well-being, not only emotionally, but in developing valuable life-coping skills. The foster parent or caregiver should be the one to make the decisions about participation in such activities – not caseworkers, or the department.

THE LAW: LETTING KIDS BE KIDS § 39.4091

Caregivers must use a **reasonable prudent parent** standard to determine if child can participate in **age-appropriate** activity.

CAREGIVER

- Caregiver means a person with whom the child is placed in out-of-home care, or a designated official for group care facilities licensed by the department. There must be an identified caregiver (a person) making normalcy decisions (even if child placed in group home or shelter).
- Group homes & shelters are not exempt from § 39.4091.

PRACTICE TIP: Be sure to identify the person making normalcy decisions – especially important in group homes, shelters and other institutional settings.

REASONABLE PRUDENT PARENT STANDARD

The Reasonable Prudent Parent standard is characterized by careful and sensible parental decisions that maintain the child's health, safety, and best interests while at the same time encouraging the child's emotional and developmental growth that a caregiver shall use when determining whether to allow a child in out-of-home care to participate in extracurricular, enrichment, and social activities.

AGE APPROPRIATE ACTIVITIES

Age-appropriate means activities or items that are generally accepted as suitable for children of the same chronological age or level of maturity. Age appropriateness is based on the development of cognitive, emotional, physical, and behavioral capacity that is typical for an age or age group.

Care giver must consider the child's:

- Age, maturity and developmental level;
- Risks of activity;
- Best interest of child;
- Importance of child's emotional & developmental growth;

- Importance of most family-like living experience; and
- Behavioral history of the child & child's ability to safely participate in activity.

Caregiver is not liable for harm caused to child, provided decision was **reasonable** and **prudent**.

ADVOCATE REMOVING BARRIERS TO NORMALCY

The guardian ad litem shall advocate to remove barriers that prevent children from participating in age-appropriate extracurricular, enrichment and social activities (normalcy) as required by § 39.4091.

PRACTICE TIP: Always be aware of WHO is making the decisions for children

The department cannot require prior approval for a child to participate in an activity.

If a caregiver is not being permitted to make decisions for a child, inform the department or the court

PRE-EXISTING COURT ORDERS

A caregiver's decisions regarding normalcy activities cannot be contrary to a pre-existing court order.

For example, if there is court ordered visitation with the child's parents on Saturdays, a normalcy activity planned or approved by the caregiver would not trump or take precedence over an existing court order for Saturday visitation.

- Request staffing / file motion.
- Notify the department and / or the court if the caregiver is making decisions that are inconsistent with the Reasonable Prudent Parent standard.

CONFIDENTIALITY REQUIREMENTS

Confidentiality requirements for department records shall not restrict the child's participation in customary activities appropriate for the child's age and developmental level.

DISABLED YOUTH

Disabled youth shall be provided with an equal opportunity to participate in activities.

FREQUENT ISSUES

DRIVING

- Caregiver and services worker shall assist the child in finding a driver's education program.
- Support of the child's efforts to learn to drive a car, obtain learner's permit & driver's license (age, maturity, insurance).
- Efforts shall be made to obtain automobile insurance.

OVERNIGHT PLANNED OUTINGS

- The out-of-home caregiver must determine that it is safe and appropriate.

- Background screening is not necessary for a child to participate in normal school or community activities and outings such as school field trips, dating, scout campouts, and activities with friends, families, school and church group.

BABYSITTING

- Can be 14+ (14-15 must have babysitting course).
- Caregiver must ensure:
 - Babysitter suitable for the age, developmental level and behaviors of child;
 - Babysitter understands how to handle emergencies, has telephone numbers - case manager and physician; and
 - Discipline and confidentiality policies for the child have been explained.
- Babysitting does not have to be in a licensed setting.

VACATIONS

- Caregiver may take child on vacations.
- The caregiver must inform the department.

CHILD SHALL BE GIVEN PERMISSION /ENCOURAGEMENT TO:

- obtain employment;
- have contact with family members;
- have access to phone usage;
- have reasonable curfews;
- travel with other youth or adults;
- have his or her picture taken for publication in a newspaper or yearbook;
- receive public recognition for accomplishments;
- participate in school or after-school organizations or clubs; and
- participate in community events.

CHILD MUST BE PROVIDED INFORMATION REGARDING:

- | | |
|---------------------------------|---------------------------------------|
| drug and alcohol use and abuse | teen sexuality issues |
| runaway prevention | health services |
| community involvement | knowledge of available resources |
| identifying legal issues | understanding his or her legal rights |
| accessing specific legal advice | |

NORMALCY CHECKLIST

ADVOCATE REMOVING BARRIERS TO NORMALCY

The GAL shall advocate to remove barriers that prevent children from participating in age-appropriate extracurricular, enrichment and social activities (normalcy) as required by § 39.4091.

WHAT IS THE LAW?

Caregivers must use a **reasonable prudent parent** standard to determine if child can participate in **age-appropriate** activity considering the child's:

- Age, maturity and developmental level
- Risks of activity
- Best interest of child
- Importance of child's emotional & developmental growth
- Importance most family-like living experience
- Behavioral history of the child & child's ability to safely participate in activity

Caregiver is not liable for harm caused to child, provided decision was **reasonable** and **prudent**

The Reasonable Prudent Parent standard is characterized by careful and sensible parental decisions that maintain the child's health, safety, and best interests while at the same time encouraging the child's emotional and developmental growth that a caregiver shall use when determining whether to allow a child in out-of-home care to participate in extracurricular, enrichment, and social activities.

REMOVE BARRIERS BY ENSURING:

- CBCs / department not requiring prior approval for age-appropriate activity
- There is an identified caregiver (a *person*) making normalcy decisions (even if child placed in group home or shelter)
 - o Group homes & shelters are not exempt from § 39.4091
- Pre-existing court orders do not conflict with statute / normalcy decisions
 - o Request Staffing / File Motion
- Policies and practices of agencies & placements consistent with § 39.4091
- Caregiver making decisions consistent with reasonable prudent parent standard

FREQUENT ISSUES

Social Media

- Child permitted to participate in social media as long as permission has been given by caregiver

Driving

- Caregiver and Services Worker shall assist the child in finding a driver's education program
- Support of the child's efforts to learn to drive a car, obtain learner's permit & driver's license (age, maturity, insurance)
- Efforts shall be made to obtain automobile insurance

Overnight / Planned Outings

- The out-of-home caregiver must determine that it is safe & appropriate
- Background screening is not necessary for a child to participate in normal school or community activities and outings such as school field trips, dating, scout campouts, and activities with friends, families, school and church group

Babysitting

- Can be 14+ (14-15 must have babysitting course)
- Caregiver must ensure:
 - o Babysitter suitable for the age, developmental level and behaviors of child
 - o Babysitter understands how to handle emergencies, has telephone numbers - case manager and physician; and
 - o Discipline and confidentiality policies for the child have been explained
- Babysitting does not have to be in a licensed setting

Vacations

- Caregiver may take child on vacations. Inform department / CBC

SPECIAL CONSIDERATIONS

- Disabled youth shall be provided with an equal opportunity to participate in activities
- Confidentiality requirements for department records shall not restrict the child's participation in customary activities appropriate for the child's age and developmental level

CHILD SHALL BE GIVEN PERMISSION /ENCOURAGEMENT TO:

- obtain employment
- have contact with family members
- have access to phone usage
- have reasonable curfews
- travel with other youth or adults
- have his or her picture taken for publication in a newspaper or yearbook
- receive public recognition for accomplishments
- participate in school or after-school organizations or clubs
- participate in community events

CHILD MUST BE PROVIDED INFORMATION REGARDING:

- drug and alcohol use and abuse
- teen sexuality issues
- runaway prevention
- health services
- community involvement
- knowledge of available resources
- identifying legal issues
- understanding his or her legal rights
- accessing specific legal advice

WORKSHEET

THE GAL SHALL ADVOCATE TO REMOVE BARRIERS THAT PREVENT CHILDREN FROM PARTICIPATING IN AGE-APPROPRIATE EXTRACURRICULAR, ENRICHMENT AND SOCIAL ACTIVITIES (NORMALCY) AS REQUIRED BY §39.4091.

Child's Name: _____
Last First M.I. Date of Birth

Date in Care

Placement: _____
Name of Placement Type of Placement

Identified Caregiver: _____
Phone Number E-mail

Permanency Goal: _____

PRE-EXISTING COURT ORDERS

Court Order Date	Court Order	Is there a potential conflict with normalcy activities?	Request Staffing? File Motion? Other

NORMALCY ACTIVITY

Child would like to participate in the activities listed below. Barriers are listed below with GAL plan to remove barriers.

Normalcy Activity

Possible Barriers

GAL Plan to Remove Barriers
(finding resources, plan staffing, file a motion, inform the department of issues)

DRIVER'S LICENSE

The following steps are being taken to address child's (age appropriate)

Learner's Permit: _____

Driver's _____

Education: _____

Auto Insurance: _____

PARENTAGE & PATERNITY

ALICIA L. GUERRA M.SW./J.D, CHIEF LEGAL COUNSEL FLORIDA GUARDIAN AD LITEM PROGRAM

Paternity is the determination of biological fatherhood whereas parentage is the determination of the rights and responsibilities of legal fatherhood. Parentage might not be based on biological paternity. Paternity is determined via human leukocyte testing. Parentage is established either by legal presumptions or adjudication in a court proceeding¹. In Florida, paternity may also be established by voluntary acknowledgement of both parents where it has not already been established by law. *See generally* §§ 742 & 382.013. Neither a scientific determination of biological paternity nor a legal finding of fact as to biological paternity establish parentage in and of themselves. Shuler v. Guardian ad Litem Program, 17 So. 3d 333 (Fla. 5th DCA 2009); Dep't. of Health & Rehab. & Servs. v. Privette, 617 So. 2d 305 (Fla. 1993); G.F.C. v. S.G. & S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997); Slowinski v. Sweeney, 117 So. 3d 73 (Fla. 1st DCA 2013); Sirdevan v. Strand, 120 So. 3d 1280 (Fla. 1st DCA 2013); and C.G. v. J.R., 130 So. 3d 776 (Fla. 2d 2014).

WHY IS PARENTAGE AND PATERNITY IMPORTANT?

- To know who to notice.
- To know who to advise of the right to file an affidavit of parenthood if parentage is not established by law.
- To know who has standing to petition for custody and visitation.
- To know who to advise of right to counsel.
- To know who has an obligation to support the minor child.
- To ensure permanency within the statutory time period.
- To ensure children whose goal is adoption are legally freed from all parental ties and available to be adopted.

WHO IS A PARENT FOR THE PURPOSES OF CHAPTER 39

§§ 39.01(49), 39.503(1), 63.062(1), & 382.013; & Rule 8.210

- A woman who gives birth to a child.
- The adoptive mother or father of a child who has been adopted.
- The legal custodian who has assumed the role of parent ONLY IF there is no living parent with intact parental rights.
- A man who was married to the mother at the time of the child's conception or birth.

¹ Chris W. Altenbernd, *Quasi-Marital Children: The Common Law Failure in Privette and Daniel Calls for Statutory Reform*, 26 Fla. St. U. L. Rev. 219 (Winter 1999).

- A man whose consent to the adoption of the child would be required under § 63.062(1).
- A man who has been established in a court proceeding to be the child's father.
- A man who has filed an acknowledgement of paternity under § 382.013(2)(c) in regards to a child who was born to an unmarried woman.

Per § 382.013(2)(a)&(b), the husband's name shall be entered on the child's birth certificate unless paternity has otherwise already been established in a court of law even if the husband is deceased at the time of the child's birth.

Section 382.013(2)(c), states: If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father.

WHEN THE IDENTITY OR LOCATION OF A PARENT IS UNKNOWN

§§ 39.503(1) & 39.803(1)

AN INQUIRY INTO THE IDENTITY OR LOCATION OF A PARENT SHALL BE CONDUCTED BY THE COURT

When:

A Petition for Shelter, Dependency, or Termination of Parental Rights is filed; and

- The identity or location of a parent is unknown.

Of Whom:

- The available parent or legal custodian.
- Any relative or custodian of the child who is present and likely to have information if there is no available parent or legal custodian.

WHAT INQUIRY MUST BE MADE IF IDENTITY IS UNKNOWN?

§§ 39.503(1) & 39.803(1)

- Was the mother of the child married at the probable time of conception of the child or at the time of birth of the child?

PRACTICE TIP: If the affiant answers "Yes", the husband is the father. Where a child is born to a married woman, the mother's husband must be listed on the birth certificate. See *S.B. v. D.H.*, 736 So. 2d 766 (Fla. 2d DCA 1999)(holding it error as a matter of law for the biological father's name to be placed on child's birth certificate by voluntary acknowledgement as Florida Statutes require the husband to be named on the birth certificate as the father.

The court may not recognize an alleged biological parent as a parent in the dependency proceedings unless a court has entered an order establishing the biological parent as a parent pursuant to law. Rule 8.226(b)(5), Rule (2015).

- Was the mother of the child co-habiting with a male at the probable time of conception?

- Has the mother received promises of support or payments with respect to the child or because of her pregnancy from a man who claims to be the father?
- Is there a father listed on the birth certificate?
- Has the mother named any man in connection with applying for or obtaining public assistance?
- Has any man acknowledged or claimed paternity of the child in a jurisdiction where the mother and/or child has resided since conception?

PRACTICE TIP: Have the available affiant fill out Form 8.969 Rule Sworn Statement Regarding Identity or Location of Father, for each child. The form allows the affiant to answer all the above questions and to provide the name(s) of any males identified, their social security number, their dates of birth, their last known address, and any other information that will help identify the prospective father's name or whereabouts.

- Check the putative father registry to determine if any man has acknowledged paternity with the office of Vital Statistics.
 - If the inquiry under §§ 39.503(1) or 39.803(1) fails to identify a prospective parent, the court may find the father's identity is unknown, relieve the petitioner of further duty of search and proceed without further notice. Get the findings in a written court order. The petitioner has a duty to continue searching and reporting on the search at each court proceeding unless excused from further search by the court. Rule 8.225(b), Rule (2015).
 - The petitioner must conduct a diligent search if the inquiry under §§ 39.503(1) or 39.803(1) produces a name and the parent or prospective parent's whereabouts are unknown

ESTABLISHING PATERNITY DURING CHAPTER 39 PROCEEDINGS

§§ 39.503(8) & 39.803(8), 742.011 & 742.10; & Rules 8.210 & 8.226

Florida enacted Chapter 742, which provides statutory authority for the establishment of parentage where parentage or paternity has **not been established** by law or otherwise. A woman who has a child or who is pregnant, a man who believes he is the father of a child, and the child may petition to establish paternity under Chapter 742. § 742.011. Section 742.10 vests the trial court with primary jurisdiction and provides procedures for determining paternity for children not born to a marriage. Chapter 742 also declares paternity is established for the purposes of this chapter via uncontested voluntary acknowledgment executed in accordance with § 382.013. This acknowledgement must be executed by both the mother and individual to be named as the father under oath and they must provide their social security numbers in the acknowledgement. The acknowledgement must also be signed by two witnesses and be notarized. Valid execution creates a rebuttable presumption of paternity and can only be rescinded within 60 days from the date of signing unless there is a judicial or administrative order on paternity entered within the 60 days deciding the matter of paternity.

WHEN A PETITION IS FILED UNDER CHAPTER 39 ALLEGING A CHILD TO BE DEPENDENT

- The court is required to identify parents and prospective parents at the first proceeding.
- If the identity or location of a parent or prospective parent is unknown, the court must conduct an inquiry. If the court's inquiry under §§ 39.503(1) or 39.803(1) or a diligent search identifies a parent, then the parent must be given notice of the proceedings and an opportunity to participate.

PRACTICE TIP: If the child has already been adjudicated, a motion and order for supplemental findings under § 39.507(7) and amendments to the case plan is appropriate where the later arriving parent is also a cause of the child's dependency.

- If parentage is not established by law and the court's inquiry identifies a prospective parent, that person must be given the opportunity to become a party by voluntary acknowledgment to the dependency proceeding by completing a sworn affidavit of parenthood and filing it with the court or the department prior to any termination of parental rights adjudicatory hearing unless the other parent or another party objects or unless the court on its own motion requires further proceedings to determine parenthood. If further proceedings are required, the prospective parent may proceed with a petition pursuant to Chapter 742 to establish paternity. The prospective parent shall continue to receive notices of proceedings under Chapter 39.
- The prospective father can also file an affidavit of non-paternity, waiver of parental rights, and waiver of notice.
- The court having jurisdiction over the dependency action can conduct Chapter 742 proceedings as part of the Chapter 39 proceedings or in a separate action.

PRACTICE TIPS:

Family Law Forms 12.983(a) Petition to Determine Paternity and for Related Relief, 12.983(e) Motion for Scientific Paternity Testing, and 12.983(f) Order on Motion for Scientific Paternity Testing may be used where appropriate.

Be aware of B.B. v. P.J.M. and K.M., 933 So.2d 57 (Fla. 1st DCA 2006), where the petitioner plead the putative father to be the father and the putative father participated in the Chapter 39 proceedings without objection from any party, including the unmarried mother, and the court held such actions might "establish" paternity "in a court proceeding". **Note.** The Florida Rules of Juvenile Procedure were later amended to add Rule 8.226 providing a procedure for the establishment of parenthood. Rule 8.226 makes clear that where the court has identified parenthood as established by law, the court shall not recognize an alleged biological parent as a parent until a court enters an order pursuant to law establishing the alleged biological parent as a parent.

Rule 8.226 requires that the court enter an order on paternity at the conclusion of proceedings under Chapter 742. Family Law Form 12.983(g), Final Judgment of Paternity, can be used where appropriate. The birth certificate should then be amended accordingly.

A "prospective parent" means a person who claims to be, or has been identified as, a person who may be the mother or father of a child. § 39.01(61). A "prospective parent" is not a parent. § 39.01(49). Prospective parents are participants in a Chapter 39 proceeding. § 39.01(50).

DISESTABLISHMENT OF PATERNITY

§§ 742.10 & 742.18

Disestablishment of paternity is codified in Florida law at § 742.18. Section 742.18(1), allows a limited cause of action by a legal father to disestablish paternity.

The petition must include:

- an affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination;
- the results of paternity testing administered within 90 days prior to the filing of such petition excluding the legal father as the biological father or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition; and
- an affidavit executed by the petitioner stating that the petitioner is current on all child support payments or has just cause for any delinquent payments. § 742.18(1)(a)-(c).

PRACTICE TIPS: Legal fathers seeking to disestablish paternity can use Family Law Form 12.951(a) "Petition to Disestablish Paternity and/or Terminate Child Support Obligation."

An Affidavit and Acknowledgment of Surrender, Consent, and Waiver of Notice surrendering the child to the department for adoption is a ground for voluntary termination of parental rights under § 39.806. It is not a pleading to disestablish paternity.

To grant such a petition the court must find all of the following:

- there is newly discovered evidence relating to the paternity of the child since the initial paternity determination or establishment of a child support obligation;
- scientific paternity testing was properly conducted;
- the legal father is current on his child support payments or has just cause for any delinquency of child support payments;
- petitioner did not become the legal father by adoption;
- petitioner did not act to prevent the biological father from asserting parental rights in the child;
- the child was not conceived during the marriage of the legal father and mother through artificial insemination; **and**
- the child is under 18 years of age at the time of the filing of the petition. §742.18 (2) (a)-(g).

However, the court **shall not** set aside paternity where the legal father engaged in **any** of the following conduct after learning he was not the biological father of the child:

- married the mother as the reputed father of the child per § 742.091, and voluntarily assumed parental obligations and financial support;
- executed a sworn voluntary acknowledgement of paternity;
- consented to being named on the birth certificate;
- offered a written voluntary promise of support which became the basis of the obligation for child support;
- disregarded written notice from a state agency or court directing him to submit to scientific paternity testing; or
- signed a voluntary acknowledgment of paternity as provided in § 742.10(4).

§ 742.18 (3) (a)-(f).

If paternity was established by voluntary acknowledgment, then a legal father seeking to disestablish paternity must petition to disestablish pursuant to § 742.10(4) alleging and showing fraud, duress or material mistake of fact.

PRACTICE TIPS:

The Written Order. Family Law Form 12.951(b) "Order Disestablishing Paternity and/or Terminating Child Support Obligation" may be used as appropriate.

Legitimacy. An order setting aside paternity pursuant to Chapter 742 shall not affect the legitimacy of a child born during a lawful marriage. § 742.18(9).

Fraud. While §§ 742.18 and 742.10 do not permit legal fathers who execute voluntary acknowledgements of paternity with knowledge they were not the biological father to later have a cause of action for disestablishment of paternity, the law never intended that any person have parental rights over a child not their biological issue without adoption. See *In re C.A.F.*, 114 S.W. 3d 524, 530 (Tenn. App. 2003) (reversing trial court's order denying Department of Children and Family Service's request to rescind voluntary acknowledgment of paternity fraudulently signed by the child's mother and a man who they both knew was not the father of the child.) Pursuant to Florida law, voluntary acknowledgements may be challenged in court "on the basis of fraud, duress, or material mistake of fact." § 742.10(4). If this situation is present, the guardian ad litem should ask does the best interest of the child require an action to disestablish under § 742.10.

Knowing or willful false statements of paternity made by a male or the mother of a dependent child in conjunction with a petition for termination of parental rights under Chapter 39 or made when applying for public assistance may be punished as provided by law. §§ 39.804; 742.108.

MARITAL CHILDREN

Parentage of children born to a marriage or of children born to a mother and reputed father who marry is established by legal presumption. A child born to a marriage is a child of the marriage and the husband is the father of the child. Parentage is established in the husband of the mother to the exclusion of all others. Eldridge v. Eldridge, 153 Fla. 873 (1944); § 382.013(2)(a) (providing the husband is the presumed father and the legal father and his name is required to be recorded as the father of the child on the birth certificate within 5 days of the birth unless there is a court order providing otherwise); and § 742.091 (providing that if the mother and reputed father of a child born out of wedlock marry at any time after the birth, the child shall be deemed and held out as a child of the marriage).

Under the common-law no cause of action exists to compel a paternity determination or to establish parentage. G.F.C. v. S.G. & S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997). Paternity proceedings are purely statutory and must be strictly construed. *Id.*, Stella v. Garcia (In re Stella), 353 Ill. App. 3d 415, 818 N.E.2d 824, 288 Ill. Dec. 889 (Ill. 1st DCA 2004) & In re Marriage of Simmons, 355 Ill. App. 3d 942, 292 Ill. Dec. 47, 825 N.E.2d 303 (1st Dist. 2005), appeal denied, 216 Ill. 2d 687, 298 Ill. Dec. 377, 839 N.E.2d 1024 (2005) and appeal denied, 216 Ill. 2d 734, 298 Ill. Dec. 390, 839 N.E.2d 1037 (2005). In G.F.C., a putative father filed an action for paternity under Chapter 742, where the child was born while the husband and mother were living together. The Fifth District held no cause of action exists under Chapter 742 for a man to petition to establish his paternity to a child born to an intact marriage between the mother and another man because § 742.011 only provides a cause of action to establish paternity where paternity has not been

established by law or otherwise. *Id.* Paternity is established when a child is born to an intact marriage and the husband and wife recognize the child as theirs; the husband is the legal father of the child to the exclusion of all others. *Id.* See also Johnson v. Ruby, 771 So. 2d 1275 (Fla. 4th DCA 2000). Furthermore, the court in G.F.C. affirmed, “a scientific determination that a man other than legal father is the child’s biological father is irrelevant.” *Id.* at 1387.

A trial court hearing a petition to determine paternity filed by an alleged biological father must afford him a hearing on standing (L.J. v. A.S., 25 So. 3d 1284 (Fla. 2nd DCA 2010) & J.T.J. v. N.H. & E.R., 84 So. 3d 1176 (Fla. 4th DCA 2012)). However, so long as the husband and wife are married and they have no pending action for dissolution of marriage, trial courts are not authorized to engage in any qualitative analysis of whether the marriage is intact. See S.B. v. D.H., 736 So. 2d 766 (Fla. 2d DCA 1999), J.S. & C.L. v. S.M.M., 67 So. 3d 1231 (Fla. 2nd DCA 2011), & Pena v. Diaz, 125 So. 3d 356 (Fla. 5th DCA 2013). If a favorable rebuttal is possible, the Fifth District Court suggests a putative father trying to attack his biological child’s legitimacy and assume her legal father’s parental rights might file a petition to establish paternity pursuant to the Florida State Constitution’s due process clause. G.F.C. v. S.G. & S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997). This action must be brought prior to the termination of the legal father’s parental rights. See Shuler v. Guardian ad Litem Program, 17 So. 3d 333 (Fla. 5th DCA 2009); Dep’t. of Health and Rehab. Servs. v. Privette, 617 So. 2d 305 (Fla. 1993); G.F.C. v. S.G. & S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997); and Fernandez v. Fernandez, 857 So. 2d 997 (Fla. 5th DCA 2003).

ADOPTIONS FROM THE DEPENDENCY SYSTEM

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Adoptions are generally two stages: termination of parental rights and adoption of the child by the adoptive family. The final judgment of adoption creates a legal relationship between the child and adoptive parents. § 63.172.

APPLICABLE LAW

All adoptions are governed by Chapter 63, including adoptions that arise from Chapter 39 cases. Adoptions must comply with all ICPC laws and it is crucial that a child in the process of being adopted does not cross state lines without ICPC approval (See ICPC chapter). If the child is of Indian descent, then ICWA must also be followed carefully (See ICPC chapter). The Florida Administrative Code, specifically Chapter 65C-16, governs administrative aspects of adoption such as home studies and actions of the department and the CBC's in the adoption process.

The standard of proof for terminating parents pending adoption is clear and convincing evidence.

JURISDICTION

The Circuit Court has exclusive jurisdiction and the petition for adoption is typically filed in the Domestic Relations Division. However, a few circuits require that the petition be filed in the Juvenile Division. It is important to check with the clerk before filing as each Circuit is unique.

A petition for adoption is filed in the county where the judgment for termination of parental rights was granted or where the adoption entity is located. § 63.102(2).

CONFIDENTIALITY

Similar to Chapter 39 cases, Adoptions are confidential. § 63.162(1). Unlike a dependency case, the birth parents do NOT have access to any of the pleadings in an adoption case. Adoptions are sealed, typically within 30-60 days after the Final Judgment of Adoption is entered, and there is a motion and fee required to unseal the file.

The birth or previous name of the child may NOT be disclosed in the petition, notice of hearing, the final judgment of adoption, or the court docket. §§ 63.162(3), 63.102(1).

WHO CAN ADOPT?

In Florida, individuals with a positive home study can adopt. The home study must be conducted by a licensed child-placing agency, a child-caring agency registered under § 409.176, or a licensed professional or agency as described in §§ 61.20(2), 63.092(3). These individuals can be any race, disabled, unmarried, older or homosexual.

GRANDPARENTS

Grandparents are of course given priority of placement in the dependency system. If a child has lived with a grandparent for six months or more within the 24 months immediately following the preceding the filing of the petition for termination of parental rights pending adoption, the adoption entity must give the grandparents notice of the hearing on the petition to terminate parental rights pending adoption. § 63.0425(1).

CONSENT

Once a child has been permanently committed to the department by the Termination of Parental Rights Order, the department must consent to the adoption. § 39.812(1). The child must also consent if the child is twelve years old or older.

The department's consent can be waived by the court if the court makes a finding that the department is unreasonably withholding their consent and the petitioner has filed a favorable home study. B.Y. v. DCF, 887 So.2d. 1253 (Fla. 2004).

PUTATIVE FATHER REGISTRY

The Florida Office of Vital Statistics of the Department of Health maintains a putative father registry. § 63.054(1). To preserve the right to receive notice and consent to an adoption, an unmarried biological father must file a notarized claim of paternity with the Florida Putative Father Registry. This registry must be searched in every adoption before the court terminates parental rights. Upon a search, the Department of Health issues a Certificate of Diligent Search, which must be filed with the court. It is important to note that Chapter 39 does not require a search of the registry however Chapter 63 does. It is very important to search the registry post-TPR if for some reason it was not searched prior to TPR otherwise the adoption could be at risk for reversal. The form for searching the registry can be found here, http://www.floridahealth.gov/certificates/certificates/birth/Putative_Father/index.html.

TIMING

The adoption can finalize no sooner than 30 days after the date of the judgment terminating parental rights was entered and after the 90 day placement period has passed. § 63.102(1). Unless leave of the court is granted for good cause shown, the petition must be filed within 60 days after entry of the termination of parental rights. § 63.102(3).

Concurrent planning is very important with adoptions. While the average adoption does not finalize until 6-12 months after termination of parental rights, there is nothing preventing an adoption from finalizing much closer to the 30 day after termination of parental rights mark (assuming 90 day placement period has passed). Advocates must push for adoption caseworkers to complete paperwork in a timely manner.

THE ADOPTION PETITION

The adoption petition must only contain the name the child will have if the adoption is granted; it does not contain the birth name of the child other than within the original birth certificate that is filed as an exhibit to the petition. § 63.102(1).

The adoption petition must be signed and verified by the adoptive parent(s). The following attachments must be filed with the petition: 1) certified copy of the final judgment terminating parental rights; 2) a copy of the favorable preliminary home study; 3) a documentation that if the child was over 12 an interview occurred with the child; 4) a UCCJEA Affidavit; 5) the department's Family Social and Medical History Report; 6) a certified copy of the Diligent Search of the Putative Father Registry; 7) consents of the department; and 8) a final home study as conducted pursuant to § 63.125(1).

FINAL HEARING

The petitioner(s) and the child if over age twelve are required to attend the final hearing. F.S. 63.142(1). Typically all children attend the hearing, as well as extended family and friends. With the court's permission, the petitioner(s) may appear by phone with a notary to verify their identity. These proceedings are closed to the public and typically occur in chambers.

NEW BIRTH CERTIFICATE

A new birth certificate is issued by the state where the child was born subsequent to the adoption. This new birth certificate contains the names of the adoptive parents as if the child were born to them.

ADOPTION SUBSIDY

Children adopted from Florida's dependency system are eligible for subsidy. Payments are available for support and maintenance of the child under age 18. § 409.166(4)(b)-(4)(e). These children also receive Medicaid until turning eighteen, as well as the college tuition voucher for four years of college tuition to any state of Florida school. Subsidy also covers the legal expenses related to the adoption so there are not costs or fees due to the adoptive family.

There is also sometimes available a bonus to state employees adopting children. The amount of this bonus varies and is not always available but adopting families should inquire.

ADOPTION TAX CREDIT

The adoption tax credit is currently over \$13,000 and it generally increases each year, subject to the income limitations of the adoptive parents. The credit can be first taken in the year of the adoption finalization and the family has five years to use the credit. The adoption tax credit form can be found here, <https://www.irs.gov/pub/irs-pdf/f8839.pdf>, and directions for completing the form here, <https://www.irs.gov/pub/irs-pdf/i8839.pdf>. It is important to note that it is no longer an adoption refund as it has been in the past but only a credit.

All special needs adoptions, which in most circuits includes all dependency adoptions, qualify for the full amount of the credit unlike private adoptions where only actual expenses qualify.

ADOPTION INTERVENTION

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Chapter 63, Florida Statutes, governs adoptions. Section 63.082 provides a mechanism whereby parents whose children are subject to the jurisdiction of the dependency court may execute consents for adoptions and utilize private adoption proceedings. Its terms are narrow and must be strictly complied with. Pursuant to § 63.082(6)'s provisions, when an adoption entity seeks to intervene into a dependency case as a party in interest, the court must make a determination "that the prospective adoptive parents are properly qualified to adopt the minor child and that the adoption appears to be in the best interests of the minor child." Section 63.082(6)(d), Fla. Stat. (2015). The parent's choice for an adoptive placement is not determinative: the court must "consider" the factors enumerated in § 63.082(6)(e) to "determine" if the change of placement serves the best interests of the child. To understand the court's authority in these proceedings, we must look at the authority of the dependency court and the legislative intent associated with the adoption intervention statute.

The dependency court, standing *in loco parentis*, is responsible for exercising the states' *parens patriae* authority after children are removed from their parents.

When children are removed from their parent's care, custody and control and the child is placed under the jurisdiction of the circuit court pursuant to § 39.013, Florida Statutes (2015) the state is exercising its police power to protect its children under the common law doctrine of *parens patriae* codified by the legislature in Chapter 39, Florida Statutes. See *In the Interest of Ivey*, 319 So.2d 53, 58 (Fla. 1st DCA 1975); *Gibbs v. Titlelman*, 39 F.Supp. 38, 54 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974); *Fontain v. Ravenel*, 58 U.S. 369, 392-93 (1894)(Taney, J. concurring)(citations omitted). When a child is placed in the state's care the state "acts in the protective and provisional role of *in loco parentis*" for the child. See *Buckner v. Family Services of Central Florida*, 876 So.2d 1285, 1288 (Fla. 5th DCA 2004). In Florida's system, "[i]t is the dependency court which has been charged with protecting the rights and interests of dependent children." *Id.* at 1287.

The paramount concern of the child protection proceedings is the health, safety and welfare of the child. Section 39.001(1)(b)1, Fla. Stat. (2015). Once the child is removed from the home and the jurisdiction of the dependency court attaches, the parent's rights to unilaterally direct the care, custody and control of their child is diminished in order to accomplish this goal. Any other policy would allow abusive parents to undermine the court's ability to protect the child's safety, welfare and best interests while a determination of the dependency proceedings is pending. If parents believe this level of interference with their parental rights is not warranted, they are free to challenge the validity of the shelter order. *P.U. v. Dep't of Children and Families*, 24 So.3d 706 (Fla. 4th DCA 2015).

After a shelter order has been entered, it is the trial judge who has the ultimate responsibility to direct such matters including the appropriate placement for a child. "In addition to the State's statutory responsibilities, the courts also have specific statutory responsibilities for these children. The courts are charged with the duty of ensuring that the best interests of the children are advanced. This duty exists during the dependency proceedings, and continues through the adoption proceedings." *B.Y. v. Dep't of Children and Farms.*, 887 So. 2d 1253, 1256 (Fla. 2004)(internal citations omitted).

One of the limitations on the parent's rights while the dependency case is pending is that the parent loses the ability to make exclusive determinations that the parents routinely make for their children such as those involving the child's education, healthcare and placement. As stated above, once a shelter order has been entered by the court parents have a right to be heard regarding their directives for the child's needs, however, it is the trial judge who has the ultimate responsibility to make the final determination regarding such matters including the appropriate placement for a child until the dependency matter is resolved.

Among the many powers vested in dependency court judges pursuant to their statutory authority is the right to determine placement. The court may:

Require placement of the child either under the protective supervision of an authorized agent of the department in the home of one or both of the child's parents or in the home of a relative of the child or another adult approved by the court, or in the custody of the department. Protective supervision continues until the court terminates it or until the child reaches the age of 18, whichever date is first.

§ 39.521(1)(b)3, Fla. Stat. (2015).

The law related to shelter hearings reflects this policy in Rule 8.305(b)(6)(C), Florida Rules of Juvenile Procedure (2015). In adopting that rule, the Florida Supreme Court defined the right as one "to present placement alternatives" not determine the appropriate placement. *See, Id. (emphasis added)*.

Thus, a parent whose child is subject to dependency proceedings does not have an exclusive right to determine placement for their child. This is particularly true in adoption proceedings. Adoption did not exist at common law but is a purely statutory privilege. *Buckner v. Fam. Servs. Of Central Fla.*, 876 So. 2d 1285, 1288 (Fla. 1st DCA 2004)(citations omitted.) Therefore, there is no right to adopt or to have one's child adopted. *Id.* The act of adopting a child is a public act and unlike the formation of a natural family, is "wholly a creature of the State." *Id.* (citations omitted).

Section 63.082(6) provides the legislative vehicle for permitting private intervention into dependency proceedings for purposes of adoption when the child is under the jurisdiction of the dependency court.

Recognizing that termination of parental rights and subsequent adoption proceedings for children in the state's care are handled within the Chapter 39 proceedings, while adoptions of children voluntarily placed for adoption without state involvement are handled within an original Chapter 63 proceeding, the Legislature sought to create a method to allow adoption entities to intervene into the dependency proceedings to effectuate adoptions. Florida Staff Analysis, H.B. 835, 4/2/2003, Florida Staff Analysis, H.B. 835, 4/2/2003 at page 7. Accordingly, the Florida Legislature adopted a comprehensive scheme for handling adoption intervention proceedings when the child to be adopted was in the custody of the department. Ch. 2003-58, s. 15, Laws of Fla. (2003). However, there is nothing on the face of the statute or in the legislative intent to suggest that once a private adoption petition has been filed courts are to miraculously treat parent's decisions regarding the custody and control of their children as though a shelter of their child from their custody never occurred. Except as permitted in the statute, the dependency court's orders regarding custody take precedent over those entered pursuant to Chapter 63. *See S.E.R. v. J.R.*, 803 So.2d 861 (Fla. 4th DCA 2002).

These statutory changes specified in H.B. 835 embody the public policy of Florida, as expressed by the legislative intent contained within the bill and made law. These principles include the belief both that "[t]he

state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children,” and that “[a]doptive children have the right to permanence and stability in adoptive placements.” § 63.022(1)(a), Fla. Stat. (2003).

To meet this compelling interest, and to ensure the rights of the child are protected, the legislature further expressed its intent “that in every adoption, the best interest of the child should govern and be of foremost concern in the court’s determination...” § 63.011(2), Fla. Stat. (2003). Lastly, the legislature expressed its intent that there be “cooperation between private adoption entities and the department in matters relating to permanent placement options for children in the care of the department whose birth parents wish to participate in a private adoption plan with a qualified family.” § 63.011(5), Fla. Stat. (2003). The legislative intent remains the same today. See § 63.022, Fla. Stat. (2015).

At the same time, the provisions of what is now section 63.082(6) were adopted. See Ch. 2003-58, s. 15, Laws of Fla. (2003). Section 63.082(6) specifies the circumstances under which a private party may intervene in a dependency proceeding for purposes of adoption. The provisions of § 63.082(6), sets forth when a consent for adoption executed by a parent whose child is under the jurisdiction of the dependency court is valid, binding and enforceable, as well as the procedure to be used once a valid consent is executed and filed with the dependency court judge having jurisdiction. See § 63.082(6), Fla. Stat. (2015). The narrow exception carved out to allow for private adoptions of children in the custody of the department provides the statutory requirements for these type of proceedings.

As set forth above, adoption did not exist at common law but is purely a statutory privilege. Because any rights are statutorily created, it is a long established principle in Florida that the proceeding’s “validity, as well as the efficacy of any decree pursuant thereto, is dependent upon substantial compliance with the statutory requirements.” *McMillen v. Findley*, 135 So. 2d 873 (Fla. 3d DCA 1962). Accordingly, by the express language of the statute when a party seeks to intervene in dependency proceedings to adopt a child in the custody of the Department of Children and Families, the party may only do so in the manner permitted by § 63.082(6), which must be strictly complied with by both the parties and the trial court.

THE PROCEDURAL PROCESS FOR INTERVENING

Subsections 63.082(6)(a) through (c), Florida Statutes (2015), set forth the procedural process for intervening into a dependency case. Sections 63.082(1)-(5) provide the technical requirements for consent in all adoption proceedings in Florida. Based upon section 63.082(6)(a), “[i]f a parent executes a consent for placement of a minor with an adoption entity or qualified prospective adoptive parents and the minor child is in the custody of the department, but parental rights have not yet been terminated, the adoption consent is valid, binding, and enforceable by the court.” § 63.082(6)(a), Fla. Stat. (2015).

A WORD ABOUT CUSTODY

As currently written, § 63.082(6)(a) allows a parent whose child is under the jurisdiction of the dependency court and whose child is in the custody of the department to execute a consent for adoption if the parent’s rights have not yet been terminated. The term “custody” is not defined in a uniform manner by Florida’s trial courts. Proposed revisions to the statute contained within HB 673 substitute the phrase “under the supervision” or “otherwise subject to the jurisdiction of the dependency court” for custody in the statute. Should this statute become law, this conflict should be resolved.

Once the consent is executed, the adoption entity may move to intervene. § 63.082(6)(b), Fla. Stat. (2015). Along with the consents, the adoption entity must provide the court with a copy of a preliminary home study of the prospective adoptive parents and any other evidence of the suitability of the placement. *Id.* The home study will be deemed sufficient and no further home study needs to be performed by the department “unless the court has concerns regarding the qualifications of the home study provider, or concerns that the home study may not be adequate to determine the best interests of the child....” *Id.* Once the motion is filed, “the dependency court shall promptly grant a hearing to determine whether the adoption entity has filed the required documents to be permitted to intervene and whether a change of placement of the child is appropriate.” § 63.082(6)(c) Fla. Stat. (2015).

To determine whether the appropriate paperwork has been filed, in addition to looking at the technical requirements for execution of a consent, the court must analyze the sufficiency of the home study. Section 63.092(3) sets forth the criteria for an adoptive home study. That statute provides specific statutory criteria which must be included **at a minimum**. § 63.092(3), Fla. Stat. (2015)(*emphasis added*). Because the statutory factors are the minimum, additional information may be considered by the judge to determine if the home study is adequate. If the consents and the home study meet the statutory requirements, the motion to intervene should be granted and a hearing on whether a change of placement is appropriate should take place. § 63.082(6)(d), Fla. Stat. (2015). The court’s determination in the change of placement hearing is based on the best interests of the child, after consideration of the factors set forth in § 63.082(6)(e), Fla. Stat. (2015).

DETERMINING CHANGE OF PLACEMENT – APPLYING § 63.082(6)(E)

Subsection 63.802(6)(e) sets forth the test for determining whether to change placement. Subsection (e) provides:

In determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent, the court shall consider the rights of the parent to determine an appropriate placement for the child, the permanency offered, the child’s bonding with any potential adoptive home that the child has been residing in, and the importance of maintaining sibling relationships, if possible.

§ 63.082(e), Fla. Stat. (2015).

The legislative directive related to the child’s best interests in § 63.082(e), is consistent with the state’s public policy which is applicable to all dependent children: it is the court, not the unfit parent of a dependent child that makes the ultimate best interest determination. *P.K. v. Dep’t of Children & Fams.*, 927 So. 2d 131, 134 (Fla. 5th DCA 2006)(upholding trial court order rejecting adoption proposal by parent); *see also Hausmann ex rel. Doe v. L.M.*, 806 So. 2d 511, 514-515 (Fla. 4th DCA 2001) (“...where a parent has been found to be unfit, that parent abdicates his or her sole right to determine the best interests of a child...”).

By the plain language of the statute the legislature has provided for the distinction in the best interests considerations between children that are traveling through adoption proceedings when they have been removed from their parent’s custody by the state and those that have not. This scheme is consistent with this state’s policy for children that have been removed from their parent’s custody as explained by the First District Court of Appeal:

The question of who is a proper person to have the care and custody of such child is not one that can be directed by whim, fancy, or caprice of those who had the responsibility and right under God's, nature, and man's law to nurture, care for, and support their offspring, and who by their own making have forfeited that right and cast the responsibility upon others.

Pendarvis v. State, 104 So.2d 651, 652 (Fla. 1st DCA 1958).

There is no precedent under either the federal or state constitutions which supports the argument that parents have a fundamental right to unilaterally choose an adoptive placement when their child is subject to the dependency court's jurisdiction. Rather, the fundamental liberty interest recognized is a right to *parent* your child. *Santosky v. Kramer*, 455 U.S. 745 (1982), is often cited by adoption entities to establish a federal constitutional right to determine adoptive placement for children under the jurisdiction of the dependency court. However, *Santosky* does not stand for that proposition.

The *Santosky* Court established the evidentiary standard to be used for termination of parental rights (TPR), once TPR proceedings were initiated against a parent. The court held that even when biological parents have not been "model parents," they have a "fundamental liberty interest ... in the care, custody, and management of their child[ren]" and a "vital interest in preventing the irretrievable **destruction** of their family life." *Santosky* at 753. (*emphasis added*).

Santosky only addressed the procedural protections legal parents receive under the 14th Amendment of the United States Constitution in connection with a state's decision to permanently end "*their* family life." (*emphasis added*). There is no mention of any limitations to the states' police power *under the parens patriae* doctrine outside of the TPR proceedings themselves. This language in *Santosky* makes evident that the decision is irrelevant to the question of whether a parent has a right to choose a child's placement or custody for purposes of adoption.

As stated above, the fundamental right which the court set forth was the parent's interest in preventing the destruction of their family. The *Santosky* Court was following the Supreme Court's reasoning in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). In determining whether the parents in that case were entitled to court appointed counsel, the court emphasized the matter involved TPR proceedings: "Here the state sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation." *Id.* at 27.

Clearly there was no intent by the Supreme Court in either case to pass upon the states' authority to protect the safety, welfare and best interests of children under the *parens patriae* doctrine. There is no basis for extending the Court's ruling that you have a right to parent your child to a finding that you have a right to determine the adoptive placement – a traditionally state function - once the jurisdiction of the dependency court has attached pursuant to § 39.013. Regarding placement decisions, *Santosky* and *Lassiter* are more appropriately cited only for the proposition that parents have a right to due process and to be heard. See *J.B. v. Florida Department of Children and Families*, 768 So.2d 1060 (Fla. 2000). They cannot be stretched to the point of establishing an affirmative right of the parent to unilaterally direct placement of a child under dependency court jurisdiction.

Just as there is no right under the federal constitutions, there is no right under the Florida constitution. Relying on *Padgett v. Department of Health & Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991), and cases involving the rights of *fit* parents, adoption entities sometimes argue Florida recognizes the fundamental liberty interest of parents to the care, custody and control of their children. However,

Appellants fail to recognize that the *Padgett* court defined the parent's right as one of "maintaining parental ties." *Id.* at 570. (*emphasis added*). Appellants also fail to recognize that the right is limited. As the Florida Supreme Court also held in *Padgett*:

While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly **that the right is not absolute** but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail. *Id.* (*emphasis added*).

Article I, section 23 does not raise an impenetrable wall that blocks the legislature from acting to protect dependent children and to ensure the best interests of the child prevails. Article I, section 23 of the Florida Constitution provides:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Although more expansive than the corresponding federal provision, "this provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Florida Board of Bar Examiners v. Applicant*, 443 So.2d 71, 74 (Fla. 1983). The extent of an individual's privacy right "must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances." *Id.* "The right to privacy is not a wild card that, when played, suddenly renders any ordinance unconstitutional." *State v. J.P.*, 907 So.2d 1101, 1124 (Fla. 2004) (Cantero, J. dissenting). Rather, the issue to be determined by this court is whether the scope of the right to privacy includes the right asserted: the absolute right to choose an adoptive placement for the child. It does not.

Further, in attempt to convince the court it has no discretion to prevent a child from being moved to an adoptive placement selected by the parent, some adoption attorneys argue that of the factors the court must consider to determine if a change of placement is appropriate under § 63.082(6)(e), the rights of the parent to determine an appropriate placement for the child is the primary factor to be considered above all others. This argument assumes that § 63.082(6)(e) is a fixed scheme rather than a discretionary scheme. See, *Solving Injustice In Inheritance Laws Through Judicial Discretion: Common Sense Solutions From Common Law Tradition*, 2 Wash. U. Global Stud. L. Rev. 447, at 463. The distinction between a fixed scheme and a discretionary scheme can be found in the erosion of judicial discretion in the federal criminal sentencing guidelines. *U.S. v. Severson*, 3 F.3d. 1005 (7th Cir. 1993). The federal sentencing scheme now uses restrictive language to limit the court's discretion in 21 U.S.C. 841 and 846, requiring mandatory sentence periods. See, 21 U.S.C. 841, 846 ("...such person **shall be sentenced** to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both.")(emphasis added).

By inserting the words "shall be sentenced" the legislature intended to compel a fixed result/sentence if the defendant is convicted of the specified offense. Section 63.082(6)(e), has no such mandatory language. Conversely, § 63.082(6)(e) directs the court to "consider" the enumerated factors to "determine" if the change of placement serves the best interests of the child. By leaving the ultimate decision regarding the child's change of placement in adoption interventions to the court's determination after consideration of

all factors without restrictions it is apparent on the face of the statute the legislature intended to give the court broad discretion.

WHAT ABOUT THOSE DISTRICT COURT CASES DISCUSSING FUNDAMENTAL RIGHTS?

The Second District's case of *In re S.N.W.*, 912 So. 2d 368 (Fla. 2d DCA 2005), cited by many as acknowledging a constitutional right to determine placement in adoption intervention proceedings, involved a birth mother who was attempting to revoke her consent to her child's adoption. *Id.* at 371. The sole issue on appeal was whether an adoption entity was entitled to intervene in a dependency proceeding when the child was in the custody of the department. *Id.* at 370-71. The department had confessed error on this point. *Id.* at 370. In dicta found in a footnote, the court opined regarding legislative intent related to the best interests standard found in 63.082(6). *Id.* at 373 n. 4.

It is a well settled principal of jurisprudence that dicta in appellate opinions cannot serve as precedent. *Continental Assur. Co., v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986). Rather, dicta "is not binding on anyone for any purpose." *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir.2013). The Florida Supreme Court explained the concept of obiter dicta in *Myers v. Atlantic Coast Line R. Co.*, 112 So. 2d 263 (Fla. 1959). In *Myers*, the Supreme Court rendered an interpretation of its previous opinion in the same matter. While that previous opinion had discussed three points, the decision turned on only one of those points. *Id.* at 266. The Court described the discussion of the remaining two points as obiter dicta. *Id.*

As the decision in *S.N.W.* did not turn on an analysis of the parent's fundamental rights, it should be viewed as non-binding dicta. Similarly, the two subsequent appellate decisions based on this language did not address this issue and the language within those opinions should similarly be considered dicta. *See In re Adoption of K.A.G.*, 152 So.3d 1271, fn. 4 (Fla. 5th DCA 2014); *R.L. v. W.G.*, 147 So.3d 1054 (Fla. 5th DCA 2014).

GUARDIAN AD LITEM REPORT WRITING

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The drafting and filing of a guardian ad litem court report is directed by language in both Chapter 39 of the Florida Statutes and the Guardian ad Litem Program Standards. Chapter 39.702(2)(b) and § 39.807(2) directs the guardian ad litem to provide a written report to the court for the judicial review hearing, permanency review hearing, and termination of parental rights trial. At a **minimum**, the report must include a statement of the wishes of the child and recommendations of the guardian ad litem. Additionally, the report must be provided to the court and all parties at least 72 hours before the hearing. Because the statute requires the report to be filed within 72 hours, it is best practice for the assigned guardian ad litem to provide the report to the other advocacy team members no later than 10 days before the scheduled hearing.

In addition to adhering to the statutory requirement for a guardian ad litem report to be filed with the court for certain court hearings, the Guardian ad Litem Advocacy Team (program attorney, CAM, and guardian ad litem) should be guided by the Program Standard that addresses the guardian ad litem court report. Standard 2.B is entitled “Best Interest Advocacy.” The Standard requires that the guardian ad litem submit independent recommendations (to the court and all the parties on the case) that are based on all the information they gathered about the child and should be guided by the guardian ad litem best interest principle. All of the information gathered and their recommendations should be shared by the guardian ad litem with their CAM and the program attorney assigned to the case no later than 10 days prior to the scheduled hearing. The drafting of the report should be a collaborative team effort and the report should always focus on the child’s safety in his/her placement, the achievement of desired outcomes for the child, and how to expeditiously achieve the permanency goal for the child. It is best practice for both the guardian ad litem and their CAM to sign the court report, as this reflects the collaborative nature of the court report. Should a conflict within the team arise over the drafting of the report, it should be addressed as set forth in Program Standard 1.C.

PRACTICE TIP: What is the program attorney’s role in creating the guardian ad litem court report? The Guardian ad Litem Attorney reviews for legal sufficiency. Are the recommendations supported by reasonable facts? Have we included all the current relevant information concerning the child in the report? If it’s a new judge could she or he read our report and have a good picture of the child and what is going on with the child?

It is considered best practice to use the standardized court report template that includes all of the necessary components of the guardian ad litem report; however, additions may be made to the report should this serve the best interests of the child or they are necessary to address requests made by the local circuit court.

GUARDIAN AD LITEM STANDARDIZED REPORT INSTRUCTIONS

The purpose of the report is to provide more detailed information to the court and to emphasize the importance of achieving permanency.

It is recommended that you review the instructions prior to writing your report.

COURT CAPTION

The report should list the children in age order, with the oldest child listed first. On the right side of the page, insert the case number and your Judge's name. If the hearing will be conducted in front of the Magistrate, you will need to add the Magistrate's name below the Judge's name. The court caption information may already be completed in advance by your CAM.

SECTION 1

Date of hearing is self-explanatory.

TYPE OF HEARING

Insert the name of the hearing and if there are multiple types of hearings, list them all, divided by a back slash. Hearings requiring a report are: Permanency Hearing, Judicial Review and Disposition. From time to time you may prepare a report for another type of hearing. You may want to also use this report form after discussion with your CAM and/or attorney.

GUARDIAN AD LITEM

Insert your name.

CASE PLAN GOAL

This should be the goal that was previously ordered by the court, even if you anticipate a goal change. Goals are: Reunification, Adoption, Permanent Guardianship, Fit and Willing Relative or APPLA. You may have a concurrent goal also which should be noted here, example: Reunification/Adoption. Sometimes, Maintain and Strengthen is the goal. This is used when the children are placed with a parent but the case is not ready to close. It is used to indicate Reunification has occurred, it is not a separate goal.

LENGTH OF TIME CHILDREN IN OUT-OF-HOME CARE

Calculate in months.

NUMBER OF PLACEMENTS

This number is generally viewed in terms of caretakers (if the caretaker moves, do not count that as a change of placement).

While not considered a change of placement, information to explain short-term changes in the child's environment where the caretaker does not change but the "4 walls surrounding the child change" should be provided, if applicable. Some examples are: respite care, vacations with relatives, the caretaker moves, etc. Some of these short-term changes may indicate problems or adjustments that impact the child. The literature supports that all moves, even for positive reasons, have effects on children, particularly

traumatized children. A short sentence will suffice. If this is a significant issue for the children, a lengthier explanation should be provided in Children's Status section below.

SECTION 2: RECOMMENDATIONS

The titles in this section help the court focus on the nature of your recommendations. Each section must have your recommendation. For each recommendation, write a clear, simple sentence. Leading up to your recommendation, you will write a more detailed explanation, usually 3- 5 sentences which will be the basis of why a particular recommendation is being made. If you have different recommendations for the children in the case, the best approach is to write a separate paragraph for each child's recommendation.

PLACEMENT

This should include a description of the current type of placement and the guardian ad litem's opinion on whether a change of placement is recommended.

SIBLING VISITATION

The guardian ad litem needs to explain the current status of sibling visits if siblings are separated (example: the children visit 1 time per week at the park) and whether sibling visitation needs to be changed (i.e. increased, decreased, cease).

PARENTAL VISITATION

In this section the guardian ad litem should describe the type of visitations the parents have (example: both parents have unsupervised day visits); the quality and quantity of parental visits (examples: the children enjoy visiting with their mother, she brings them clothing, toys, food, the children greet her with open arms, the children are unresponsive to the mother, the mother does not appear to know how to interact with her child) and regarding quantity (example: the parents have only visited 2 times in the past 6 months.); And finally end with their recommendation regarding the parents type of visits (remain supervised, changed to unsupervised, etc.).

SERVICES NEEDED FOR THE CHILDREN

These should be as specific as possible and separately identified for each child. For example, the child needs tutoring after school or needs to be evaluated for a learning disorder is better than the child needs help with school.

PERMANENCY

This should include the current case plan goal and whether the guardian ad litem is in agreement with the goal, including whether concurrent planning has been implemented, if appropriate.

CHILDREN'S WISHES

While most guardians ad litem ascertain children's wishes in managing their case, the separate section highlights the importance of listening to our children particularly our older children. Specifically, this section should state what the child wants and whether or not she wishes to attend court. This information must come directly from the child. If the child is nonverbal or is unable to express herself or himself, a simple explanation should be inserted, for example, the child is not able to express herself due to her age. NOTE: Even a child that is only two years old can verbalize some things.

CHILDREN'S STATUS

This section should be tailored to the case and is your opportunity to share your information about the children. Some examples of things that would go in this section are: How the child is adjusting to his/her current placement; if the child has had multiple placements and the common reason for the breakdown of the placements; how the child is doing in services, for example, therapy or tutoring. Any side effects the child may be having on their medications; how the child is doing in school and or daycare/preschool; and whether the child is performing at grade level, are issues that should be addressed in this section.

OTHER (OPTIONAL)

This section is for information that may not fit neatly into any of the previous sections. Also, some of the cases have extremely long histories or unusual facts. If a paragraph written here would aid the court in understanding your position, please feel free to add material under this section. If you choose not to use this section, simply delete it from the report.

FAMILIES WITH DISABILITIES IN THE DEPENDENCY SYSTEM

AND THE AMERICANS WITH DISABILITIES ACT & SECTION 504 OF THE REHABILITATION ACT

MATTHEW W. DIETZ, ESQ., LITIGATION DIRECTOR, DISABILITY INDEPENDENCE GROUP, INC.

Children with disabilities have the same rights to benefits, privileges, services and programs as any other child would have. Often times, these children and their families are not provided the resources necessary to live and grow, both physically and psychologically, in a community-based setting. Federal Disability Rights law has mandatory requirements for both parents and/or children with disabilities so each has an equal opportunity to benefit from protections and services offered to others in the child welfare system.

WHO IS A PERSON WITH A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT OR THE REHABILITATION ACT?

A person with a disability is defined as a person:

- with a physical or mental impairment that substantially limits one or more major life activities or major bodily functions;
- who has a record of such impairment; or
- who is regarded as having such an impairment.

However, the definition of disability may be different for other programs or benefits under Federal or Florida law. For example, Chapter 393, Florida Statute, defines developmental disability to specific diagnosis for eligibility for benefits, such as home and community based waivers. Similarly, the definition of disability to be eligible for disability benefits is narrower than the definition under the ADA, as the ADA is intended to protect all persons with disabilities, not only those who need or are eligible for financial assistance. The definition of disability is broader under the ADA as the ADA guarantees equal protection and is not a waiver or benefit program. Title II of the ADA and Section 504 protect persons with disabilities, which can include children, parents, legal guardians, guardians ad litem, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents from discrimination.

WHAT ARE THE BASIC REQUIREMENTS OF THE ADA AND SECTION 504?

No person with a disability shall, by reason of such disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, the services, programs, or activities of state and local government entities or those who receive federal financial assistance. Discrimination in the context of persons with disabilities has two aspects. The first is that a person with a disability cannot be excluded or treated differently because of assumptions or stereotypes about the disability. For example, you cannot

assume that because a person has a developmental disability, a person cannot be a good parent or have a job. The second is that a person with a disability may need a reasonable modification in policies, practices and procedures in order to obtain an equal benefit or opportunity. For example, a reasonable modification would be when a parent with a developmental disability may need additional parenting classes, or even one-on-one parenting classes, to promote and ensure reunification of a child with his parent.

HOW DOES A PERSON RECEIVE A MODIFICATION AND WHAT PROGRAMS CAN BE MODIFIED?

Each agency that contracts with the department, as well as all governmental entities should have a single point of contact who is responsible for compliance with the Americans with Disabilities Act or Section 504. This single point of contact is called the ADA or Section 504 coordinator. The agency that is responsible for providing the program or service, or even the agency (or court) that required the program or service is responsible for ensuring equal access to all programs or services.

All programs and services provided by or ordered by any entity related to the child welfare system would be covered by the ADA or Section 504. This includes all services, including, investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, independent living services, VPK, reunification services, and family court proceedings.

In order to receive a modification, there must be a request by or on behalf of a person with a disability. The request must identify the disability and the disability related need for the accommodation. For example, if a child or a guardian is deaf, a sign language interpreter may be requested. Occasionally, additional programs or services may be required for a person with a disability to have the same level of opportunity as a person without a disability. This may include, but is in no way limited to the following:

- Additional mental health/behavioral services;
- Sign Language Interpreter services for investigations;
- Additional in-home or out-of-home respite services;
- Additional in-home or out of home health care services;
- Extension of case plans beyond 12-months;
- Assistance with transportation needs;
- Additional life skills and education classes for independent living and employment; and
- Specialized living options for foster youth aging out of the system

Further, as best practices, any additional services that may be required by a child with a disability should be brought before the attention of the court that presides over the dependency case. The court must be told that the child is a child with a disability, and that this is a request for a modification under the Americans with Disabilities Act, and provide any documentation that you may have which establishes the connection between the disability and the needed modification. In this way, the court can attempt to order the provision of services within the case plan of the child, or some other remedial measures can be taken.

WHAT ARE THE LIMITS OF PROVIDING A REASONABLE MODIFICATION OF A POLICY, PRACTICE OR PROCEDURE?

An entity can deny a reasonable modification when the entity can demonstrate that making the modification would ***fundamentally alter*** the nature of the service, program, or activity or in add ***undue financial or administrative burden***. The decision that compliance would result in such alteration or burden must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. However, even if there is a determination that an action would be a fundamental alteration or an undue burden, an entity still has an obligation to ensure that individuals with disabilities receive the benefits or services provided by the public entity to the greatest extent with a less burdensome alternative.

This is a high burden with regards to whether a program or service is available to a single person; however, when the failure to participate in a program effects a large number of persons, such as access to a particular waiver program, the state may take into account the range of services the entity provides others with disabilities, and the obligation to mete out those services equitably.

HOW DO YOU DETERMINE IF A RISK IS REAL OR IF IT IS BASED ON STEREOTYPES OR ASSUMPTIONS?

Whether a person has a disability or does not, there are always risks involved. The issue is whether such risks can be reduced by a reasonable accommodation, or whether, even with an accommodation, the risks may be too substantial. For example, all six year old children need supervision crossing a street, but a six year old who is blind may need assistance crossing a street that she is unfamiliar with, and may need someone to help her cross. On the other hand, a six year old may operate a motorized go-cart, but it may be too much of a risk to allow the six year old to drive in a motorized go-cart, even with a person providing directions over an earphone.

So, when determining whether an person's participation in a program or service poses too much of a risk (a direct threat to the health or safety of others), a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether there can be any reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services that will lessen the risk.

WHAT IS THE INTEGRATION MANDATE AND WHY IS THIS IMPORTANT?

The Americans with Disabilities Act is a civil rights law, and at its core is the right for persons with disabilities to be integrated in the community, and participate on an equal basis in all aspects of society. Pursuant to the Supreme Court's decision in Olmstead v. L.C., states are required to eliminate unnecessary segregation of persons with disabilities and to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs.

Relating to children with disabilities, this means that children with disabilities, like all other children, should be with his or her own family at the family home. This includes upholding the states policy to preserve and

strengthen the child's family ties whenever possible. Because of the specialized needs of children with disabilities, the state has the additional duty to ensure a family has the technological, medical, nursing, or educational services needed to ensure that the family ties are preserved.

For example, children under age 21 who are enrolled in Medicaid are eligible for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefits which provides comprehensive and preventive health care services for all children. Such Medicaid services are available to ensure that home health or nursing services and equipment can be provided for children with disabilities. Further, children with developmental disabilities will be eligible for services from the Agency for Persons with Disabilities, and those who are in a situation in which the caregiver is unable to give care are entitled to crisis eligibility for services. However, the services rendered should be requested so that the services provided are in a home or home-like environment, such as a family or relative home, medical foster home; and if that is not possible, a medical group home.

The integration mandate is not exclusive to housing and medical care, but the duty not to segregate persons with disabilities extends to all governmental programs and services unless such segregation is necessary for provision of the good or service.

HOW DO YOU COMPLAIN?

If a request is made for a modification or for equal treatment for a person with a disability and is denied in whole or in part, you have the right to make a complaint. Under the ADA and Section 504, an entity is responsible for its own action as well as through actions for entities with whom it has a contractual, licensing, or other arrangement. Each of the entities should have an ADA or Section 504 grievance mechanism. In order to get an effective resolution to the complaint, a grievance should be made through each of the entities.

For example, a court orders behavioral treatment for a deaf child, and the local agency refers the service to a behavioral treatment clinic that refuses to provide a sign interpreter after a request is made. These are the options to whom a complaint can be made to the ADA/504 coordinator:

- The specific entity that denied the accommodation – ask for the ADA coordinator for the specific agency and make the complaint, if unsuccessful, then proceed further;
- The ADA coordinator for the specific circuit in which the case is heard, and be sure to have a copy of the order for which the service is ordered. The court is responsible for ensuring that programs and services that a court may order is accessible by a person with a disability. Court ADA coordinators: http://www.flcourts.org/core/fileparse.php/243/urlt/ADA_directory.pdf;
- Court ADA policy: Rule 2.540, Rules of Judicial Administration;
- Complain to the referring agency's ADA/504 coordinator, and then Go to the lead Community Based Care agency for the region and complain to their ADA coordinator, and then file a complaint with the Regional Section 504/ADA coordinator for Department of Children and Families www.dcf.stts.fl.us/admin/servicedelivery/docs/HHS_CivilRightsOfficers-ADA-504Coordinators.pdf; and
- If a complaint does not resolve the situation, then you can file a complaint with the United States Department of Health and Human Services Office of Civil Rights at the following location: www.hhs.gov/ocr/.

There is also no requirement to do internal or administrative complaints, and there is always an option to go directly to Federal Court to file a complaint under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. If a complaint is made in Federal Court, the court can force the entity to provide the accommodation, and attorney's fees and costs would be available if you prevail. However, damages would be unavailable unless the entity knew that its actions were in violation of the law, and a key decision maker for the agency made the decision to deny the modification, service, or benefit. So, if you go through the above complaint procedure and the accommodation is clearly necessary and authorized by law, and it continues to be denied, then damages may be available under Section 504.

ADDITIONAL RESOURCES

- Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, found at http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html
- Florida Department of Children and Families, Office of Civil Rights – found at <http://www.myflfamilies.com/general-information/office-civil-rights>
- Olmstead: Community Integration for Everyone - <http://www.ada.gov/olmstead/>
- www.ADA.gov – Information and Technical Assistance on the Americans with Disabilities Act.
- Florida Agency for Persons with Disabilities, found at www.apdcares.org
 - <http://resourcedirectory.apd.myflorida.com/resourcedirectory/> APD offers this interactive directory of services and resources, searchable by zip code

EXTENDED FOSTER CARE

CAITLIN WILCOX, ESQ., CHILD'S BEST INTEREST ATTORNEY FLORIDA GUARDIAN AD LITEM PROGRAM

Extended Foster Care is the automatic extension of court jurisdiction that allows a young adult to remain in foster care until their 21st birthday (or 22nd birthday if they have a documented disability) if the young adult meets certain requirements. § 39.013(2). Young adults can leave and re-enter foster care at any time and as many times as they want between their 18th and 21st birthday. See also Independent Living chapter.

REQUIREMENTS

Pursuant to § 39.6251, a young adult is eligible for Extended Foster Care if the young adult is living in licensed foster care on his or her 18th birthday AND is:

- Enrolled in and attending high school;
- Working towards a GED or its equivalent;
- Enrolled in an institution that provides postsecondary or vocational education;
- Working at least 80 hours per month;
- Participating in another activity designed to promote or remove barriers to employment; or
- Unable to participate in any of the above activities due to a documented disability.

A young adult is considered to have been living in licensed care on the date of his or her 18th birthday if the young adult was in the legal custody of the department on the date of his or her 18th birthday. Fla. Admin. Code R. 65C-41.003(2).

Thus, if the young adult was in the legal custody of the department but living away from the licensed home, the young adult is considered to be "in licensed care" on his or her 18th birthday. Examples of this include, but are not limited to, a young adult in a medical or mental health facility, in a correctional facility (either juvenile or adult), or on runaway status, provided that the young adult was living in licensed care immediately prior to leaving the licensed facility and the legal custody of the young adult remained with the department.²

Rationale: Although under the physical control of another agency, the child was still in the legal custody of the state on their 18th birthday. This comports with current program eligibility standards. *Id.*

A young adult may change qualifying activities and remain in Extended Foster Care. A change in the qualifying activity does not require a new application, although it does require the designated staff to amend the young adult's transition plan and may require the designated staff to amend the case plan. Fla. Admin. Code R. 65C-41.003(6). Each young adult in Extended Foster Care must have both a transition plan and a

² (Independent Living Redesign Resource Guide Frequently Asked Questions (2014), available at www.centerforchildwelfare.org/kb/indliv/ILRedesignFAQ.pdf, last visited February 1, 2016.

case plan developed by a case manager in consultation with the young adult. Fla. Admin. Code R. 65C-41.004(2).

TRANSITION PLAN

The provisions of the transition plan form the basis of the young adult's case plan and delineate the young adult's short-term and long-term goals, the young adult's obligations, and the obligations of the foster parent, caregiver or group home, the case manager, and any other service provider. Fla. Admin. Code R. 65C-41.004(2)(a).

CASE PLAN

The young adult must have a case plan while in Extended Foster Care. The case plan must include:

- a description of the qualifying activity;
- a description of programs and services identified to assist the young adult in their chosen qualifying activity;
- the young adult's long-term goal for living independently; and
- a designation of the permanency goal.

The case plan shall be initialed within thirty (30) days of the young adult's 18th birthday or approval of entry into foster care. Fla. Admin. Code R. 65C-41.004(2)(b).

The permanency goal for a young adult who chooses to remain in care is the transition from licensed care to independent living. § 39.6251(3).

BENEFITS

The young adult will be able to live with foster parents, in a group home, or in another setting approved by the department such as an apartment or dorm with approved adults or another supervised independent environment. The young adult will also be given living expenses (i.e., food and transportation) and an allowance.³

When a young adult enters into Extended Foster Care, he or she will have monthly contact with a caseworker, continue to participate in at least one of the activities listed above (job, school work, etc.), and attend court review every six months. *Id.*

ALLOWANCE

A young adult who is participating in Extended Foster Care will receive an allowance so that he or she may practice budgeting. An allowance will be paid directly to each eligible young adult on a monthly basis.⁴

³ (*Independent Living Redesign, Common Sense and Compassion Independent Living Act, & The Role of the Guardian ad Litem* (2014), available at <http://guardianadlitem.org/wp-content/uploads/2014/12/ILRedsign-EFC-TrainingPPT-6.9.2014.ppt>, last visited Feb. 11, 2016.

⁴ *Our Kids of Miami-Dade/Monroe, Inc., Extended Foster Care: Most Frequently Asked Questions* (2013), available at <http://www.ourkids.us/info4us/Documents/01%20Most%20Frequently%20Asked%20Questions%2012-16.pdf>, last visited Feb. 11, 2016.

PRACTICE TIP: Best practice would also include the young adult filling out a Financial Management Needs Assessment Form. The form can be downloaded at <http://www.centerforchildwelfare.org/kb/indliv/efc-FinManagementNAssess.pdf>. This form will be used to help the CBC determine the young adult's allowance.

Young adults have the right to contest the decision setting their allowance at a specified amount. There are two ways in which to accomplish this: 1) use the alternative dispute resolution procedure (ADR), if one is available through their community-based care agency; and 2) request a hearing before the dependency judge.⁵

The amount of the young adult's allowance will become active on the effective date included in the *Notice of Right to Contest Determination of Amount of Allowance* or on the effective date included in the notice of the ADR decision unless the young adult asks for the court hearing before the effective date of allowance. *Id.*

HOUSING

The young adult must reside in a supervised living environment that is approved by the department or a community-based care lead agency. A young adult may continue to reside in the place where he or she turned 18 if the foster parent or group home agrees. A supervised living arrangement may include a licensed foster home, licensed group home, college dormitory, shared housing, apartment, or another housing arrangement if the arrangement is approved by the community-based care lead agency and is acceptable to the young adult, with the first choice being a licensed foster home. § 39.6251(4)(a).

The arrangement must be acceptable to the young adult, consistent with the safety, well-being and life skills needs of the young adult, and approved by the CBC. Twenty-four hour onsite supervision is not required; however, 24-hour crisis intervention and support must be available. § 39.6251(4)(b).

PARENTS OF YOUNG ADULTS IN EXTENDED FOSTER CARE

The parent of the young adult is not a party to the ongoing judicial proceedings once the young adult reaches the age of 18. The parent does not have the right to be notified of ongoing judicial review hearings, nor to attend such hearings, unless at the request of the young adult.

Parents cannot demand visitation with an adult. Visitation with parents is at the young adult's discretion. If it is in the young adult's Transition Plan or Case Plan, the case manager would have an obligation to assist the young adult in arranging visitation.⁶

⁵ *Notice of Right to Contest Determination of Amount of Allowance*, available at <http://www.centerforchildwelfare.org/kb/indliv/efc-allowancecontestnotice.pdf>, last visited Feb. 11, 2016.

⁶ (Independent Living Redesign Resource Guide Frequently Asked Questions (2014), available at www.centerforchildwelfare.org/kb/indliv/ILRedesignFAQ.pdf, last visited February 11, 2016

YOUNG ADULT'S PRIVACY RIGHTS

Upon turning 18, the right to privacy and the protections of confidentiality laws belong to the young adult. Only the young adult can provide his or her parents or third parties with information held by the case manager. The case manager and guardian ad litem are prohibited from sharing information with the parent or any other third party unless the young adult so authorizes. *Id.*

YOUNG ADULTS WITH A KNOWN OR SUSPECTED DISABILITY

Young adults with disabilities retain the same rights to self-determination as their nondisabled peers. Upon turning 18, they are presumed capacitated unless a court determines otherwise. Therefore, the young adult with a disability retains the right to choose whether or not to remain in foster care and to make all other decisions about their life. *Id.*

ROLE OF THE GUARDIAN AD LITEM

Once the youth turns eighteen (18) years of age, the law allows for the appointment of a guardian ad litem or the continuation of the appointment of a guardian ad litem for judicial review proceedings, if the young adult in Extended Foster Care approves and desires the continued involvement. Extended Foster Care is driven by the young adult. At any time, the young adult can ask to no longer have a court appointed guardian ad litem. § 39.6251(8).

The guardian ad litem duties remain the same. The guardian ad litem will maintain monthly contact with the young adult, and will still need to submit a written report for all Judicial Review and Permanency Hearings. The guardian ad litem should attend those hearings in support of the young adult.

The program attorney may file any pleadings throughout the period of Extended Foster Care even if the young adult is no longer in licensed care. *Id.*

DISCHARGE FROM EXTENDED FOSTER CARE PROGRAM - § 39.6251(5)

A young adult shall be discharged from the Extended Foster Care program when the young adult is no longer eligible to participate in the program.

Eligibility to remain in Extended Foster Care ends on the earliest of the following dates upon the young adult:

- (a) Reaching 21 years of age or, in the case of a young adult with a disability, reaching 22 years of age;
- (b) Leaving care to live in a permanent home consistent with his or her permanency plan; or
- (c) Knowingly and voluntarily withdrawing his or her consent to participate in Extended Care.

Withdrawal of consent to participate in Extended Care shall be verified by the court pursuant to § 39.701, unless the young adult refuses to participate in any further court proceeding.

APPLICATION TO RE-ENTER - § 39.6251(6)

A young adult may apply for readmission to Extended Foster Care at any time before his or her 21st birthday. Prior Discharge is not a barrier to readmission. Fla. Admin. Code R. 65C-41.002.

Application for readmission must be readily available to young adults. The applications for initial re-entry entitled "Application for Extended Foster Care" can be downloaded at <http://www.centerforchildwelfare.org/kb/indliv/efc-Application.pdf>. Fla. Admin. Code R. 65C-41.002(1).

To reenter Extended Foster Care, the young adult must complete the application for Readmission into Extended Care and provide proof of participating in a qualifying activity. Designated staff shall offer to assist the young adult with completing the application and/or obtaining the necessary documentation. Fla. Admin. Code R. 65C-41.002(2)

The case manager or designated staff has a maximum of 10 business days to make a decision on re-entry; the clock starts upon receipt of a completed application. Fla. Admin. Code R. 65C-41.002(5).

If the decision is to readmit the young adult into Extended Foster Care, the case manager shall request the Children's Legal Service attorney or legal representative of the department to petition the court for reinstatement of jurisdiction. The department shall then petition the court to reinstate jurisdiction over the young adult. *Id.*

If the decision is to deny the application for Extended Foster Care, the community-based care agency shall provide a "Notice of Denial for Readmission into Extended Foster Care," CF-FSP 5410, May 2015, and an "Application for Aftercare Services," CF-FSP 5391, May 2015. *Id.*

APPEALS - § 39.6251(9)

A young adult may appeal a determination of eligibility to remain in care that was made by the community-based care lead agency.

Before the case manager may discharge a young adult from extended foster care, other than when the young adult voluntarily leaves the program, the case manager must provide the young adult with a written notice that describes all reasons for the discharge and the form "Due Process Rights," CF/PI 175-74, August 2014. Fla. Admin. Code R. 65C-41.005(3).

The community-based care lead agency shall give timely and adequate written notice to the young adult regarding any decision to deny readmission or terminate participation in Extended Foster Care. The notice shall be provided on the form "Notice of Discharge from Extended Foster Care," CF-FSP 5376. Fla. Admin. Code R. 65C-41.006(2).

A "Request for Fair Hearing," CF-FSP 5380, August 2014, and "Due Process Rights," CF/PI 175-74, shall be attached to the notice. *Id.*

A young adult shall have thirty (30) calendar days from the date of receipt of the notice of discharge to request a fair hearing. If the young adult requests the fair hearing within ten (10) business days from the date of receipt of the Notice of Adverse Action Terminating Participation in Extended Foster Care, then the

young adult shall remain in Extended Foster Care pending the resolution of the fair hearing. Fla. Admin. Code R. 65C-41.006(3)(a).

A REQUEST FOR FAIR HEARING MAY BE MADE ORALLY OR IN WRITING

Written request may be prepared by the young adult in the form "Request for Fair Hearing," CF-FSP 5380. The request for fair hearing is made on the date the young adult sends a written request for fair hearing by U.S. Mail, e-mail, or hand-delivers the written request to the staff member of the agency who sent the notice of adverse action. An oral request for a fair hearing is made on the date the young adult speaks with his or her case manager or designated staff, the community-based care agency, or the Department of Children and Families, Office of Appellate Hearings in Tallahassee. Fla. Admin. Code R. 65C-41.006(3)(b). The decision of the department constitutes final agency action and is reviewable by the court as provided in § 120.68.

EXTENDED FOSTER CARE CHECKLIST (EFC)

Automatic extended court jurisdiction allows young adults to remain in foster care until their 21st birthday, or 22nd birthday if they have a documented disability

ELIGIBILITY

- In licensed foster care on their 18th birthday AND
 - Are working at least 80 hours per month OR
 - Are in high school / GED / College, etc. OR
 - Are participating in a job skills program OR
 - Are unable to participate in any of the above activities due to a disability.
- Young Adults Must:
 - Meet with caseworker once a month
 - Continue to participate in activities such as a job, school, job skills program
 - Attend Court reviews every six months
 - Live with foster parents, or in a group home, apartment, dorm or other supervised independent environment
 - Be given expenses (i.e. food, transportation) and allowance

POSTSECONDARY EDUCATION SERVICES AND SUPPORT (PESS) (18 – 23)

- Turned 18 while residing in licensed care and have spent a total of six months in licensed out-of-home care before turning 18; OR
- Adopted after the age of 16 from foster care or placed with a court-approved dependency guardian after spending at least 6 months in licensed care within the 12 months immediately preceding such placement or adoption;
- Have earned a standard high school diploma, or its equivalent; and
- Enrolled in college, a university or vocational school that is Florida Bright Futures eligible for at least 9 hours a semester.
 - If a disability of faced with another challenge or circumstance that would prevent full-time attendance, the student may still receive PESS with a part-time enrollment

LIVING ARRANGEMENTS

- If in EFC, then the young adult must live in an approved living arrangement
- If the young adult is not in EFC, the young adult may live in any place of his or her choosing
- For the young adult who is not in EFC, there is no prohibition against living with a parent or relative, nor does being married or adult-adopted disqualify a young adult from receiving PESS

AFTERCARE SERVICES (18-21)

Aftercare Services are available to young adults 18 years old but not yet 23 years old who are **not** enrolled in EFC or PESS

- Provides for Emergency Services:**
 - Housing
 - Electric bills
 - Transportation
 - Security deposits for rent or utilities
 - Furnishings
 - Household goods
 - Water

- Gas
- Sewer service
- Food

TRANSITION PLAN DEVELOPMENT

- ❑ Within 180 days of 17th birthday, (JR is still by day 90)
- ❑ In collaboration with department, CBC, caregiver, child/young adult, and anyone the child wishes to include
- ❑ Time, place, and location must be convenient for the child and the persons the child wants to include
- ❑ Meeting must be conducted in child's primary language
- ❑ **If child is leaving care upon age 18, must be approved by the court before the child leaves care**
- ❑ To be reviewed and updated as needed as long as child remains in care
- ❑ Must detail:
 - Housing
 - Health insurance
 - Education
 - Workforce support
 - Employment services
 - Accommodations for those with disabilities
 - Emergency contact person
 - Participation in case planning / JR reports
- ❑ Must consider:
 - Establishing/maintaining naturally occurring mentoring relationships and personal support services
- ❑ Must coordinate with:
 - IL services provided by the department/CBC in the Case Plan; TIEP transition plan

DEPARTMENT / CBC MUST PROVIDE YOUNG ADULT WITH (17 JUDICIAL REVIEW):

- ❑ Medicaid card and Information to apply
- ❑ Certified Copy of Birth certificate
- ❑ State identification card if no Driver's License
- ❑ Social Security Card
- ❑ Information on social security insurance benefits for eligible child
- ❑ Master Trust Accounting and information on accessing the funds held in trust
- ❑ Information on eligibility and applying for RTI
- ❑ Bank account or identification to open bank account
- ❑ Banking skills training
- ❑ Information on how to apply for public assistance
- ❑ Clear understanding of where will be living, what educational program will be enrolled in and how expenses will be paid at age 18
- ❑ Information on ability to remain in care
- ❑ A letter stating the dates that the child has been under court jurisdiction
- ❑ A letter stating child is in compliance with financial aid documentation requirements
- ❑ Educational records
- ❑ Health and mental health records
- ❑ Process for accessing his or her case file
- ❑ Encouragement to attend JRs

JUDICIAL REVIEW & PERMANENCY REVIEW

17 Judicial Review

- Ensure Transition Plan is complete and above is complete
- Guardian Advocate if applicable

18+ Judicial Review

- Every 6 months - can be more often if requested
- Case plan goals progress
- Independent living and Transition Plan progress
- Appropriate services are being provided
- Court may order additional services

PERMANENCY REVIEW

- At least yearly
- Make sure young adult understands
 - Permanency Plan; Case Plan; Individual Education Plan

CLOSING THE CASE

Case Stays Open Unless Court Finds Young Adult:

- Waived their right to attend the hearing (in writing) after being informed of their right to attend;
- Understands all that is available to them before age 21 and has signed a document stating they have been informed; or
- The young adult has voluntarily left the program, has not signed the document, and is unwilling to participate in any further court proceeding.

DEPENDENCY DELINQUENCY CROSSOVER

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“Dependency – Delinquency Crossover Child” refers to a child who is involved with both the delinquency and dependency courts. Many of the issues youth have in dependency and delinquency are the same. An understanding of the delinquency *and* dependency systems work is key to helping children involved in both courts. This chapter provides a very brief overview of the detention system, and associated mental health, educational, and substance abuse issues, as well as special issues for girls involved in the delinquency system.

“Research has shown that victims of physical abuse/neglect are at an increased risk of becoming crossover children and engaging in delinquent acts. In 1995, researchers found that between 9% and 29% of dependency children crossed over into delinquency court. A more recent study found that the delinquency rate for children previously abused or neglected is 47% higher than for those with no such history. Crossover children typically cross into the delinquency court for the first time around 14 years of age, although delinquent or disruptive behavior can begin as early as 7 years of age.”⁷

PROCESS OF DETERMINING DETENTION

While adults are *arrested* for crimes they commit, youth are *taken into custody*. Children under the age of 18 who have been taken into custody are first sent to juvenile court.

- Child evaluated and questioned regarding his life, family and peers as well as his involvement in the charges. *In-take information is inadmissible in court pre-adjudication.*
- A Department of Juvenile Justice (DJJ) probation officer conducts a detention risk assessment to determine whether the child can be legally detained before the first court hearing.
- The DJJ uses a “score” to determine whether the juvenile may be released or will be detained.
- A detained juvenile is not entitled to bond, but will appear before a judge for a detention hearing within 24 hours. The judge reviews the detention risk assessment for accuracy. The judge is not obligated to follow the original DJJ recommendation.

⁷ Office of the State Court Administrator, Florida’s Juvenile Delinquency Benchbook 2015, Florida Courts, *available at: <http://flcourts.org/core/fileparse.php/260/urlt/DelinquencyBenchbook091410.pdf>*, last visited February 5, 2016.

THREE OPTIONS FOR NON-JUDICIAL HANDLING

1. Delinquency Pretrial Substance Abuse Education and Treatment
2. Pretrial Diversion
 - This is an option if it is the first or second time taken into custody and the charge is relatively minor and/or non-violent.
 - Diversion involves a contract in which the State agrees not to prosecute the child if the child agrees to meet certain conditions.
 - If the child fails to complete the diversion program requirements, the child can be brought back to court for further prosecution of the charge.
3. Case Closed (Petition Never Filed).

DETENTION HEARING

- If the child is detained, the child will be taken before a judge within 24 hours for a detention hearing.
- The judge determines **probable cause** and **appoints counsel**.
- If the judge determines that the child should *remain* detained, the judge has three levels of detention security and supervision available: home detention, non-secure detention, or secure detention.
- Pre-trial detention cannot exceed 21 days without a hearing or a waiver of the time period.

HOME DETENTION

- Home detention is similar to “house arrest” in the adult system.
- A youth can be placed in their home, the home of a responsible friend or relative, a **dependency shelter or foster home setting**.
- The judge *may* require electronic monitoring.
- Child may only leave house to attend school and work.

SECURE DETENTION

- Secure detention is a lock-up facility that is the juvenile justice system’s equivalent of adult jail.
- This is an appropriate placement for children assessed to be a **risk to public safety**.

NON-SECURE DETENTION

- Non-secure detention is an alternative with a home-like setting.
- The judge may require the youth to wear an electronic monitoring device.
- The provider of the non-secure detention is responsible for ensuring that the youth receives adequate supervision and attends school, court and scheduled appointments.

TRANSFER OF A CHILD TO ADULT COURT

The prosecutor may seek to have a child transferred to adult court. There are three ways to do this:

- **Indictment.** The State can seek a grand jury indictment of a juvenile of any age. A child can only be indicted for an offense punishable by life in prison.
- **Waiver.** A waiver motion is a request made by the prosecutor asking the juvenile court judge to transfer a child at least 14 years old to adult court. The judge conducts a hearing and reviews the child's history, the charge and potential for rehabilitation, then either grants or denies the prosecutor's request.
- **Direct File.** The prosecutor typically announces the State's intent to "direct file" the child into adult court at the detention hearing. The case is reset for the State to report on its direct file decision. If the child is detained, the child must be direct filed or released by the 21st day if there was not a waiver of the 21 days.
 - There are **three types of "direct file" actions:**
 - *Mandatory direct files* stem from a state law requiring that for certain crimes, a child 16 years and older be tried as an adult.
 - *Discretionary direct-file law* allows the prosecutor to file charges for certain crimes against a child 14 years or older in adult court.
 - If a child is found guilty or pleads guilty in adult court and is sentenced as an adult, that child is forever considered an adult for future violations of state law.

ARRAIGNMENT

The arraignment is a hearing at which the judge informs the child of the formal charges in the delinquency petition and, if the child qualifies, appoints the public defender.

GUILTY OR NO CONTEST PLEAS

- At the arraignment, the child typically enters a plea of not guilty and the case is set for an adjudicatory hearing (trial).
- The arraignment for a detained child must be held within 48 hours following the filing of a delinquency petition.
- In nearly 98% of juvenile cases, there is no trial. Cases are disposed of by the prosecutor not filing charges, the case being dismissed or the client entering a guilty or no contest plea or completing a diversion program.

Possible consequences in the community of a guilty or no contest plea could include: suspension from school; registration as a sexual offender; unable to live with or visit someone in Section 8 (HUD subsidized) housing; may have license suspended in certain circumstances; may not be able to serve in the military; cannot possess a firearm until 24 years old (applies only to felonies); and child may be required to submit to DNA sample.

Confidentiality. With a few exceptions, all information obtained in a delinquency proceeding is confidential, so long as the information was obtained in the discharge of an official duty by any judge, employee of the court, authorized agent of DJJ, the Parole Commission, the Department of Corrections, the juvenile justice circuit boards, law enforcement officer, licensed professional or licensed community agency representative who is participating in the assessment or treatment of a juvenile. §985.04(1). It is critical that information gathered during the dependency case is not used in the delinquency court as evidence against the youth.

TRIAL (ADJUDICATORY HEARING)

The Adjudicatory Hearing is the fact finding (trial) phase of a juvenile case in which a judge receives and weighs evidence before deciding whether a delinquency or status offense has been proven beyond a reasonable doubt. Juveniles do not have the right to a jury trial in juvenile court. The judge decides whether the child is guilty beyond a reasonable doubt. A juvenile may be held 21 days prior to his adjudicatory hearing and up to 15 days following an order of adjudication.

SENTENCING (DISPOSITION)

The judge generally orders the DJJ to prepare a predisposition report (PDR), which includes information about the family, school, education, psychological and delinquent history of the child and recommendations for the judge to consider at disposition. The Disposition Hearing is the hearing in a juvenile case (like a sentencing hearing in criminal court) at which the court receives the predisposition report containing information and recommendations to help determine the appropriate sanction. These sanctions can include probation, commitment to the custody of the state's DJJ, or community-based sanctions.

- The judge in juvenile court cannot sentence a child to serve time in adult jail or a detention center at disposition of a case, but a child can be sentenced to a detention center for contempt (Order to Show Cause).
- The judge focuses on the child's needs and strengths and combines treatment with discipline and can:
 - Place the child on probation
 - Set a curfew
 - Require repayment to victims
 - Require community service hours
 - Commit the child to a commitment program
 - Send the child to mental health and drug treatment programs
 - Order the child to be held after disposition while awaiting placement in a residential treatment program
- If ordered to a commitment program, juveniles can be placed in either:
 - non-residential (daytime only) and/or
 - residential (overnight programs) programs
- Child can be moved in between programs which offer both education and treatment services

SEALING AND EXPUNGING ARREST INFORMATION

Sealing a criminal record involves making a person's criminal history inaccessible to the general public. Expunging a record involves the court ordered physical destruction or obliteration of a criminal history record or a portion of that record. For more detailed information go to http://www.pdmiami.com/FAQs_Seal_and_Expunge.pdf

APPEALS

There is no right to appeal a plea of guilty or no contest, except when the judge allows an attorney to reserve the right to appeal a particular point of law. A juvenile who is convicted at trial and wants to appeal the conviction must file a notice of appeal within 30 days of being sentenced and must advise the appellate court of the exact errors in the trial. It is possible that the client may serve the entire sentence during the appellate process.

To learn more, please review The Office of the State Court Administrator, Florida's Juvenile Delinquency Benchbook 2015, Florida Courts, <http://flcourts.org/core/fileparse.php/260/urlt/DelinquencyBenchbook091410.pdf>

EDUCATIONAL ISSUES AFFECTING CROSSOVER YOUTH

Youth in out of home care perform worse than youth in the general population on a number of academic achievement measures and children in the juvenile justice system have even greater educational challenges. These youth are more likely to be held back a grade; be diagnosed with learning disabilities; have school disciplinary problems; have higher rates of tardiness and absences; be suspended from school; and be expelled from school.

EDUCATIONAL STABILITY

There is often a lack of continuity due to placement changes that result in a change in schools. Some studies suggest that children lose as much as six month's school progress with each new placement. Changes of placement can also prevent or interrupt the provision of special education services. Florida Statute § 39.0016(2) provides that there must be interagency agreements to provide for continuing the enrollment at the same school if possible. The School Board, the Department of Education, and the department are also charged with assisting with transportation to maintain stability.

Many Florida counties require the department to seek home placements within the child's school district.

PRACTICE TIP: The guardian ad litem can be an effective advocate for insisting on school stability when a child is changing placements.

ATTENDANCE

Excessive absences can be a serious problem for crossover children. Many Florida counties require the department to minimize appointments for youth during the school day.

PRACTICE TIP: The guardian ad litem can assist with ensuring that the department and DJJ staff are aware of the child's school requirements and hours in hopes of minimizing absences

CHILDREN WITH DISABILITIES

Youth who are suspected of having a disability are evaluated and if necessary, provided with appropriate educational services. The school must provide the child with an individualized student intervention or an Individual Education Plan (IEP) when a determination has been made through legally appropriate criteria

that intervention services are required. The IEP must include strategies to enable the child to maximize the attainment of education goals. § 39.0016 (4)(b)(4).

Crossover youth are entitled to current and accurate IEP's and the guardian ad litem can be an incredible advocate in this arena.

EDUCATIONAL SURROGATES

Crossover youth should have at least one significant adult involved in their education and encouraging educational pursuits.

Florida Statute § 39.0016 (3)(b)1 requires that a surrogate parent be appointed as soon as the youth is determined to be dependent and without a parent to advocate for the youth. The surrogate must be appointed by the school district without regard to where the child is placed so that one surrogate parent can follow the education of the youth. The district school superintendent must first consider the child's guardian ad litem when appointing a surrogate parent. § 39.0016 (3)(b)3.

PRACTICE TIP: Guardians ad litem can serve as the child's educational surrogate. See www.GuardianadLitem.org for more information.

MENTAL HEALTH ISSUES AFFECTING CROSSOVER YOUTH

CHILDREN EXPOSED TO TRAUMATIC EVENTS ARE AT HIGHER RISK FOR MENTAL HEALTH CONDITIONS.

- 34% in the child welfare system and 28% in the juvenile justice system had experienced four or more types of traumatic events.
- 86% in delinquency and 93% in dependency had been exposed to a recurring traumatic event before entering services.
- High levels of difficulty in school and in forming relationships.
- Higher rates of depression and PTSD are reported over children not involved in one of these systems.
- Some disorders have predominately **biological** or **neurological** basis; others are related to **life experiences** and **trauma** or **communication difficulties**.

CROSSOVER CHILDREN/YOUTH ARE MORE LIKELY TO HAVE BEEN EXPOSED TO POTENTIALLY TRAUMATIC EVENTS SUCH AS:

- Witnessing or being subjected to physical or sexual abuse
- Bullying
- Violence in home or in community
- Loss of a loved one
- Being a refugee
- Life-threatening injury or illness

PRACTICE TIP: If there is a delay in service referral or initiation, make sure to notify the advocacy team.

DELINQUENT YOUTH ARE MORE LIKELY TO HAVE BEEN EXPOSED TO:

- Multiple types of traumatic events;
- Multiple occurrences of a potentially traumatic event; and
- Repeated occurrences of a potentially traumatic event.

COMMUNITY VS. COMMITMENT PROGRAMS

- Youth who are imprisoned have higher recidivism rates than youth who stay in the community.
- Community programs outside criminal and juvenile justice systems have shown an ability to reduce recidivism up to 22%.
- Multi-systematic therapy and functional family therapy have been shown to produce \$13 in benefit to every dollar spent

PRACTICE TIP: Make sure to attend the multidisciplinary team staffing and advocate for the least restrictive placement appropriate.

CHILDREN SERVED IN COMMUNITY OUTPATIENT PROGRAMS:

- Improved on measures in emotional and behavioral symptoms and strengths within 1 year of entering services at a rate of 33% of those in dependency and 40% in delinquency.
- After 6 months, academic and behavior problems decreased significantly, and delinquent youth had fewer contacts with law enforcement and substance use and dependent children showed fewer difficulties in relationship building.
- During first 3 months of treatment, there was a significant reduction in trauma symptoms.

PRACTICE TIP: Work with DJJ to make sure any commitment program recommended has the appropriate mental health services. Ask stakeholders to discuss whether dependency community mental health services or residential treatment with probation is appropriate.

TRAUMA FOCUSED THERAPY

Therapy that is trauma-focused has been shown successful in mental health treatment for this population. The Substance Abuse and Mental Health Services Administration (SAMHSA) trains juvenile justice and child welfare professionals in trauma-informed perspectives and how to deliver trauma-focused, evidence – based practices. Trauma Focused Therapy includes:

- Trauma-Focused Cognitive Behavioral Therapy
- Attachment Therapy
- Self-Regulation Therapy
- Child-Parent Psychotherapy
- Structured Psychotherapy for Adolescents Responding to Chronic Stress.

See www.samhsa.gov/children for information on these therapies.

WHAT CAN A GUARDIAN AD LITEM DO?

Be alert for symptoms of mental illness which may include the following:

- Social Withdrawal
- Depression
- Thought Disorders
- Inability to express appropriate emotion
- Behavior changes
- Hyperactivity
- Sluggishness
- Deterioration in hygiene
- Noticeable, rapid weight loss or gain
- Drug or alcohol abuse
- Forgetfulness
- Staring or strange posturing

PRACTICE TIP: Discuss with the Guardian ad Litem Advocacy Team whether special considerations implicated by the offense the child/youth is accused of (for example: a child-on-child sexual offense) indicates you should seek appointment of an attorney ad litem (AAL) for the child. Remember, discussions with a guardian ad litem are not privileged. Guardian ad litem records have protection from public records inquiry and have confidentiality protections, but like all records, could be subject to a judicial order compelling production. See Access to Records chapter

PRACTICE TIP: Ensure the youth has been evaluated for mental health needs. Have services begun? What can be done to facilitate quick referrals and continuing care? Follow up if necessary. Ensure that mental health and substance abuse evaluations are complete and recommendations followed; and that services remain consistent through delinquency into dependency.

SUBSTANCE ABUSE

- Youth from substance-abusing families frequently have serious emotional and behavioral problems, including a tendency to choose risky behavior.
- Substance abuse is a factor in at least three quarters of all foster care placements nationwide. Studies indicate high rates of lifetime substance use and substance use disorders for youth in the foster care system.
- Youth in foster care had higher rates of use of any illicit drug than youths who have never been in foster care (33.6 vs. 21.7 percent).
- Youths aged 12 to 17, in need of substance abuse treatment, are more likely to have received treatment if they had been in foster care.

17 YEAR OLDS IN FOSTER CARE:

- 45% of these youth reported using alcohol or illicit drugs within six months of being surveyed;

- 49% had tried drugs sometime during their lifetime and 35% met criteria for a substance use disorder.
- Having a diagnosis of Conduct Disorder and/or living in an independent living situation significantly increased the likelihood of current and lifetime substance use and disorder.
- A diagnosis of Post-Traumatic Stress Disorder also predicted increased likelihood of polysubstance use and substance abuse disorder.

DUAL DIAGNOSIS – SUBSTANCE ABUSE AND MENTAL HEALTH

The diagnosis of Conduct Disorder increases significantly with the occurrence of substance abuse.

- The number of symptoms for Conduct Disorder, anxiety, and depression increases with substance abuse.
- With polysubstance abuse the probability of having more than one of the other psychiatric diagnoses is above 50%.

PRACTICE TIP: Dual diagnosis residential care centers are available as dependency placements in Florida. May need a qualified assessment recommending placement.

RISK FACTORS

Risk factors that significantly increase the likelihood of dependent youth becoming delinquency wards after arrest include:

- having a history of running away;
- being detained at a juvenile detention center after arrest; and
- having a substance abuse problem.

Of youth committed to a delinquency facility:

- 17 percent had no indication of a problem;
- 28 percent of youth had a mental health problem without mention of a substance abuse problem;
- 17 percent had a substance abuse problem without mention of a mental health problem; and
- 38 percent were dually diagnosed.

PRACTICE TIP: Work to promote normalcy; connect youth to family members; connect youth to a supportive adult; and advocate for mentoring services.

GIRLS IN THE JUVENILE JUSTICE SYSTEM

GIRLS ARE THE FASTEST GROWING SEGMENT OF THE JUVENILE JUSTICE POPULATION

Girls account for:

- 22% of juvenile arrests for aggravated assault and 30% of simple assaults.
- 36% of arrests for larceny-theft, mostly shoplifting.
- 59% of all juveniles arrested for running away from home.
- 30% of curfew arrests.

- The increase in the number of drug abuse violation arrests between 1990 and 1999 was greater for female juveniles (190%) than for male juveniles (124%).

The types of offenses for which girls are arrested and incarcerated are typically less serious than boys.

- Girls are disproportionately charged with status offenses (running away, truancy).
- Girls enter the system at younger ages than boys.
- Almost half (42%) of girls who are incarcerated are 15 or younger.
- 78% of incarcerated girls have a history of emotional, physical, and sexual abuse (more than boys).
- Girls are more likely than boys to be sexually victimized while in a facility.
- Adolescent girls have different health needs than boys, including gynecological exams, and in some cases, pregnancy-related healthcare.
- Girls in the juvenile justice system face a substantially higher risk for reproductive health problems compared to girls outside of the system.

PREGNANCY AND CHILDREN

Estimates are that 10% of incarcerated girls are pregnant and that 30% already have children when they enter the juvenile justice system. Minor parent and child shall reside together unless the younger child's safety is "at a substantial risk" or there is no facility to house both.

PRACTICE TIP: Ensure that the young mother gets assistance in prenatal care; daycare; public benefits; and appropriate housing.

SEXUAL ABUSE

- Girls in the system may be three times more likely than boys to have been sexually abused.
- Abuse has been found to be a stronger predictor of offending behavior for females than for males.
- 5% of females reported being the victim of sexual assault while in custody. Most of those reporting sexual assault had been victimized multiple times.
- The impact of abuse inside institutions, coupled with past life experiences puts girls at great risk for self-harming and high-risk behaviors.

PRACTICE TIP: Find out if there are services needed to address possible sexual abuse. Does the child have any concerns regarding safety in detention or at home? If the child has run away – ask why and explore other options.

GIRLS AND THEIR MENTAL HEALTH NEEDS

- Some studies have shown that as many as 3 in 4 girls who are detained have a diagnosed mental health disorder.
- Approximately 70% have been exposed to a traumatic experience.
- Girls have higher rates for post-traumatic stress disorder; rates of suicide attempts and self-harming behavior are higher than those for boys.

GIRLS AND SUBSTANCE ABUSE/ADDICTION

- 46% of delinquent girls have substance abuse/addiction issues.

PRACTICE TIP: Has the youth been evaluated for addiction/substance abuse? Have services begun? What can be done to facilitate quick referrals and continuing care? Is the youth living with a substance abuser? If so, are there any other options?

CHALLENGES FACING GIRLS IN THE JUVENILE JUSTICE SYSTEM

- Because of the system's historical focus on male offenders, gender bias has been a long-term problem within the juvenile justice system.
- States have designed facilities to meet the needs of boys and, as a result, such facilities are often less equipped to treat female juvenile offenders.
- There is a lack of adequate training on how to work with female juveniles for those in the juvenile justice system.
- An American Bar Report found that the practice of charging girls with a delinquent offense for violation of a court order is applied disproportionately to girls.
- Although girls' rates of recidivism are lower than those of boys, the use of contempt proceedings and probation and parole violations make it more likely that, without committing a crime, girls will return to detention or a residential commitment program.
- Girls pick up more charges inside institutions that are ill equipped to meet their needs and thus, are "fast tracked" deeper into the system.
- The level of resources allocated for gender-specific services is significantly less than the proportion of girls in the system.

PRACTICE TIP: Ask if any gender specific programs are available.

PROTECTIVE FACTORS

Presence of a Caring Adult. Researchers have found that support from a caring adult can serve as a protective factor for adolescents, decreasing the likelihood that they will engage in delinquent behaviors.

- Adolescents are less likely to engage in delinquent behaviors if they have adults in their lives who are aware of their daily activities and associations.
- A caring adult can come from adults outside a child's family.

PRACTICE TIPS: Help to find a Mentoring Program; ask the child who they are connected with – who is a positive influence, such as a teacher, coach or family member; and encourage child to work with probation officer and case worker as these professionals can be great advocates for youth.

School Connectedness and Success. School connectedness appears to be especially important to adolescents who experience adversity in their homes because school may be one of few contexts where the adolescents' achievements are recognized and celebrated.

PRACTICE TIPS. Advocate for the same school – minimize attendance at different schools through placement in same school district; investigate tutoring programs; support normalcy as much as

feasible; seek out a PACE school (all-girls school); be creative; don't be afraid to seek out new solutions!

Spiritual Life. The National Study of Youth and Religion found religious faith was important in the lives of many teens in the United States. Recent literature documents that religion among U.S. adolescents is positively related to participation in constructive youth activities, and that those who participate in religious activities seem to be less likely to engage in many delinquent and risk behaviors.

CROSSOVER YOUTH CHECKLIST

INITIAL HEARING

- Youth
- Judge (Assigned To Family If Possible)
- Parent Or Legal Custodian
- Child's Caseworker
- Youth's Caretaker
- Youth's Counsel
- DJJ Representative
- Prosecuting Attorney
- Interpreter
- GAL Volunteer

Considerations

- Who is child currently living with?
- Who is child's Legal Custodian?
- Parent/Legal Custodian present? Why or why not?
 - What is being done to ensure parent/guardian presence at next hearing?
- Names and phone numbers of close relatives; possible placements; temporary placement.
- Legal counsel appointed? GAL appointed?
- Youth competent?
- Educational Plan? IEP? Same School?
 - Assessment for special education services?
 - If the youth has an IEP, is parent participating? If not, educational surrogate?
- Any physical, mental health, substance abuse issues? Services ordered?
- Information supporting secure or non-secure placement?
- Does the youth have any medical, physical or mental health issues including trauma history that places the youth's safety in question in a detention setting? Services ordered?
- If the youth is detained have all of the parent's or guardian's questions been answered – including visitation?
- Has the Court explained reasons why detention is necessary?
- If not in detention, what restrictions placed on youth until next hearing?
- What evaluations/services are necessary?
 - Who is responsible for referrals? Follow up.
- Next hearing date, time and purpose.

ADJUDICATORY HEARING

- Youth
- Judge assigned to family
- Parent or Legal Custodian
- Child's caseworker
- Youth's Caretaker
- Youth's Counsel
- DJJ Representative
- Prosecuting Attorney
- Interpreter
- GAL volunteer
- Witnesses
- Victim advocate
- Probation officers are not necessary unless a witness

Considerations

- Were the Prosecutor and Counsel prepared?
- Did the prosecutor prove every element of the alleged offense beyond a reasonable doubt?

- Are the immediate needs of the youth being addressed?
- Is there information supporting secure or non-secure placement? Or can the youth be released with or without restrictions?
- Does the youth have any medical, physical substance abuse, or mental health issues, including a trauma history, that places the youth's safety in question in a detention setting?
- Is there an environment adequately structured by family, community, school or other support systems to enable the youth to avoid harmful behaviors and associations?
 - o Services provided to youth and youth's family if not detained?
- Educational Plan? IEP? Same School?
 - o Assessment for special education services?
 - o If the youth has an IEP is parent participating? If not, educational surrogate
- If the youth is not in detention, description of any restrictions placed on the youth until the next hearing.
- If the youth is detained have all of the parents or guardian's questions been answered – including visitation.
- What evaluations/services are necessary?
 - o Who is responsible for referrals?
- Next hearing date, time and purpose.

DISPOSITION HEARING

- Youth
- Judge assigned to family
- Parent or Legal Custodian
- Child's Caseworker
- Youth's Caretaker
- Youth's Counsel
- DJJ Representative
- Prosecuting Attorney
- Interpreter
- GAL Volunteer
- Victim Advocate

Considerations

- Is plan **specific** to **this** child's needs?
- What level of intervention is required in order to protect community safety while the youth is engaged in services?
 - o Mental health, substance abuse, sexual offending and physical health.
- Educational Plan? IEP? Same School?
 - o Assessment for special education services?
 - o If the youth has an IEP is parent participating? If not, educational surrogate?
- Identify youth, family, and community strengths that can assist the youth in making the necessary change.
- Identify family and community issues are likely to impede the youth in implementing necessary behavior change.
- Should the juvenile delinquency court judge consider any orders specific to the parent?
- Can services begin immediately? When will they begin?
- Does the youth have any medical, physical or mental health issues, including a trauma history, which places the youth's safety in question in a detention setting?
- Should a progress hearing or progress conference be set, or a progress report ordered?
- The date and time of the progress hearing or conference, or the date a progress report is due, if applicable.
- Appeal rights and process.

EDUCATIONAL ADVOCACY UNDER IDEA, 504 & MCKINNEY-VENTO

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MAJOR SOURCES OF EDUCATION RIGHTS: FEDERAL

- IDEA: Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq.; regulations, 34 C.F.R. Part 300.
- 504: Rehabilitation Act, 29 U.S.C. §794; regulations, 34 C.F.R. Part 104.
- ADA: Americans With Disabilities Act, 42 U.S.C. § 12101-12189; regulations, 28 C.F.R. Part 35.
- NCLB: No Child Left Behind, 20 U.S.C. § 6301 et seq. To be replaced by Every Student Succeeds Act (ESSA) beginning in 2016-17.
- McKinney Vento Act, 42 U.S.C. §§ 11301, 11431-11435.
- Foster Care Independence Act, 42 U.S.C. § 677.
- Due Process Clause of Fourteenth Amendment of U.S. Constitution.

MAJOR SOURCES OF EDUCATION RIGHTS: FLORIDA

- Fla. Const.: education is a fundamental value
- § 1003.57, Fla. Stat.: exceptional students instruction
- Fla. Admin. Code Ch. 6A-6: rules for programs for exceptional students
- § 409.1451, Fla. Stat.: independent living transition services for foster teens
- § 411.012, Fla. Stat.: voluntary universal pre-kindergarten

INTRODUCTION

Children and youth who are, or have been in out-of-home care face extra challenges: more than half of children or youth in care drop out of school before graduation, a rate that is much higher than the dropout rate for all students.

Children and youth who are, or have been in out of home care are two or three times more likely than other students to have disabilities that affect their ability to learn.

Numerous studies have confirmed that foster children perform significantly worse in school than do children in the general population. The educational deficits of foster children are reflected in higher rates of grade retention; lower scores on standardized tests; and higher absenteeism, tardiness, truancy and dropout rates. The poor academic performance of these children affects their lives after foster care and contributes to higher than average rates of homelessness, criminality, drug abuse, and unemployment among foster care "graduates."

What are the causes of such undesirable educational outcomes? First, most of the 500,000 children in foster care bear the scars of physical and emotional trauma, such as prenatal exposure to alcohol, tobacco and other drugs; parental abuse, neglect and abandonment; exposure to violence in their homes and communities; separation from their birth families; and frequent changes in foster placement. These experiences place children at great risk of developing physical, emotional and behavioral disorders that interfere with learning.⁸ Advocating for trauma sensitive educational practices in addition to their special education needs will greatly increase the chances of academic success.

WHAT IS SPECIAL EDUCATION?

School districts must provide a free and appropriate public education (FAPE) for all students with a disability who need special education services. FAPE includes special education and related services.

SPECIAL EDUCATION IS:

- individually designed instruction
- to meet child's unique educational needs

RELATED SERVICES ARE:

- transportation and such developmental, corrective, and other supportive services
- that are required to assist a child with a disability to benefit from special education

ELIGIBILITY CATEGORIES

The first step in determining whether a child qualifies for special education is determining whether the child has a disability under the IDEA. The second step is to show that the child needs special education services or that the disability adversely affects the child's education performance. The IDEA sets forth the exclusive categories for eligibility, but each state establishes the criteria for eligibility. In Florida, Chapter 6A-6 of the Florida Administrative Code details the requirements for the following disability categories:

- Autism Spectrum Disorder (ASD)
- Deaf or Hard of Hearing (DHH)
- Developmentally Delayed (DD)
- Language Impairment (LI)
- Other Health Impairment (OHI)
- Orthopedic Impairment (OI)

⁸ Educating Children in Foster Care, Steve Christian, National Conference of State Legislatures: *available at*: <http://www.ncsl.org/programs/cyf/cpieucate.pdf>, viewed August 9, 2007

- Dual Sensory Impairment (DSI)
- Emotional or Behavioral Disability (EBD)
- Homebound/Hospitalized (H/H)
- Intellectual Disability (InD)
- Specific Learning Disability (SLD)
- Speech Impairment (SI)
- Traumatic Brain Injury (TBI)
- Visual Impairment (VI)

Gifted is a category that is not identified in the federal IDEA. It is only a Florida category.

EVALUATIONS

If a child has not already been found eligible for special education but you have reason to believe he or she may qualify, you should send a written request to the school for the child to be evaluated for a disability (See Sample Request Letter). A sample request letter is available at the end of the chapter. Although anyone, including the guardian ad litem, can request an evaluation, the school must get a parent's (or a person acting as a parent, see next section) informed consent before conducting an evaluation.

The following are examples of when an evaluation should be requested:

- Bad grades
- Low test scores
- Speech is hard to understand
- Difficulty following directions
- Difficulty paying attention
- Gets frustrated with school work
- Truancy
- Gets in trouble/suspended

EVALUATIONS FOR CHILDREN AGED 0-6

- At risk infants and toddlers (birth to 36 months) should be evaluated for early intervention services through the Early Steps Program. May also request evaluation through FDLRS.
- Pre-school children (3-5) with suspected disability should be evaluated through school district or FDLRS for needed educational services.

EVALUATIONS FOR SCHOOL AGE CHILDREN (5-22)

- School districts are responsible
- Request in writing to Principal
 - Give copy to Guidance Counselor

WHO CAN SIGN AS A PARENT?

If a child is a ward of the state and the parent's whereabouts are unknown or rights are terminated, the following people are considered parents for special education purposes and can sign for the child to be evaluated:

- Foster parent
- Guardian
- Individual acting in place of parent with whom child lives or has legal responsibility
- Surrogate parent

PRACTICE TIP: The case worker cannot sign as a parent, and guardians ad litem should sign only if appointed as the surrogate parent.

WHAT IF FOSTER PARENT DOES NOT WANT TO ACT AS PARENT?

- Request appointment of a surrogate parent for children whose foster parents are not willing or able to participate in educational process.

WHAT IS A SURROGATE PARENT?

- Acts as a parent and has all of parent's rights in the educational setting.
- Anyone over 18 and not employed by school district, Florida Department of Education, or an agency involved with education or care of child, which includes a child welfare agency.
- School district must appoint within 30 days.

WHO APPOINTS SURROGATE PARENTS?

- School districts have responsibility to appoint.
- For wards of state, state court overseeing child's care may appoint.
- For unaccompanied homeless youth, school district shall appoint.

PARENTAL CONSENT FORM

Make sure all boxes are checked for areas of testing that need to be done, but no more.

- Academic achievement
- Vision screening/ evaluation
- Hearing screening/ evaluation
- Medical
- Behavioral observations
- Functional behavioral assessment
- Individual developmental evaluation
- Occupational therapy evaluation

- Social and developmental history
- Speech and language screening/ evaluation
- Individual personality/ behavioral evaluation
- Individual intellectual evaluation
- Learning abilities evaluation
- Assistive technology screening/ evaluation
- Physical therapy evaluation

Consider if other assessments that are not listed are needed, e.g. vocational assessment or assessment of trauma experiences.

WHEN MUST THE EVALUATION BE COMPLETED?

- IDEA requires that an evaluation be completed within 60 days of parental consent.
- School can take longer if parent repeatedly fails to produce child for evaluation.
- For transfer students, assessments must be coordinated and conducted as quickly as possible.

WHAT IF SCHOOL WANTS TO EVALUATE AND PARENT WON'T GIVE CONSENT?

- School may file for due process and ask Administrative Law Judge (ALJ) to authorize evaluation.
- Remember there may be more than one person who can act as a parent for special education purposes. If parent is not cooperative, consider asking for a surrogate parent to be appointed.

WHAT HAPPENS ONCE EVALUATION IS COMPLETED?

- Reports will be written
- Results will be explained in a meeting
- Someone who can answer questions about the reports must be at meeting

WHEN MUST SCHOOL DO A RE-EVALUATION?

- At least every 3 years
- School district and parent may agree to waive re-evaluation if both believe it is not necessary. **As a rule, do not agree to this as updated information is important.

WHAT HAPPENS ONCE THE CHILD IS FOUND ELIGIBLE?

Each child who is found eligible for special education under the IDEA is required to have an Individualized Education Plan (IEP).

WHO IS ON THE IEP TEAM?

- Someone acting as a parent: biological parent, foster parent, guardian, individual with child lives and/or surrogate parent
- Regular education teacher

- Special education teacher
- School district representative
- Evaluation specialist
- Student, if appropriate
- Others with knowledge or special expertise about child, including guardians ad litem.

DOES EVERYONE HAVE TO BE AT THE IEP MEETING?

- Parent and school district may agree that a team member does not need to attend if that member's area of curriculum or related services is not being modified or discussed.
- Meetings must be scheduled at a time agreeable to whoever is acting as a parent.
- If needed, it is important to request interpreter for parents and students who are deaf or whose native language is a language other than English.

WHAT INFORMATION GOES ON THE IEP?

- A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum
- A statement of measurable annual goals designed to enable the child to make progress in the general education curriculum and to meet each of the child's other educational needs that result from the child's disability
- A statement of special education and related services and supplementary aids and services to be provided to the child to advance toward meeting goals
- An explanation of the extent, if any, to which the child will not participate with nondisabled children
- A statement of accommodations in the administration of statewide standardized assessments or district assessments of student achievement
- A statement of how progress will be measured
- Whether extended school year (ESY) services are necessary

COMMUNICATION PLANS

For students who are deaf or hard-of-hearing or dual-sensory impaired, a Communication Plan should be developed. See <http://www.flrules.org/Gateway/reference.asp?No=Ref-04776>.

TRANSITION PLANS

- Required for students age 16 and older;
- Must include a statement of how student will meet requirements for standard diploma as Florida abolished the special diploma (students who entered 9th grade before 2014-15 may still pursue special diploma);
- Appropriate measurable postsecondary goals must be identified;
- Appropriate transition assessments related to training, education, employment and independent living skills must be conducted; and

- Transition services needed to assist child in reaching those goals must be provided.

DISCIPLINE

The IDEA provides certain protections for children covered under the Act. There are limitations in the way these children can be disciplined when the behaviors in question are a manifestation of their disability.

SCHOOL MAY MAKE UNILATERAL CHANGE IN PLACEMENT

- For 10 school days or less for students who violate code of conduct
- For 11 or more school days for violations of code of conduct IF NOT a manifestation
- For 45 days or less for weapons, drugs or infliction of serious bodily injury

SERVICES DURING CHANGE OF PLACEMENT

- Setting determined by IEP Team
- Participation in general education curriculum
- Progress to meet IEP goals
- Behavioral services to prevent recurrence

WHAT IS A MANIFESTATION DETERMINATION?

- Two tests. If either answer is yes, then misconduct is a manifestation of the disability:
 - If conduct was caused by, or had a direct and substantial relationship to, the child's disability; **OR**
 - If the conduct was the direct result of the school district's failure to implement the IEP.
- What Happens if Behavior IS a Manifestation?
 - Functional Behavioral Assessment (FBA) conducted and Behavioral Implementation Plan (BIP) implemented
 - Child returns to current placement unless parent and school district agree otherwise as part of BIP
- What Happens if Behavior is NOT a Manifestation?
 - Discipline in same manner and same duration as for children without disabilities
 - Educational services still required
- Manifestation Determinations
 - Only need for change of placement for code of conduct violations
 - Relevant members of IEP Team. It is important to have someone who understands the child's disability and can explain how the misconduct relate to the disability.
 - Review relevant information

WHAT IF CHILD IS NOT YET ELIGIBLE FOR IDEA, BUT GETS INTO TROUBLE?

If school district had knowledge that child had disability before behavior occurred, IDEA protections apply

WHAT IS NEEDED TO SHOW THAT SCHOOL HAD KNOWLEDGE?

- Parent expressed concern in writing
- Parent requested evaluation
- Teacher or other school personnel expressed specific concerns about a pattern of behavior demonstrated by child to Exceptional Student Education (ESE) Director or other school personnel
- No knowledge if parent did not allow evaluation or has refused services or child was evaluated and found not eligible

WHAT HAPPENS IF SCHOOL DID NOT HAVE KNOWLEDGE?

- Request an Initial Evaluation during disciplinary period
 - This evaluation must be expedited, so must be quicker than 60 days

WHAT HAPPENS IF PARENT DISAGREES WITH A DISCIPLINE DECISION?

- Hearing before ALJ within 20 school days of request (this is different from school board expulsion hearings)
- Determination within 10 school days after hearing

WHAT CAN BE DONE IF CHILD'S NEEDS ARE NOT BEING MET?

- Ask to meet with teachers, principal, ESE Director, Superintendent
- Ask for a new IEP meeting
- Request Mediation
- Request an Administrative Due Process Hearing

WHAT ELSE CAN PARENT DO?

- File complaint with:
 - Florida Department of Education
 - U.S. OCR – Office of Civil Rights
 - U.S. OSERS – Office of Special Education Rehabilitation Services
- Mediation
 - May be conducted without the filing of a due process complaint
 - Paid by Florida DOE
 - Resolutions must be written and are legally binding in state or federal court

PROCEDURAL SAFEGUARDS

Parents have the right to:

- Examine records from all files

- Participate in meetings with respect to identification, evaluation and educational placement, and provision of Free Appropriate Public Education (FAPE)
- Independent Educational Evaluation
- Prior Written Notice
- Procedural Safeguards Notice
- Mediation
- Due Process
- Stay Put (except for discipline)

These rights transfer to the student on his/her 18th birthday unless a guardianship has been established by a court.

Students in charter schools retain all of these procedural rights. Students in private schools, even those with a McKay Scholarship, do not.

DUE PROCESS HEARINGS

There is a two-year statute of limitations (SOL) from date parent or school district knew or should have known of violation, unless state sets shorter time SOL or information withheld or misrepresented by school district

DUE PROCESS HEARINGS

- Any party that initiates due process must file due process complaint notice and forward copy to Division of Administrative Hearings (DOAH)
- Notice must include:
 - Name and address of child (or contact information for homeless)
 - Name of school child attending
 - Description and facts of problem
 - Proposed resolution to extent known
- May not raise issues in hearing that were not raised in notice
- Timelines after complaint is filed
 - Notice is sufficient unless opposing party objects within 15 days
 - ALJ must decide if complaint is sufficient within 5 days after objection
 - May amend complaint only if parties agree, or ALJ permits not later than 5 days before hearing
 - Opposing party must respond to complaint within 10 days

RESOLUTION SESSION

- Within 15 days after school district receives complaint, a Resolution Session with IEP Team is required
- If no resolution within 30 days, due process hearing may occur and timelines commence

- If resolution is reached, must be written and is enforceable in state or federal court; agreement may be voided within 3 business days

REMEDIES

- Appropriate education - based on child's unique needs

Placement	Program
Services	Qualified personnel
- Compensatory education
- Reimbursement for private services
- Damages – rare
- Attorney's fees

ATTORNEY'S FEES

A court may order the school district to pay the parent's attorney's fees if the parent wins a due process hearing or a court action.

Usually, the court cannot order a parent to pay the school district, even if the school wins.

A court may order a PARENT'S ATTORNEY to pay the school's attorney's fees, but only if:

- The school wins, AND
- The parent's attorney filed a complaint or subsequent cause of action that is frivolous, unreasonable or without foundation, or continued to litigate after litigation clearly became frivolous, unreasonable or without foundation.

A court may order a PARENT'S ATTORNEY or the PARENT to pay the school's attorney's fees, but only if:

- The school wins; and
- The complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

SECTION 504 PLANS

WHO IS ELIGIBLE FOR 504 PLAN?

- Disabilities are not specifically listed.
- Disability is defined as a physical or mental impairment that substantially limits one or more major life activities (e.g., learning).
- Attention Deficit Hyperactive Disorder (ADHD) is example of a disability that is not specified under IDEA but is a disability under 504.

504 PLANS

- Identifies accommodations and modifications

- If many services are being provided through 504 Plan, it is advisable to request comprehensive evaluation for IDEA services.

MCKINNEY-VENTO

WHO IS ELIGIBLE?

- Homeless children and youth are individuals who lack a fixed, regular, and adequate nighttime residence.
- Includes children staying in other people's homes, hotels, and shelters.
- Includes those abandoned in hospitals or awaiting foster care placement.

RIGHTS OF HOMELESS CHILDREN

- Can stay in home school
- Do not need required documentation
- Services provided: school supplies, case management, transportation, and other services as needed

EDUCATION IDEA ALPHABET SOUP

504	Section 504 of the Rehabilitation Act. Federal law that prohibits discrimination against people with disabilities by recipients of federal money, generally state and local governments, schools and colleges. 504 Plans for students with disabilities are different than IEPs.
ADA	Americans with Disabilities Act. Federal law that prohibits discrimination against people with disabilities - no federal money required.
ADHD	Attention Deficit Hyperactive Disorder. This is a medical diagnosis and not a listed disability under IDEA, but could be under 504.
ALJ	Administrative Law Judge. ALJs work for Florida's Division of Administrative Hearings, and are not local judges. They preside over special education due process hearings.
APD	Agency for Persons with Disabilities. A Florida state agency created in 2004 whose responsibilities were previously with DCF's Developmental Services. Serves people with developmental disabilities.
ASD	Autism Spectrum Disorder
BEESS	Bureau of Exceptional Education Student Services. The division of Florida's Department of Education with responsibility for educating students with disabilities.
BIP	Behavioral Intervention Plan.
DCF	Department of Children and Families. The state agency with responsibility for, among other things, foster care and mental health.
DD	Developmental Disability.
DHH	Deaf or Hard of Hearing.
DOH	Department of Health. The state agency with responsibility for, among other things, Children's Medical Services which administers the Early Steps Program.
DSI	Dual Sensory Impairment.
E/BD	Emotional/Behavioral Disability.
ED	U.S. Department of Education. (Note that federal terminology for DOE refers to Dept. of Energy)
EIS	Early Intervention Services.
ESE	Exceptional Student Education. Florida's term for special education. Includes services under the IDEA. Florida also includes Gifted in ESE, which is not a federal category.
ESOL	English as a Second Language.
ESSA	Every Student Succeeds Act. Changes some requirements of NCLB beginning in 2016-17.
ESY	Extended School Year.
FAPE	Free Appropriate Public Education.
FBA	Functional Behavioral Assessment.
FCAT	Florida Comprehensive Assessment Test.

FDOE	Florida Department of Education.
FDLRS	Florida Diagnostic and Learning Resources System. Provides diagnostic and instructional support services to district exceptional student education programs and families of students with exceptionalities statewide.
FSA	Florida Standards Assessment.
HH	Hospital/Homebound.
IAES	Interim Alternative Educational Services.
IDEA	Individuals With Disabilities Education Act.
IEE	Independent Educational Evaluation.
IEP	Individualized Education Program.
IFSP	Individualized Family Service Plan. These are essentially IEPs for infants and toddlers.
InD	Intellectual Disability.
LI	Language Impairment.
LRE	Least Restrictive Environment.
NCLB	No Child Left Behind. Federal law that applies to all schools and all children, not just children with disabilities.
OCR	Office of Civil Rights. Office within U.S. Department of Education which oversees compliance with Section 504.
ODD	Oppositional Defiant Disorder. This is a mental health diagnosis and not a listed disability under IDEA.
OHI	Other Health Impairment.
OI	Orthopedic Impairment.
OSEP	Office of Special Education and Programs. Office within U.S. Department of Education which oversees compliance with IDEA.
OSERS	Office of Special Education and Rehabilitative Services. Office within U.S. Department of Education which oversees OCR and OSEP.
OT	Occupational Therapy.
PLOP	Present Levels of Performance.
PT	Physical Therapy.
SI	Speech Impairment.
SLD	Specific Learning Disability.
TBI	Traumatic Brain Injury.
VI	Visual Impairment.

QUESTIONS TO ENSURE THAT THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE ARE BEING ADDRESSED⁹

ENROLLMENT

- Is the child or youth enrolled in school?
- At which school is the child or youth enrolled?
- In what type of school setting is the child or youth enrolled (e.g., specialized school)?
- How long has the child or youth been attending his/her current school?
- Where is this school located in relation to the child's or youth's foster care placement?
- Were efforts made to continue school placement, where feasible?
- If currently not in a school setting, what educational services is the child or youth receiving and from whom?
- Is the child or youth receiving homebound or home-schooled educational services?
 - If Yes: Who is responsible for providing educational materials and what information is available about their quality?
 - If Yes: How frequently are educational sessions taking place?
 - What is the duration of each session? (e.g., how many hours?)

PROVISION OF SUPPLIES

- Does the child or youth have appropriate clothing to attend school?
- Does the child or youth have the necessary supplies and equipment (e.g., pens, notebooks, musical instrument) to be successful in school?

TRANSPORTATION

- How is the child or youth getting to and from school?
- What entity (e.g., school, child welfare agency) is responsible for providing transportation?

ATTENDANCE

- Is the child or youth regularly attending school?
- Has the child or youth been expelled, suspended or excluded from school this year/ever?
 - If Yes: How many times?
- Have proper due process procedures been followed for the expulsions, suspensions or exclusions from school?
- What was the nature/reason for the child's or youth's most recent expulsion, suspension or exclusion from school?
- How many days of school will the child or youth miss as a result of being expelled, suspended or excluded from school?
- If currently not attending school, what educational services is the child or youth receiving and from whom?
- How many days of school have the child or youth missed this year?
 - What is the reason for these absences?
 - What steps have been taken to address these absences?
- Has the child or youth received any trancies, and if so, for how many days?
- Has the child or youth been tardy, and if so, for how many times?

PERFORMANCE LEVEL

- When did the child or youth last receive an educational evaluation or assessment?
- How current is this educational evaluation or assessment?
- How comprehensive is this assessment?
- At which grade level is this child or youth currently performing? [Is the child or youth academically on target?]
- Is this the appropriate grade level at which the child or youth should be functioning?
 - If No: What is the appropriate grade level for this child or youth?
- Is there a specified plan in place to help this child or youth reach that level?

⁹Asking the Right Questions II: Judicial Checklists to Meet the Educational Needs of Children and Youth in Foster Care <http://www.ncfci.org/sites/default/files/education%20checklist%202009.pdf>, last visited February 13, 2016.

- What is this child's or youth's current grade point average?
- If below average, what efforts are being made to address this issue?
- Is the child or youth receiving any tutoring or other academic supportive services?
 - o If Yes: In which subjects?

TRACKING EDUCATION INFORMATION

- Does this child or youth have a responsible adult serving as an educational advocate?
 - o If Yes: Who is this adult?
- How long has this adult been advocating for the child's or youth's educational needs?
- How often does this adult meet with the child or youth?
- Does this adult attend scheduled meetings on behalf of the child or youth?
- Is this adult effective as an advocate?
- If there is no designated educational advocate, who ensures that the child's or youth's educational needs are being met?
- Who is making sure that the child or youth is attending school?
- Who gathers and communicates information about the child's or youth's educational history and needs?
- Who is responsible for educational decision-making for the child or youth?
- Who monitors the child's or youth's educational progress on an ongoing basis?
- Who is notified by the school if the child or youth is absent (i.e., foster parent, social worker)?
- Who could be appointed to advocate on behalf of the child or youth if his or her educational needs are not met?

CHANGE IN PLACEMENT / CHANGE IN SCHOOL

- Has the child or youth experienced a change in schools as a result of a change in his or her foster care placement?
 - o If Yes: How many times has this occurred?
- What information, if any, has been provided to the child's or youth's new school about his or her needs?
- Did this change in foster care placement result in the child or youth missing any school?
 - o If Yes: How many days of school did the child or youth miss?
- Have any of these absences resulted in a truancy petition?
- Were efforts made to maintain the child or youth in his or her original school despite foster care placement change?

HEALTH FACTORS IMPACTING EDUCATION

- Does the child or youth have any *physical* issues that impair his or her ability to learn, interact appropriately, or attend school regularly (e.g., hearing impairment, visual impairment)?
 - o If Yes: What is this physical issue?
- How is this physical issue impacting the child's or youth's education?
- How is this need being addressed?
- Does the child or youth have any *mental health* issues that impair his or her ability to learn, interact appropriately, or attend school regularly?
 - o If Yes, what is this mental health issue?
- How is this mental health issue impacting the child's or youth's education?
 - o How is this need being addressed?
- Is the child or youth currently being prescribed any psychotropic medications?
 - o If Yes: Which medications have been prescribed?
- Has the need for the child or youth to be taking this medication been clearly directly explained to him or her?
- How will this medication effect the child's or youth's educational experience?
- Does the child or youth have any *emotional* issues that impair his or her ability to learn, interact appropriately, or attend school regularly?
 - o If Yes: What is this emotional issue?
- How is this emotional issue impacting the child's or youth's education?
 - o How is this need being addressed?
- Is the child or youth experiencing any difficulty interacting with other children or youth at school (e.g., Does the child or youth have a network of friends? Has he or she experienced any difficulty with bullying)?
 - o If Yes: What is being done to address this issue?

SPECIAL EDUCATION AND RELATED SERVICES UNDER IDEA AND SECTION 504

- If the child or youth has a physical, mental health or emotional disability that impacts learning, has this child or youth (birth through age 21) been evaluated for Special Education/Section 504 eligibility and services?
 - If No: Who will make a referral for evaluation or assessment?
 - If Yes: What are the results of such an assessment?
- Has the child been assessed for trauma experiences?
- Have the assessment results been shared with the appropriate individuals at the school?
- Does the child or youth have an appointed surrogate pursuant to IDEA (e.g., child's or youth's birth parent, someone else meeting the IDEA definition of parent, or an appointed surrogate parent)?
 - If No: Who is the person that can best speak on behalf of the educational needs of the child or youth?
- Has the court used its authority to appoint a surrogate for the child or youth?
- Has the child's or youth's education decision-maker been informed of all information in the assessment and does that individual understand the results?
- Does this child or youth have an Individualized Education Plan (IEP)?
 - If Yes: Is the child's or youth's parent or caretaker cooperating in giving IEP information to the appropriate stakeholders or signing releases?
 - Is this plan meeting the child's or youth's needs?
 - Is the child's or youth's educational decision-maker fully participating in developing the IEP and do they agree with the plan?
- Does this child or youth have a Section 504 Plan?
 - If Yes: Is this plan meeting his or her needs?
 - Is there an advocate for the child or youth participating in meetings and development of this plan?

EXTRACURRICULAR ACTIVITIES AND TALENTS

- What are some identifiable areas in which the child or youth is excelling at school?
- Is this child or youth involved in any extracurricular activities?
 - If Yes: Which activities is the child or youth involved in?
- Are efforts being made to allow this child or youth to continue in his or her extracurricular activities (e.g., provision of transportation, additional equipment, etc.)?
- Have any of the child's or youth's talents been identified?
 - If Yes: What are these talents?
- What efforts are being made to encourage the child or youth to pursue these talents?

TRANSITIONING

- Does the youth have an independent living plan?
 - If Yes: Did the youth participate in developing this plan?
- Does this plan reflect the youth's goals?
 - If Yes: Does the plan include participation in Chafee independent living services?
- Does this plan include vocational or post-secondary educational goals and preparation for the youth?
- Is the youth receiving assistance in applying for post-secondary schooling or vocational training?
- Is the youth being provided with information and assistance in applying for financial aid, including federally-funded Education and Training Vouchers (see Chafee Foster Care Independence Program)?
- If the youth has an IEP, does it address transition issues?
 - If Yes: What does this transition plan entail?
- Did the youth participate in developing the transition plan?
- Is this transition plan coordinated with the youth's independent living plan?

SAMPLE LETTER TO REVIEW RECORDS

Date

Dear Name of Principal:

School Name

Address

Re: Name and birth date of child

I am the [mother, father, legal guardian, foster parent, or some other relation of name of child, or court-appointed guardian ad litem]. In order to be better prepared for [a teacher conference, an IEP meeting, a manifestation hearing, or other event], I would like to review [name of child's] school records. I would like to review the following files: [*pick which ones are needed*]

- cumulative record
- ESE file
- discipline files
- evaluators' files, including tests and protocols from psychologists and others
- therapists' files
- teachers' files
- counselors' files
- nurse's files

Please let me know when they will be available. You can reach me at phone number or address. Thank you for your attention to this matter.

Sincerely,

Your Name & Address

SAMPLE LETTER TO REQUEST EVALUATION

Date

Dear Name of Principal:

School Name

Address

Re: Name and birth date of child

I am the [mother, father, legal guardian, foster parent, or some other relation of name of child, or court-appointed guardian ad litem.] I write to request a comprehensive evaluation of [name of child] to see if he/she is eligible for special education services.

I believe [name of child] needs to be evaluated because [list examples of poor academic performance and discipline problems].

Please let me know what I need to do to help get this process going as soon as possible. You can reach me at phone number or address. Thank you for your attention to this matter.

Sincerely,

Your Name & Address

EDUCATIONAL RIGHTS FOR CHILDREN WITH DISABILITIES CHECKLIST

AT-RISK INFANTS AND TODDLERS (UNDER AGE 3) NEED EARLY INTERVENTION SERVICES.

- Advocate for comprehensive evaluation by Early Steps (Children's Medical Services) or FDLRS if there is suspicion of an unidentified disability.
- Advocate for Individualized Family Service Plan (IFSP)
- Advocate for comprehensive services.
- Advocate for qualified personnel.

PRE-SCHOOL CHILDREN (3 THROUGH 5) WITH DISABILITIES NEED AN APPROPRIATE EDUCATION.

- Advocate for comprehensive evaluation by school district or FDLRS if there is suspicion of an unidentified disability.
- Advocate for Individualized Education Plan (IEP) or IFSP.
- Advocate for comprehensive services.
- Advocate for qualified personnel.

SCHOOL DISTRICTS HAVE DUTY TO IDENTIFY CHILDREN WITH DISABILITIES.

- Determine if school has identified child as having a disability.
- Determine if medical or other professionals have identified or suggested that child has disability.
- Review school records and ask caregivers and teachers if child is having academic or behavioral problems at school.
- Advocate for comprehensive evaluation by school if there is suspicion of a disability that has not been identified.

A SURROGATE PARENT MUST BE APPOINTED FOR ALL FOSTER CHILDREN NEEDING EARLY INTERVENTION OR SPECIAL EDUCATION SERVICES WHO HAVE NO PARENT, FOSTER PARENT, GUARDIAN OR RELATIVE CAREGIVER INVOLVED IN THEIR CHILD'S EDUCATION.

- Determine if parent, foster parent or relative caregiver is involved in child's education.
- Request appointment as surrogate parent by school district or juvenile judge.
- Or advocate for another adult who is independent of school district to be appointed.
- Ensure that consent forms are signed only by parent, foster parent, guardian, relative caregiver, or surrogate parent, and not by case workers or GALs (unless appointed as surrogate parent).

SCHOOL DISTRICTS MUST PROVIDE APPROPRIATE SPECIAL EDUCATION SERVICES TO CHILDREN WITH DISABILITIES.

- Determine unique educational needs of child from caregivers, teachers and professionals involved with child.
- Review IEP and other records to see if needs are being addressed by school.
- Request IEP meeting.
- Advocate for comprehensive assessments, services and placement that child needs.
- Advocate for qualified personnel.

STUDENTS WITH DISABILITIES AGE 16 AND OLDER NEED TO HAVE A TRANSITION PLAN IN IEP.

- Ensure that appropriate measurable postsecondary goals are identified.
- Advocate for appropriate transition assessments related to training, education, employment and independent living skills.
- Advocate for transition services needed to assist child in reaching those goals.

STUDENTS' MISCONDUCT NEEDS TO BE APPROPRIATELY ADDRESSED.

- Ensure that manifestation hearings are properly held.
- Advocate for Functional Behavioral Assessment by qualified personnel.

- Advocate for appropriate Behavioral Intervention Plan.
- Ensure educational services are continued during any discipline period.

RIGHTS FOR STUDENTS REGARDLESS OF DISABILITY.

Infants and toddlers with substantiated cases of abuse or neglect need to be referred for an evaluation by Early Steps.

- Advocate for comprehensive evaluation.
- Advocate for comprehensive services.

THREE AND FOUR YEAR OLDS BENEFIT FROM PRE-KINDERGARTEN.

- Advocate for enrollment in voluntary universal pre-kindergarten education program for all children who could benefit.
- Advocate for enrollment in Head Start and Early Head Start programs.

ALL SCHOOL-AGE CHILDREN NEED TO BE IN SCHOOL.

- Advocate for continued enrollment in same school throughout foster care unless unsafe or otherwise impractical.
- Advocate for transportation to be provided by school district to maintain same school.
- Demand immediate enrollment if not in school.

HOMELESS CHILDREN MUST BE IN SCHOOL. HOMELESS INCLUDES CHILDREN LIVING IN EMERGENCY OR TRANSITIONAL SHELTERS, ABANDONED IN HOSPITALS OR AWAITING FOSTER CARE PLACEMENT.

- Determine whether it is in the child's best interests to remain in home school or new school.
- Advocate for continuation in home school or immediate access to new school based on that determination.
- Ensure elimination of obstacles: no need for residency, record or guardianship requirements; need for transportation.

OLDER FOSTER CARE CHILDREN, NOT LIMITED TO THOSE WITH DISABILITIES, MAY NEED INDEPENDENT LIVING TRANSITION SERVICES.

- Advocate for independent living assessments and educational and vocational assessments.
- Ensure that identified needs are addressed in transition plan, choice of school courses and activities.
- Ensure that youth is included in each step of process.

ALL STUDENTS MUST BE AFFORDED DUE PROCESS IN SCHOOL DISCIPLINE PROCEEDINGS.

- Ensure that students in the expulsion process are provided with notice of the violation and an opportunity to be heard before the School Board.

MASTER TRUST ISSUES FOR CHILDREN & YOUTH IN FOSTER CARE

**DEBORAH A. SCHROTH ESQ., APPELLATE COUNSEL & COUNSEL FOR EDUCATION,
INDEPENDENT LIVING AND MASTER TRUST, CHILDREN'S LEGAL SERVICES, DEPARTMENT
OF CHILDREN AND FAMILIES**

The Master Trust is a legal trust document that was filed by the department in the Circuit Court in Leon County, Florida and approved by that Court in 1997. It was created to hold in trust the money and property intended for the use and benefit of those individuals who are in the legal custody, care or control, or who are receiving services from, the department. For these children, individual accounts, and sometimes subaccounts, are created within the Master Trust.

“Master Trust” is also the name commonly used to describe the department’s fiscal program where the lead agencies recover the money due and owing to children in the department’s custody, reimburses the department from that money for the cost of care of these children, and makes the remaining money available to these children.

The funds typically received by children in the department’s custody are disability funds (SSI) due to the child’s own disability, or benefits due to a parent’s status, such as disability or survivor benefits from the Social Security Administration. A few children in care also receive lump sums, often from life insurance proceeds after the death of a parent, or from a tort action on the child’s behalf. These funds often exceed the cost of care and thus there is a remaining balance. The department has a fiduciary duty to conserve or invest these funds. There are a number of complicated laws and regulations that the department should follow in regard to Master Trusts.

It is crucial for the child advocate to be extremely vigilant in regard to Master Trust issues. Many of the children who have Master Trust Accounts will turn 18 while in the custody of the department. It is imperative that their income and resources are protected.

WHO ARE THE CHILDREN WITH MASTER TRUST ACCOUNTS?

Not all children in the department’s custody will be beneficiaries of the Master Trust. According to the trust’s terms, the beneficiary class consists of those individuals who are in the legal custody, care or control, or who are receiving services from the department “and who have received or who will receive money and tangible or intangible property for their sole use and benefit from any other person or entity that is placed in the possession or control of the department and for whom a separate trust for such individual does not exist.”

Money in the Master Trust Accounts can come from a variety of sources. However, most of the children with subaccounts in the Master Trust receive SSI benefits due to their own disability. However, money also comes from other government benefits such as derivative Social Security benefits (disability or survivor

benefits), Veteran's benefits, and Railroad Retirement benefits. Occasionally, child support, litigation proceeds, and private insurance benefits will be placed into Master Trust Accounts.

SOCIAL SECURITY BENEFITS (SSA)

- These benefits are available for a child of an individual who is age 62 or above, disabled or deceased, based on the wage-earner's contributions to Social Security.
- The child beneficiary must be under the age of 18; or in elementary school or secondary school and under the age of 19; or disabled before the age of 22. 20 C.F.R. 404.

SUPPLEMENTAL SECURITY BENEFITS (SSI)

- These benefits are based on financial need, rather than contributions by wage-earners and are provided to individuals with a disability.
- There are elaborate criteria regarding eligibility, both financial and substantive.
- Criteria for establishing disability for a child are different from those for an adult and when the child turns 18, there will be a re-determination of eligibility based on the adult criteria, provided the child or young adult applies for adult benefits. 20 C.F.R. 416.

Rules and policies and procedures (POMS) for both SSA and SSI funds can be found in the Social Security Administration's website at: www.ssa.gov.

The application for SSA or SSI funds can be a time consuming and cumbersome process. The first step in dealing with potential Master Trust Funds is to determine if the child in fact receives SSA or SSI benefits. If the child does not receive social security funds and the advocate believes the child may qualify, the advocate should immediately file a motion to compel the department to apply for social security disability funds on behalf of the child. The advocate should also provide as much information as possible to the department case worker so the application will be complete. It takes approximately three to six months from the date of the initial application for the child to begin receiving the funds, assuming the application is granted upon the initial filing. If there is medical support for a determination that the child is disabled, but the SSA denies the child's SSI application, the advocate should work with the department's attorney (Children's Legal Services) to ensure the child has a legal advocate to appeal the denial of the SSI application.

Once the child qualifies for social security benefits, the Social Security Administration will designate a representative payee to receive the benefits on behalf of the child. The lead agency typically will be the representative payee. However, 20 C.F.R. §§404.2010 and 20 C.F.R. §416.621 provide for an order of preference of representative payees. An agency may be appointed as the representative payee, but it is low on the order of preference list. However, the department does not seek an alternative representative payee, and the SSA is comfortable appointing the lead agency to fulfill this function.

In addition to creating individual accounts, the Declaration of Master Trust, the legal trust document that has been filed by the department in the Circuit Court in Leon County, Florida and approved by that Court, provides for separate sub-accounts. A discussion of sub-accounts is below.

TYPES OF ACCOUNTS

CURRENT NEEDS SUB-ACCOUNT

The funds in this account are used for the child's ongoing, recurring, monthly needs. These funds may also be used for clothing, personal items, sports activities, computers, recreational activities and similar items. The department's maintenance fees are withdrawn from this account. Funds in this account are subject to the SSI asset limit of \$2,000, for this children who receive any amount of SSI benefits.

DISABLED SPECIAL NEEDS SUB-ACCOUNT (OR DEDICATED SUB-ACCOUNT)

The funds in this account may only be used for specially designated medical services and goods that are related to the disabled child's special needs, or otherwise with special permission of the SSA. The SSI asset limit of \$2,000 does not apply to funds in this account. Often a child will receive a lump sum retroactive SSI benefit in several payments when eligibility is established prior to the commencement of actual payments. Lump sum payments are placed in this account. Underpayments by the SSA and past-due benefits also result in funds that, if deposited in the current needs account, would render the child immediately ineligible for SSI benefits. Money assigned to this sub-account will only be exempted from being counted towards the SSI asset maximum if SSA directs the lead agency to create this dedicated sub-account. It is not possible to simply transfer funds from one account to another in order to avoid the SSI \$2,000 asset maximum.

PLAN TO ACHIEVE SELF-SUPPORT (PASS) SUB-ACCOUNT FOR DISABLED CHILDREN

The funds in this account must be used to effectuate a PASS, a plan approved by the SSA for long-term vocational or educational needs of the disabled child. As long as this plan is in effect, the child's funds may be deposited into this account without affecting SSI asset limits. 65C-17.003 F.A.C. requires the department to create a PASS, independent living or other Case Plan to submit to the dependency court and the Social Security Administration. At the time of the publication of this chapter, there are only a few PASS Accounts for dependent children in Florida. This is a complicated program, and one which many older children are not interested. However, it is worth exploring for those children who have a specific vocational or educational plan for which they will need funds in excess of \$2,000 when they have finished high school. For any child for whom the advocate wishes to explore a PASS, it would be worthwhile for the advocate to request assistance from Disability Rights Florida. (<http://www.disabilityrightsflorida.org/>) This is an organization that helps Floridians with issues related to disabilities. They have experience with PASS accounts for adults, and should be a good resource.

SUB-ACCOUNT FOR CHILDREN WHO RECEIVE SSA, VETERAN'S BENEFITS OR OTHER REGULAR BENEFITS

The funds in this account must be used to effectuate long-term vocational or educational goals. The children who receive SSA, Veteran's Benefits or other regular benefits are eligible for a PASS-ND (non-disabled) plan which serves as all or part of the required case plan for independent living transition services, pursuant to § 409.1451(4). These plans are not submitted to the SSA but must be filed in the court's case file and the court file.

DEPARTMENT'S DUTIES WITH RESPECT TO THE TRUST

The department has fiduciary duties as trustee over Master Trust funds pursuant to § 402.17. Section 402.17(2) states:

(2) MONEY OR OTHER PROPERTY RECEIVED FOR PERSONAL USE OR BENEFIT OF ANY CLIENT.

The department or agency shall perform the following acts:

- (a) Accept and administer in trust, as trustee having a fiduciary responsibility to a client, any money or other property received for personal use or benefit of that client. In the case of children in the legal custody of the department, following the termination of the parental rights, until the child leaves the legal custody of the department due to adoption or attaining the age of 18, or in the case of children who are otherwise in the custody of the department, the court having jurisdiction over such child shall have jurisdiction, upon application of the department or other interested party, to review or approve any extraordinary action of the department acting as trustee as to the child's money or other property. . . .

Moreover, the department has duties as a fiduciary pursuant to general Florida laws regulating trusts, § 518.11 and § 737.302, and section 6 of the General Provisions of the Declaration of Trust.

PRACTICE TIP: The department is required to obtain a court order prior to taking action which is in conflict with its duties as trustee. §402.17(6)(b).

SSA rules also detail the department's fiduciary duty as representative payee 20 C.F.R. §§ 404.2035(a) and 416.635(a) require that SSA funds be used "only for the use of the beneficiary in a manner and for the purposes he or she determines... to be in the best interests of the beneficiary." Where a child's current monthly benefits exceed the amount used by the department--the representative payee, the department must conserve or invest the excess funds. 20 C.F.R. §§ 404.2045(a),(c), 416.645(a).

SSI ASSET LIMITATIONS AND SPENDING DOWN ACCOUNTS

SSI is a needs-based benefit with an asset limit of \$2,000. As part of its fiduciary duty, the department must ensure that funds in the Master Trust current needs sub account do not exceed \$2,000 for children who receive SSI. Certain assets are excluded from this provision, including normal possessions such as clothing, books, electronic equipment, etc. It is important to note that children who do not receive SSI are not subject to an asset limit so their accounts may exceed \$2,000.

Caseworkers and fiscal office personnel are responsible for planning and budgeting for the child's needs. Ideally, they should create a spending plan—with the child's input where possible—that addresses the child's specific needs so that purchases are designed to improve the child's life, not just empty the trust account. Children receive SSI because they have a disability so advocates should look for ways to spend SSI money to ameliorate the effects of that disability. SSI money can be spent on tutoring for children with learning disabilities or who are behind in school because of frequent moves. It can be spent on therapies that are not otherwise covered by Medicaid. It can be spent for music or art lessons or sports equipment and after school activities.

In order to ensure that the current needs Master Trust Account balance does not exceed \$2,000, the lead agency must closely monitor the account and spend down the account when necessary. 65C-17.003(1), F.A.C. requires the caseworker to keep the child informed of all purchases from the Master Trust account. If the expenditures equal \$500 or more, the department caseworker must notify the child's parents (if prior to TPR), the guardian ad litem and the child's attorney.

Rule 65C.17-006, F.A.C. requires the department to provide a quarterly Master Trust accounting at each Judicial Review hearing. These accountings may contain mathematical errors so it is crucial that each accounting is analyzed closely by the advocate.

TOOLS FOR PRESERVING ASSETS IN EXCESS OF \$2,000 FOR YOUTH WITH DISABILITIES

Rather than spending down the child's Master Trust funds, there are tools which may be utilized to preserve the assets and make them available for children when they reach the age of 18. These tools include:

PASS Plans

If a youth has a source of income *other than SSI*, he or she may be able to accumulate assets in excess of \$2,000 in a PASS plan. PASS (Plan for Achieving Self Sufficiency) is a Social Security program designed to allow people with disabilities to accumulate and use assets for the purpose of enhancing their employment opportunities without jeopardizing their SSI (and as adults, their disability) benefits. The money must be saved for a specific job related purpose such as to purchase a vehicle to drive to work or to purchase work related tools. A PASS plan must be approved by the Social Security Administration before money can be set aside. It is important to note that SSI money cannot be saved in a PASS plan.

Special Needs Trusts

If a youth with disabilities receives a large sum of money, and if he or she will require expensive care and services, the advocate should consider a special needs trust. Money in a special needs trust does not count as an asset for purpose of government benefits, such as SSI and Medicaid. Depending on who created the trust and what money went into it, the money left in the trust after the disabled person dies may be sent to Medicaid for its medical assistance. The money can be used only for limited purposes. Money placed into a special needs trust is placed in that trust irrevocably, so it is important to make the determination that this is the best plan for the child's long-term interests. Care must be taken in choosing the form of the trust, and the trustee: everyone in the child welfare system should examine the costs of establishing the trust, monthly or annual costs to the trustee, and the responsiveness and experience of the trustee with young adults.

Pooled Trusts

Pooled trusts are a type of special needs trust. A pooled trust is a good alternative to an individual special needs trust if the funds available do not justify the cost of creating and managing a special needs trust. A nonprofit pooled income special needs trust is run by a nonprofit organization that invests and manages money from many people. Upon the death of the disabled individual, the balance is either retained in the trust for the nonprofit association or is paid back to Medicaid for its medical assistance. The money can be used only for limited purposes.

HOW ARE THE FUNDS MANAGED AND SPENT?

Pursuant to the Declaration of Master Trust, the department, as Trustee, “is to exercise sole and absolute discretion to distribute the income or principal from each client’s account or subaccount(s) to that client directly, or for that client’s sole use or benefit, as the Trustee deems advisable for the needs and circumstances of each such client respectively, and subject to the restrictions stated elsewhere in this Declaration of Trust.” See Declaration of Master Trust at 05. For many children, the largest distribution of account assets goes to the department itself as part of its fiscal program to recover money spent for the cost of care for children in its custody. Funds are also used to provide an allowance to the children. Whatever funds remain in the account when the child turns 18 or otherwise leaves the department’s custody must be disbursed. The funds will usually be disbursed either to the young adult directly, or will be returned to the SSA (if the funds are from the SSA.) If the funds are returned to SSA, SSA will then determine whether to distribute the funds, as well as any ongoing benefits, directly to the young adult or if SSA will require a new representative payee.

COST OF CARE, FEE WAIVER AND RIGHT TO NOTICE OF RIGHT TO REQUEST FEE WAIVER

Washington State Department of Social and Health Services et. al. v. Guardianship Estate of Keffeler, et. al., 537 U.S. 371, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) allows states to use Social Security (SSA) funds to reimburse themselves for the costs incurred in providing services to children in foster care. It is important to note that Keffeler only details the reimbursement of the cost of care. Under § 402.33, Fla. Stat. (2007), the department is authorized to charge fees for any services it renders, and to assess those fees against its clients, including children in foster care. Florida Law also contains more specific provisions regarding the child’s right to request a fee waiver and the notice required in this regard.

The child may request a full or partial waiver of the cost of care. This request can be made at any time. The request should be case specific, with necessary documentation attached to the request. §65C-17.005(2). Fee waivers are ordinarily of limited duration or for a limited sum, for example, the need for a security and utility deposit when a child transitions to independent living. Fee waivers may be used to pay for: specialized classes if the child has a special talent or interest such as music, arts or sports; visual aids or wheelchair for mobility-limited child; remedial tutoring; items required to implement the child’s independent living or PASS plan; prepaid college tuition program; or childcare if the youth is a parent. The fee waiver is not a substitute for other available resources such as educational supports under an IDEA Individual Education Plan (IEP).

PRACTICE TIP: The department is required to provide a notice of the child’s right to request a fee waiver with every judicial review. 65C-17.005 F.A.C.

A committee of three persons determines whether to grant a fee waiver, when one is requested. It is important to note that this is an administrative matter; the dependency court does not have subject matter jurisdiction to grant or deny a request for a fee waiver. Children and their advocates should be encouraged to meet with that committee in order to explain why the additional funds are needed.

The fee waiver review committee determines whether to grant or deny the fee waiver request. The committee’s actions are governed by the procedures set forth in Rule 65C-17.005, F.A.C. This Rule requires the committee be composed of no less than 3 persons; that there be an actual meeting, open to the person requesting the waiver and his or her representative, who does not need to be an attorney; and that the meeting be audio-taped.

The fee waiver review committee is required to make its recommendation to the department (archaically still referred to as the “District Administrator”, but the person making the final decision now should be the “Regional Managing Director” of his or her designee) within 30 days of receipt of the request for fee waiver. See 65-6.022(7) F.A.C.

This same Rule also requires the department to notify the person requesting the fee waiver within 10 days of the date the decision to grant or deny the fee waiver is made.

Appeal Rights of Waiver Denial

Appeals of denials of fee waivers are handled by the Division of Administrative Hearings (DOAH) under Chapter 120, Fl. Stat. (See § 402.33(7)). If the committee denies the child’s requested fee waiver, the request for hearing must be made within 21 days of the date of the denial. 65C-17.005(5), F.A.C. These proceedings can be complicated for the child and the advocate so it is important that an attorney familiar with Chapter 120 assist with this stage of the litigation, including when the committee does not act on a request within a reasonable time.

Allowances for Children in the Department’s Custody

Children in the department’s custody who receive SSI or SSA benefits are entitled to two types of allowances:

Foster Care Allowance

All children in the department’s custody are entitled to receive a monthly allowance. This money is to be given to them by the foster parent or group home operator and is included in the foster care board payment sent to the foster parent for the personal needs of each child living in the home. CBC’s determine the amount of allowance for youth; the current range is typically \$10-20 per month.

Personal Allowance

“Youth for whom the cost of care is being deducted from their Master Trust Account are also entitled to a personal allowance.” This is an additional amount set aside for the child’s personal needs before any funds are applied to the cost of care. The child does not actually receive this money as spending money, rather it is available to the caseworker to be used for the child’s needs. The minimum amount set aside as personal allowance is \$15 per month. 65C-17.002 (9), F.A.C. However, because SSA has set a personal allowance at \$30 monthly for all SSA-funded benefits, the department simply applies this requirement across the board to all master trust accounts that are funded by monthly payments. The child’s needs must be considered before the department’s maintenance fee is withdrawn. So if, for example, the child needs \$50 per month to participate in a school club, the “personal allowance” could be increased if those funds were available. The same form used to apply for a fee waiver can be used to seek a change in personal allowance.

DISBURSEMENT OF MASTER TRUST FUNDS

When the child turns eighteen or is discharged from the custody of the department, there are three options:

- the department may release the money to the child or as the child directs;

- if a physical or mental disability renders the child unable to handle financial affairs, the department must apply for a court order to establish a trust on behalf of the child (if no relative or friend of the child is available, then the department is the trustee of this new trust); or
- if the child is under 18 and leaves the custody of the department due to an adoption or other permanent placement, the department must seek a court order directing disposition of the money and property. §402.17.

Department of Children and Families v. R.G., 950 So.2d 497 (Fla. 5th DCA 2007) upholds a trial court's order directing the department disburse funds in the Master Trust Accounts directly to the child upon turning 18. It is critical that the advocate seek an order directing the department to disburse the funds directly to the child as it can take months (sometimes as many as 11-12) to get the funds redirected to the child.

There are still many unresolved issues regarding disbursement of Master Trust conserved SSA or SSI benefits when a mentally handicapped child turns 18 and the department is no longer the "representative payee" for the child. Effective advocacy requires early planning in these cases, well before the child's 18th birthday, to ensure that the department meets its fiduciary duty as trustee. It is important to note that the department has not established trusts, with itself as trustee, as described above. The only trusts which the department assists with at this time are special needs individual or pooled trusts.

ADDITIONAL RESOURCES

DEPARTMENT'S OPERATING PROCEDURES

The department's operating procedures regarding Master Trusts are found in CF Operating Procedure No. 175-59, dated October 18th, 2006 and are available on-line at [http://www.dcf.state.fl.us/admin/publications/cfops/175%20Family%20Safety%20\(CFOP%20175-XX\)/CFOP%20175-59,%20Master%20Trust%20for%20Benefit%20of%20Family%20Safety%20Program%20Clients.pdf](http://www.dcf.state.fl.us/admin/publications/cfops/175%20Family%20Safety%20(CFOP%20175-XX)/CFOP%20175-59,%20Master%20Trust%20for%20Benefit%20of%20Family%20Safety%20Program%20Clients.pdf) .

BASIC MASTER TRUST ISSUE SPOTTING

- Has the department applied for SSI or other available benefits on behalf of the child?
- Is the child eligible for any derivative benefits (parents deceased or disabled)?
- Is there an appropriate adult who can serve as the representative payee for the child rather than the department?
- Has the department filed the required Master Trust accountings?
- Is there a spending plan in place to ensure that funds are used to meet the child's specific needs?
- If the child receives SSI, is the balance of the Master Trust current needs sub account close to the \$2,000 limit?
- How has the department spent the child's money? Is the child's specific need being met by the expenditures? Are there accurate records? Does the child actually have the property purchased with his or her money?
- Has the advocate considered a PASS account, Special Needs Trust or Pooled Trust for the child's Master Trust funds?
- Has the department provided notice of the child's right to request a fee waiver with every judicial review?
- Does the child need a lump-sum of money to address a specific need? If so, has a waiver request been filed?
- Does the child have an ongoing need for additional funds to be expended? If so, has a request to increase the personal allowance been filed?
- Is the child close to turning 18? If so, has a motion regarding the disbursement of the funds to the child been filed?

INDEPENDENT LIVING PROGRAMS FOR FOSTER CHILDREN & FORMER FOSTER CHILDREN

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INTRODUCTION

To fully understand why the Independent Living programs were created, and ensure that they are implemented to best fulfill their purpose, it is necessary to think about how children are normally raised by their own families. Parents are responsible for ensuring their children are trained in the family's values and receive discipline to inculcate those values. Parents also help with their children's formal education. We don't often think about the day-to-day, common-sense information that parents also impart to their children. And until the "Road to Independence Act" was passed in Florida, children's advocates did not focus much, if at all, on ensuring that foster children somehow learned this day-to-day information. Clearly, ensuring that foster children receive an appropriate formal education and health care services, and that they live in an appropriate foster home, can itself be a full-time endeavor.

The statistics, however, indicate just how important it is that foster children also learn all those things that parents typically impart to their children on an informal, daily basis. These things include: budgeting and money management, including how to write a check, and how using credit cards can increase the cost of purchases; menu planning, shopping and cooking; completing forms and applications; knowledge about paying taxes and timely filing tax returns; dressing appropriately for job interviews; and on and on. Those children fortunate enough to live in a family foster home, and to be stable in that foster home, can learn these things. But foster children who are moved frequently, or who live in group homes where these tasks are not modeled, simply do not learn these things. And when these foster children graduate from the system at age 18, they usually lose the adult supports they had; they are frequently unable to successfully perform the activities of adult daily living. Past studies have shown that approximately 50% of adults who aged out of the foster care system experienced homelessness and/or joblessness, were welfare recipients, or engaged in criminal activities for which they were imprisoned. This painted a grim portrait of life after foster care.

In 1999, Congress passed the John H. Chafee Foster Care Independence Act. (42 USCA § 677; Pub. L. 106-169.) The purposes of the Act, as amended in 2002, are:

- to identify children who are likely to remain in foster care until 18 years of age and to help these children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities (including smoking avoidance, nutrition education, and pregnancy prevention);
- to help children who are likely to remain in foster care until 18 years of age receive the education, training, and services necessary to obtain employment;
- to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;
- to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults;
- to provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood; and
- to make available vouchers for education and training, including postsecondary training and education, to youths who have aged out of foster care.

The Act provided money to Florida and the other states for these purposes. In 2002, Florida first enacted § 409.1451, creating a continuum of services for foster youth and former foster youth to “enable older children in foster care and young adults who exit foster care at age 18 to make the transition to self-sufficiency as adults.”

Florida operated a set of services from 2002 through the end of 2013. A new continuum was enacted in 2013, with the enactment of SB 1036, the “Nancy C. Detert Commons Sense and Compassion Independent Living Act, which became effective on January 1, 2014. The pre-2014 Road-to-Independence program was grandfathered in and will remain in effect until no later than December 31, 2018 for those young adults who were enrolled in that program on December 31, 2013. This will be discussed in this Chapter.

CHILDREN AND YOUTH WITH DISABILITIES

For each of the Independent Living programs described herein, foster children and former foster youth should be treated equally, regardless of disabilities. The department rules are inconsistent in specifying when accommodations are permitted. When the rule is silent as to a youth with disabilities, the guardian ad litem should advocate that the youth should receive whatever accommodations are necessary in light of those disabilities; the federal Americans with Disabilities Act (ADA) applies to each of the Independent Living programs.

The law requires equality of treatment for youth with disabilities. This is reflected in the applicable statutes and rules and, to the extent there is a situation for a child or youth with a disability that is not reflected in governing authority, the advocate should ensure the child or youth receives necessary accommodations, as appropriate.

SERVICES FOR FOSTER CHILDREN

NORMALIZATION

In the past, foster children have been treated differently than children of the same age in intact families. Although the goal of protecting foster children from further harm was laudable, the effect of too much regulation was to set foster children apart from similarly aged children in the community. Older foster youth, working through their youth advisory boards, advocated for treatment called “Normalization”. Normalization means that all foster children should be permitted to engage in age-appropriate life activities. In 2013, the Legislature mandated normalcy through adoption of two statutes: § 39.4091, the “Quality Parenting for Children in Foster Care Act” and § 409.145(3), through application of the “**reasonable and prudent parent**” standard of care by foster parents. This parenting standard is defined as:

the standard of care used by a caregiver in determining whether to allow a child in his or her care to participate in extracurricular, enrichment, and social activities. This standard is characterized by careful and thoughtful parental decision making that is intended to maintain a child’s health, safety, and best interest while encouraging the child’s emotional and developmental growth. § 409.145(3).

The “Quality Parenting for Children in Foster Care Act” provides definitions for “age-appropriate” activities and for “reasonable and prudent parent standard”, which is the same standard explicated above.

Both laws apply now to all children in care, regardless of age. This is an important change as, formerly, the “normalcy” provisions were in statutes and rules applicable solely to teenagers in care.

The department has expanded on the legislative directive in its rules. The department has adopted rules to be found in the Florida Administrative Code. The child welfare rules generally are found in Chapters 65C-28, 65C-29 and 65C-30, F.A.C.

The department embarked on a comprehensive review of its rules in the Administrative Code. There was a prior rule on normalcy that actually predated the first statute mentioning this topic, found at Rule 65C-30.07(10), F.A.C. However, that rule was amended in early 2016 and the normalcy provisions were deleted from the current version of that Rule. There is a pending rewrite of Rule 65C-28.019, in draft form entitled “Normalcy”, but this Rule was not yet adopted at the time the Dependency Practice Manual went to press.

PRACTICE TIP: Advocacy: provide a copy of the specific rule to the court and ask the court to enforce the rule when appropriate for the child’s best interests. When the rule and the statute are in conflict or the rule exceeds its statutory authority, argue that the rule is illegal and cannot be applied. (May need to challenge the validity of the rule in an administrative proceeding.)

Driver’s License § 322.09(4)

Currently, a foster parent or an authorized representative of a group home can sign a driver’s license application for a foster child and not have negligence or willful misconduct of the foster child while operating a motor vehicle imputed to him or her. This exemption from liability also applies to the caseworker at the agency where the state has placed a minor, provided the driver’s license is part of a court-approved transition plan. Before a case worker signs a foster child’s driver’s license application, the case worker must also notify the foster parent or other responsible party of his or her intent to sign the application.

Motor Vehicle Insurance for Children in Care § 409.1454

In 2014, the Florida Legislature adopted this statute which created a 3-year pilot project to help pay the cost of driver education, licensure and other incidental costs, as well as motor vehicle insurance for children in licensed out-of-home care who have successfully completed a driver education program. Community Based Care of Central Florida is administering this pilot project. One component of advocacy is to help older teenagers and former foster youth, and their caregivers, access this program.

<http://www.keystoindependence.org/>

Advocates for children might consider assisting teenagers 16 – 18 with this process. A report run through January 30, 2016 shows that only 20.51% of eligible youth were actually participating in the Keys to Independence Program. As this is a pilot program, the legislature may choose not to renew this program and funding, if it does not have a better utilization rate. The problem most likely includes a lack of knowledge about this program and a lack of understanding of the liability limitations for case managers and foster parents.

SERVICES FOR OLDER FOSTER CHILDREN

INDEPENDENT LIVING SKILLS § 409.145(2)(A)8, ET AL.; PROPOSED RULE 65C-28.009(2)

Prior to January 1, 2014, the lead agencies were required to provide training in independent living skills for teenagers 13 through 17, and there were periodic assessments of the teenagers' progress required by rule. These requirements were repealed with the Nancy C. Detert Common Sense and Compassion Independent Living Act. That Act now places the responsibility for providing independent living skills training on the teenagers' foster parents. § 409.145(2) defines and requires caregivers to provide quality parenting. § 409.145(2)(a)8 specifically mandates the caregiver to ensure that the teenager in that person's care "learn and master independent living skills." For those foster parents who are complying, there is a 10% supplement paid, based on the current monthly room and board rate. § 409.145(4)(d).

To ensure that the teenagers are receiving independent living skills training, the Act also requires that each social study report for judicial review hearings include a "statement from the caregiver on the progress the child has made in acquiring independent living skills." § 39.701(2)(a)10. The court is also required to examine the child's progress in acquiring IL skills and make a determination as to "the adequacy of the child's preparation for adulthood and independent living. § 39.701(2)(c)12.

Proposed Rule 65C-28.009(2) requires monthly discussions concerning the child's acquisition of independent living skills between the child welfare professional and the child and his or her out-of-home caregiver. These discussions are to be documented in FSFN.

PRACTICE TIP: The advocate should ensure the statement required by § 39.701(2)(a)10 is included in the judicial review social study report, and be prepared to subpoena the caregiver to the judicial review hearing to specifically inquire as to what skills the child is learning and how the child is learning them. The advocate should be prepared to question the case manager about the adequacy of the skills training the child is receiving. The advocate should also ensure that the court makes a determination as to this subject in its court order.

Special Requirements for the Youth's Seventeenth Year § 39.701(3)

There is to be a special Judicial Review within 90 days of the 17th birthday, to review 14 specific matters, in addition to all that is required generally for a Judicial Review. See § 39.701(3)(a), for special contents of this Judicial Review. See Form 8.973A, Fla. R. Juv. Pro., for the specific Judicial Review form for the reviews for a foster youth who is 17 years of age.

At this review hearing, the court should be asked to enter the orders contemplated by § 39.701(3)(a) concerning the removal of disabilities of non-age pursuant to §§ 743.044 – 743.147. Sections 743.045 and 743.046 relate to the youth's acquisition of housing and utilities and are required when the youth has reached age 17. Section 743.044 permits a youth to have a bank account and § 743.047 ensures a youth has the ability to contract for motor vehicle insurance; these may both be entered as early as the youth's 16th birthday.

An updated case plan, which must include "specific information related to the independent living skills that the child has acquired" must also be presented and reviewed at this Judicial Review. § 39.701(3)(b). The Florida Legislature created a specific statute granting the court the authority to find the department in contempt if the court finds that the department has not met its obligations to the child. § 39.701(3)(c).

PRACTICE TIP: The guardian ad litem should ask the court to issue an Order to Show Cause directed at the agency. Time is now even more "of the essence" than previously. § 39.701(3)(c).

Judicial Review at Age 17.5 § 39.013(8)

For any child who remains in the custody of the department, the court must conduct an additional hearing to review the child's progress. This hearing is to be conducted within the month that marks the beginning of the 6 month period before the child's 18th birthday. This is the only hearing required by statute that applies only to children in licensed care. This is a specialized hearing, mandated outside the judicial review hearings statute.

Transition Plan § 39.6035

Within the first 180 days after the child's 17th birthday, the child is to participate in developing his or her transition plan. The child should be encouraged to invite any individual whom he or she would like to include. Case management is required to collaborate with the caregiver in developing this plan.

This plan should be specific in addressing options for the child, upon aging out, to use in obtaining services, including housing, health insurance, education and workforce support and employment services. The guardian ad litem should try to assist the child by ensuring that the plan is as detailed as possible, to include specific actions to be taken, who is designated the responsible party for taking any actions, and establishing deadlines.

When the plan is developed, it should be scheduled for a time, date and place that is convenient for the child and any individual whom the child wishes to attend, and it should be scheduled to interfere as little as possible with the child's schooling, extracurricular activities and any employment.

The transition plan must be approved by the court before the child leaves care and the court terminates its jurisdiction.

Last Judicial Review Before the Child's 18th Birthday § 39.701(3)(d)

All the subjects required by the first judicial review after the 17th birthday must be reviewed again at this final hearing for the child, and must also address a number of other issues. For the child who intends to

remain in care, the court must review the transition plan and ensure the child has a plan to meet the requirements of § 39.6251. For the child who intends to be discharged from foster care on the 18th birthday, the court must ensure that the child has been informed of the services and benefits for which she is eligible, and of the opportunity to reenter foster care pursuant to § 39.6251.

PRACTICE TIP: The guardian ad litem should advocate for the expedition of necessary services for the youth. Ensure that detailed information is included in the Judicial Review Social Service Report and in the transition plan. Ensure that the youth participates in the development of, and then signs applicable documents. § 39.4085(12). Ensure the child is present; try to have these judicial reviews scheduled so that the child does not have to miss school to attend; ensure the agency provides transportation for the child to court.

SERVICES TO FORMER FOSTER CHILDREN

Young adults between the ages of 18 and 23, who have aged out of the foster care system (i.e., were in foster care on their 18th birthday) have access to certain independent living programs offered by the department, pursuant to the Nancy C. Detert Act

EXTENSION OF JURISDICTION

The juvenile court may extend its jurisdiction beyond the age of 18, under three circumstances. First, any child who has not opted out of remaining in continuing care pursuant to § 39.6251, will automatically remain in the program known as “extended foster care.” This jurisdiction continues until the first of the following occurs: the young adult later opts out of extended care; the young adult is discharged from the program for cause; or the young adult reaches the age limit for automatic discharge from the program. § 39.6251(8). The extended foster care program is discussed below and in the Extended Foster Care chapter.

Upon the young adult’s petition or motion, if filed prior to the 19th birthday, the court may reinstate or , extend its jurisdiction until the youth reaches the age of 19, for the limited purpose of determining that appropriate services that were required to be provided to the young adult before reaching the 18th birthday were actually provided. See Form 8.974, Fla. R. Juv. P., for a petition to extend jurisdiction, but note that paragraph 2.a. needs to be modified to conform with the current language of the statute. The third reason the court may retain or extend its jurisdiction beyond the child’s 18th birthday is if a petition for special immigrant juvenile status and an application for adjustment of status have been filed on behalf of a child in foster care and the federal authorities have not yet acted on those requests. This jurisdiction is for the juvenile court to determine the status of the immigration petition and application status, and will terminate upon the final decision of the federal authorities, or upon the young adult’s 22nd birthday.

See The Florida Administrative Code for the particular program from which the young adult is being terminated.

See Extended Foster Care chapter.

MEDICAID § 409.903(4); THE AFFORDABLE CARE ACT

Former foster youth have been eligible to receive Medicaid to their 21st birthdays since 2007, provided they were also eligible to receive services under §409.1451 Federal law now provides more extensive Medicaid coverage. Effective January 1, 2014, the ACA provides that foster care youth enrolled in Medicaid on their 18th birthday are eligible for Medicaid until they turn age 26.

(<http://www.centerforchildwelfare.org/kb/ilpub/ACAYouthAgingOut.pdf>) In Florida, these young adults qualify for Medicaid services without any income or resource test.

TUITION AND FEE EXEMPTION § 1009.25

This statute provides for the exemption from paying tuition, fees and costs, including laboratory fees, to attend any public (i.e., Florida) educational institution. This statute is often amended, to include additional students from the child welfare system, and to define the benefits. Currently (prior to the conclusion of the 2016 legislative session) this benefit applies to the following:

- All students who were in either departmental or relative custody on their 18th birthday,;
- students who were adopted from departmental custody after May 5, 1997; and
- students who are placed in a guardianship by the court after turning 16 and after being in departmental custody for six months or longer.

For each category of student receiving the exemption, the exemption is available until the student reaches 28 years of age.

PRACTICE TIP: Many of Florida's public post-secondary educational institutions created limitations on the number of credit hours or the types of degrees to which this exemption would apply. This issue has now been resolved with the Board of Governors of the State University System. However, should any former foster youth be faced with limitations not appearing in the statute, the advocate should ensure the limitation is challenged as exceeding the administrative authority for rulemaking.

The advocate should be familiar with the current version of the governing statute, as it is amended from time to time. When the guardian ad litem works with the former foster youth, he or she should ensure the young adult understands the benefits of this tuition exemption and understands the downsides of attending a non-qualifying institution. Many of our youth unwittingly enroll in for-profit institutions and end up with too much student debt and insufficient education.

CONTINUING CARE/EXTENDED FOSTER CARE § 39.6251; CHAPTER 65C-41, F.A.C.

When a child ages out of foster care at age 18, the child will now be enrolled in continuing care, which is commonly called "extended foster care" and referenced as "EFC." Of course, because the child becomes an adult at age 18, the young adult has the right to opt out of this program at any time, and may signify the intent to do so in his or her transition plan prior to the 18th birthday.

EFC provides continuing care and court jurisdiction for a young adult. This includes supervision, at a level to be determined by the department or the community-based care lead agency (CBC), as well as services, including housing, life skills instruction, counseling, educational support, employment preparation and placement, and development of support networks. These services are determined based on the young adult's assessed needs, interest and input and must be consistent with the goals set forth in the young adult's case plan.

Provided the young adult continues to meet the program qualifications, he or she may remain in, or return to, EFC until the 21st birthday. Any young adult with a documented disability may receive this service until the 22nd birthday. In addition to age, the young adult must not have achieved permanency, which the Rule defines as voluntarily returning to live with a legal parent. However, if that living arrangement does not work

out, the young adult is eligible to return to EFC. Rule 65C-41.005(a)(3), F.A.C. And, as stated above, the young adult must continue to consent to remain in EFC and has every right to voluntarily leave the program.

In addition to these basic eligibility criteria, the young adult must reside in a “supervised living environment” that is “provided by the department or [the] . . . lead agency.” § 39.6251(4)(a). The legislature envisioned that the majority of young adults in EFC would remain in their foster homes, as that is the living arrangement first listed. § 39.6251(4)(a). As so many of the teenagers in foster care are already living in group homes, this has been a challenge for the CBCs. Some CBCs have had success in recruiting both licensed foster homes, as well as unlicensed “host” homes, similar to licensed homes but without the licensing, for young adults in EFC. Other CBCs have had transitional housing in their geographic locations, or have developed such housing themselves. At this time, however, it appears that the large majority of young adults in EFC move into the housing market, living in rental properties on their own. It is important advocates work within their communities to make connections to assist in developing housing for our young adults, to the extent possible.

The young adult must also be engaged in one of the following activities:

- completing secondary education or a program leading to an equivalent credential;
- enrolled in an institution that provides postsecondary or vocational education;
- participating in a program or activity designed to promote or eliminate barriers to employment; or
- employed for at least 80 hours per month.

For any young adult with a physical, intellectual, emotional, or psychiatric condition that limits participation, that young adult remains eligible for participation in EFC. This is a fifth alternative in the statutory listing of the required activity selection. 65C-41.003(7) F.A.C. does not settle the practical question of whether a young adult may participate in EFC even if he or she is totally unable to participate in any of the other 4 activities on a permanent basis. Rather, the Rule provides, at (7)(b), that the case manager shall address the condition and the accommodations or modifications necessary to achieve the young adult’s case plan goals in the transition plan.

The young adult is also required to participate in monthly case management supervision, and is encouraged to participate in attending and preparation for judicial review and permanency hearings. The young adult has the right to collaborate with the case manager in the preparation of every judicial review social study report.

The young adult may be discharged from EFC for failure to meet the program requirements, including a refusal to live in an approved supervised living environment. In this event, the CBC must provide advance written notice of the discharge from the program, and provide information concerning the right for the young adult to request a hearing to challenge the discharge. This information is contained in the “Due Process Rights” document referenced in Rule 65C-41.005.

The hearing conducted for EFC discharge cases is a “fair hearing”, which meets the requirements of the Administrative Procedures Act and which is less formal and hopefully therefore more friendly for the young adult. See 65C-41.006, F.A.C. Although the young adult has 30 days in which to request a fair hearing, if the young adult makes the request, whether verbally or in writing, **within 10 days**, then the young adult may continue to remain in, and receive EFC services pending the outcome of the fair hearing. Rule 65C-41.006(3)(a).

Any young adult who never entered EFC, or who was in the program and subsequently left, whether voluntarily or after discharge for cause, retains the right to apply for readmission (or admission) at any time prior to turning 21, or 22 if the young adult has a documented disability. See Rule 65C-41.002, F.A.C. for the application for readmission process. If this application is denied, then the fair hearing Rule also applies. The only difference is that there can be no continuing benefits when a young adult is first applying for admission or readmission, so the “10 day” rule is inapplicable.

It appears that any issues concerning the young adult’s living environment, or the specific services to be provided to the young adult, are to be litigated in the dependency court. It is clear that discharge and admission decisions have a statutorily-required administrative fair hearing procedure, which therefore removes subject matter jurisdiction over these matters from the dependency court.

As this program only became effective on January 1, 2014, and Chapter 65C-41, F.A.C. has an effective date of November 2, 2015, there is not yet significant experience with this program’s operation. Many questions about the day-to-day operation of this program remain unanswered as this Manual went to press. The advocate for the young adult should encourage the young adult to challenge CBC decisions concerning services and admission and discharge criteria in the appropriate legal forum. Until a body of law is developed around this program, the questions as to statutory interpretation will remain unsettled and there will not be state-wide uniformity in the application of this statute to our former foster youth.

See Extended Foster Care chapter.

ROAD TO INDEPENDENCE PROGRAM § 409.1451; CHAPTER 65C-42, F.A.C.

Effective January 1, 2014, § 409.1451 was significantly amended by the Nancy C. Detert Act, with this statute being named the “Road to Independence Program.” Take care not to confuse this with the pre-January 1, 2014 RTI program.

This new Road to Independence Program contains two distinct programs to assist young adults formerly in department custody: Postsecondary Education Services and Support, and Aftercare Services.

POSTSECONDARY EDUCATION SERVICES AND SUPPORT § 409.1451(2)

For anyone familiar with the “Road to Independence” educational stipend program in effect until December 31, 2013, this program, referred to as “PESS”, will seem very familiar. PESS is, essentially, the “old” RTI program, except that it is limited to students enrolled in postsecondary educational pursuits, and the stipend is now a determined amount, rather than being based on the student’s assessed needs.

The dependency eligibility requirements for a student are that the student must be between 18 and 23 years of age, and:

- Have been living in licensed care on the 18th birthday AND have spent at least 6 months in licensed care prior to the 18th birthday, which 6 months is not required to be the immediately preceding 6 months. § 409.1451(2)(a)1,2; or
- Have been adopted from foster care or placed with a court-approved guardian after spending at least 6 months in licensed care within the 12 months immediately preceding such adoption or placement. § 409.1451(2)(a)1; or
- Currently living in licensed care, and have spent at least 6 months in licensed care prior to the 18th birthday, which 6 months is not required to be the immediately preceding 6 months. § 409.1451(2)(a)1,2.

Living in Licensed Care

Rule 65C-41.002(d) considers a young adult to have been “living in licensed care” on the date of the 18th birthday if the young adult was in the legal custody of the department on the date of the 18th birthday. This interpretation therefore continues the department’s tradition of looking to the young adult’s legal status on the 18th birthday rather than simply the physical location on that date. Students who were in SIPP programs, criminal justice or DJJ commitments, in the hospital or even on runaway on their 18th birthdays may still be eligible depending on their legal status on that date.

Requirements

The statute does not explicitly require that a young adult have been adjudicated dependent, as the language no longer requires that the student have been “a dependent child.” § 409.1451(5)(b)1.a. The Rule chapter provides no guidance on this. However, it is generally accepted that the student must have been adjudicated dependent and not just living in licensed care. There should be very few situations in which a young adult was living in licensed care on the 18th birthday, in the status of shelter care, and who had previously spent at least 6 months in licensed care. This is a matter for potential litigation in the future, should such a student apply for PESS.

The student must also meet a number of other requirements, including having earned a standard high school diploma or its equivalent; submitting an “error free” Free Application for Federal Student Aid (FAFSA) and applying, with case management assistance, for any other grants and scholarships for which the student may qualify; and signing an agreement to allow the department and the CBC access to the student’s school records.

The student must have been admitted for enrollment in an eligible postsecondary educational institution “full-time”, defined as a minimum of 9 credit hours or the vocational school equivalent. For any student with a recognized disability or who is “faced with another challenge or circumstance that would prevent full-time attendance”, the student may still receive PESS with a part-time enrollment. In this event, however, the student must have a recognized disability or receive approval from his or her academic advisor. § 409.1451(2)(a)4.

Eligible Postsecondary Institution

An “eligible” postsecondary institution is an institution that is approved for receipt of the Florida Bright Futures Scholarship Program, as defined in § 1009.533. This excludes almost every postsecondary institution outside of the State of Florida. For any student who is determined to attend school outside the State, there is still some funding available through federal Chaffee funding. This is a funding stream that makes funding available at a set rate for certain former foster youth. The guardian ad litem is urged to ask the CBC about funding for any young adult who will be attending school out-of-state and who is therefore not eligible for PESS funding.

Payments

PESS provides a monthly stipend in the amount of \$1256.00 for eligible students. To whom this money is paid depends on whether the student is also in EFC, and for the non-EFC student, on whether the CBC and

the student determine that the young adult can successfully manage the full amount of the assistance. For the student who remains in the EFC program, the money is paid to the foster parent or group home provider. § 409.1451(2)(b)2-5. For the student who is not also in the EFC program, the money may be paid first to housing and utility providers, with the remainder paid to the student. § 409.1451(2)(c)1.

The payment provisions are difficult to understand and, to the extent the funds are paid to the caregivers for any student still in EFC, they appear to be a disincentive for a young adult to remain in continuing care. The data does seem to bear this out, but we will need longitudinal data to make a determination as to whether this disincentive actually helps our former foster youth to successfully gain their independence sooner or whether leaving EFC as soon as they are eligible for PESS is an impediment to successful postsecondary completion.

However the funds are paid, the student is eligible for PESS funding during those months in which he or she is enrolled in a postsecondary educational institution. § 409.1451(2)(b)7.

Eligibility Period and Renewal

Once a student is approved, the award is for a one year period. The department or CBC is required to evaluate the award for renewal annually. To be eligible for renewal, the student must meet the credit hour requirements, i.e., full-time of 9 credit hours unless the young adult qualifies for part-time status as discussed above. Additionally, the student must have maintained standards of academic progress as defined by the educational institution. A student may not be discharged from PESS for this requirement, as the statute specifically provides that, during the eligibility period, the young adult may continue to be enrolled while attempting to restore eligibility “as long as progress towards the required level is maintained.” § 409.1451(2)(d)3.b.

This language seems to mean that the young adult must meet the educational institution’s standards for academic progress at the end of the year’s eligibility in order to renew a PESS award, but failing to meet these standards is not grounds to discharge a student from the program during the annual award period unless the student is failing to make any progress toward the required level. This latter principle has been affirmed by fair hearing officers.

A PESS recipient may be terminated during the annual award period, however, if he or she is no longer enrolled in an educational institution or is no longer a Florida resident. § 409.1451(2)(d)4.

As with the EFC program, if a student is discharged for cause or has an initial or renewal application denied, there is an appeal process. Rule 65C-42.004 provides for a fair hearing process that is almost, if not actually, identical to the fair hearing process applicable to discharge from or application denial from the EFC program, discussed above.

AFTERCARE SUPPORT SERVICES § 409.1451(3), RULE 65C-42.003

This program is designed to serve as a bridge between care and independent living. A young adult may not receive after care services while also receiving program benefits from EFC or PESS. These services may help those young adults who exit foster care, either at age 18 or from EFC, make the transition. These services may also help those young adults who wish to return to care, or to apply for PESS, during the time their applications are pending, while they complete program requirements.

The statute lists services to be provided, including “temporary financial assistance.” There has been some confusion in the past as to whether financial assistance is available for reasons other than to prevent

homelessness, due to § 409.1451(3)(c)'s requirement that assistance is to be provided "as expeditiously as possible" when it is to prevent homelessness. Rule 65C-42.003(6)(a) clears this up by requiring that the "Aftercare Services Plan shall include the amount of temporary financial assistance being provided and the specific reason(s) for the assistance."

Although the statute provides that aftercare services are available "to a young adult who has reached 18 years of age but is not yet 23 years of age", Rule 65C-42.003(1)(a) limits this program to young adults who have been "considered to have been living in licensed care" on the 18th birthday, again referring back to whether the young adult was in the legal custody of the department on that date. This interpretation is reasonable, based on the context of this statute, being focused on young adults who have "lived in foster care" (§ 409.1451(1)(a)) and because a strict interpretation of this statute would lead to absurd results.

As with both PESS and EFC, there is a fair hearing provision for any young adult who has an application for services denied in whole or in part. Rule 65C-42.004. This Appeals Rule applies to both PESS and Aftercare, and is discussed above.

APPEALS: FAIR HEARINGS PROCEDURE, GENERALLY

Any former foster youth may challenge any "adverse" decision by the department concerning the young adult's application for or continued eligibility for any post-18 program benefits. An adverse decision is any decision that negatively affects the interests of the youth. The typical decisions that are appealed are decisions that deny or terminate benefits, or that set the amount of the benefit, based upon need. The appeal utilizes the provisions of Florida's Administrative Procedures Act, at Chapter 120, Fla. Stat.

The department has chosen the option of using a "Hearing Officer" from the department's Office of Appeal Hearings, which is the fair hearing office within the Department Office of Inspector General. It is important to note that the hearing officers generally are not lawyers.

- Telephone: (850) 488-1429
- For a general overview of the process directed to a layperson, see <http://www.myflfamilies.com/about-us/office-inspector-general/investigation-reports/appeal-hearings>.

The department becomes the Respondent in these cases. Also, the department is represented by an attorney with the Office of the Attorney General, under a contract between the two agencies.

If the guardian ad litem remains involved with a former foster youth due to extended court jurisdiction, the guardian ad litem might decide to assist the young adult in the fair hearing process to appeal. If the guardian ad litem is unable to pursue the administrative appeal, the guardian ad litem should refer the young adult to the local Legal Aid or Legal Services office for help with the administrative appeal. If the guardian knows any other non-attorney adult who is familiar with this fair hearing process and the particular subject matter, the guardian may refer the young adult to that other person. One is not required to be a licensed attorney to be permitted to represent an individual in these fair hearings.

An appeal of an adverse fair hearing decision will go to the District Court of Appeal, either the First DCA, or the district in which the youth resides. If a youth appeals an adverse hearing decision, he or she should definitely have legal counsel at that point.

STUDENTS GRANDFATHERED INTO THE PRE-2014 “ROAD TO INDEPENDENCE” PROGRAM § 409.1451(5)

When the Nancy C. Detert Act was passed, the legislature chose to permit those young adults who were already receiving the prior “Road to Independence” educational stipend to continue with that program until they completed it, either successfully or through a failure to renew or a discharge. Any young adult who was enrolled in the former RTI program on December 31, 2013 was therefore grandfathered in. No new applications for that program were permitted after that date, however.

Young adults who were permitted to remain in this program must continue to meet eligibility requirements. If they do so, they will be permitted to renew in this program until they reach the age of 23, or until they lose eligibility. To renew, the young adult must remain enrolled full-time in an eligible postsecondary educational institution, with the definition of “full-time” being determined by the educational institution, and must maintain “appropriate progress as required by the educational institution. § 409.1451(5)(b)6.i.(I), (II) (2012). Additionally, the young adult will be discharged from the program once he or she earns two diplomas, certificates or credentials. Any young adult who has attained an associate’s degree will be permitted to continue in RTI, if eligible, to pursue a bachelor’s degree or its equivalent. § 409.1451(5)(b)6.h. (2012).

If the CBC discharges a young adult, or denies a renewal application, the young adult has the right to request a fair hearing and continue to receive benefits if the request for a fair hearing is made within 10 days.

Theoretically this program could remain viable for renewals for 5 years from December 31, 2013. However, it is likely that the program will end sooner due to attrition.

REMOVAL OF DISABILITY OF NON-AGE – BANKING

IN THE COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

IN THE INTEREST OF:

D.O.B.: _____

CASE NO: _____

DIVISION: _____

ORDER AUTHORIZING CHILD TO SECURE DEPOSITORY FINANCIAL SERVICES
BEFORE THE CHILD'S 18TH BIRTHDAY

THIS CAUSE came before the court to remove the disabilities of nonage of(name)....., for the purpose of securing depository financial services, and the court being fully advised in the premises FINDS as follows:

.....(Name)..... is at least 16 years of age, meets the requirements of § 743.044, Florida Statutes, and is entitled to the benefits of that statute.

THEREFORE, based on these findings of fact, it is ORDERED AND ADJUDGED that the disabilities of nonage of(name)..... are hereby removed for the purpose of securing depository financial services.(Name)..... is hereby authorized to make and execute contracts, releases, and all other instruments necessary for the purpose of securing depository financial services. The contracts or other instruments made by(name)..... for the purpose of securing depository financial services have the same effect as though they were the obligations of a person who is not a minor.

ORDERED at, Florida, on(date).....

Circuit Judge _____

Copies to:

REMOVAL OF DISABILITY OF NON-AGE – RESIDENTIAL LEASES *

IN THE COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

IN THE INTEREST OF:

D.O.B.: _____

CASE NO: _____

DIVISION: _____

_____ /

**ORDER AUTHORIZING CHILD TO ENTER INTO RESIDENTIAL
LEASEHOLD BEFORE THE CHILD'S 18TH BIRTHDAY**

Based on the child and Guardian ad Litem request for the court to remove the disabilities of nonage of _____, and the court being fully advised in the premises finds as follows:

1. _____ became 17 years of age on _____, has previously been adjudicated dependent, and is in the legal custody of the Department of Children and Family Services.
2. _____ meets the requirements of §. 743.045 and is entitled to the benefits of that statute.

THEREFORE, based on these findings of fact, it is ORDERED AND ADJUDGED that the disabilities of nonage of _____ are hereby removed for the purpose of entering residential leasehold. _____ is hereby authorized to make and execute contracts, releases, and all other instruments necessary for the purpose of entering into a contract for the lease of residential property. The contracts or other instruments made by _____ for the purposes of entering into a residential lease shall have the same effect as though they were the obligations of a person who is not a minor.

ORDERED on _____, 2006.

Copies to:

* These are just two examples of Motions for the Removal of Disability of Non-Age. Others include Utility Services § 743.046; Motor Vehicle Insurance § 743.047; Borrowing Money for Educational Purposes § 743.05.

KEEPING CHILDREN SAFE ACT & DYNAMICS OF SEXUAL ABUSE

SONIA CROCKETT, ESQ., AND KAREN OEHME, ESQ., DIRECTOR, INSTITUTE FOR FAMILY VIOLENCE STUDIES

Chapter 39, Florida Statutes, was amended during the 2007 Legislative Session to provide further protection in the dependency process to children whose parents or other caregivers have histories of certain crimes, most of which involve sexually deviant behavior. The Keeping Children Safe Act created § 39.0139, effective July 1, 2007. The act was amended substantively in 2011 (Chapter 2011-209, Laws of Florida). The act places the burden on a parent or other caregiver who has a criminal record of certain crimes (listed below), or who has been found by a court of competent jurisdiction to have sexually abused a child as defined in § 39.01, to provide clear and convincing evidence that visitation by that person will not endanger the safety, well-being, and physical, mental, and emotional health of the child. This rebuttable presumption of detriment also applies to a parent or other caregiver who has been convicted of removing minors from the state or concealing minors contrary to court order or who has been designated as a sexual predator. Furthermore, this act seeks to protect a child from attempts to influence the child's testimony and to assure that any therapy the child is receiving due to being sexually abused is not impeded by visitation with the abuser. Grandparents who seek visitation in a Chapter 39 proceeding and who fit the § 39.0139 criteria will also have to rebut the presumption of detriment before being allowed visitation with the child.

INTENT OF KEEPING CHILDREN SAFE ACT

To protect children and to reduce the risk of further harm to children who have been sexually abused or exploited by a parent or other caregiver by placing additional requirements on judicial determinations related to visitation and other contact. § 39.0139(2).

REBUTTABLE PRESUMPTION

THE REBUTTABLE PRESUMPTION OF DETRIMENT TO A CHILD IS CREATED IN § 39.0139(3):

- when a court of competent jurisdiction has found probable cause exists that a parent or caregiver has sexually abused a child as defined in § 39.01;
- when the parent or caregiver has been found guilty of, *regardless of adjudication*, or has entered a plea of guilty or *nolo contendere*, to charges under the following Florida statutes or substantially similar statutes of other jurisdictions; and
 - § 787.04, relating to removing minors from the state or concealing minors contrary to court order;

- § 794.011, relating to sexual battery (Note that this is the general sexual battery statute and is not limited to child victims. A father with a 10 year old sexual battery conviction against an adult woman might easily overcome the presumption of detriment.);
- § 798.02, relating to lewd and lascivious behavior (Note: The behavior need not have occurred in the presence of children.);
- Chapter 800, relating to lewdness and indecent exposure (Section 800.04 deals with lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age. The first two sections, 800.02, unnatural and lascivious act, and 800.03, exposure of sexual organs, need not involve a child.);
- § 826.04, relating to incest (sexual intercourse with a person to whom the defendant is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece);
- Chapter 827, relating to the abuse of children (This chapter makes child abuse a crime, as well as nonsupport of dependents and misuse of child support money. It is questionable whether the Legislature intended that a conviction under this chapter would trigger § 39.0139.).
- when a parent or caregiver has been determined by a court to be a sexual predator as defined in section 775.21 or has received a substantially similar designation under laws of another jurisdiction. (There is no definition of sexual predator in § 775.21, but instead there are “sexual predator criteria” at § 775.21(4).

A Florida Sexual Offenders and Predators’ website is maintained by FDLE at <http://offender.fdle.state.fl.us/offender/homepage.do>.

ADDITIONAL REQUIREMENTS

At the shelter hearing, it is possible that the Department of Children and Families (the department) will have information about one or more of the parents or caregivers obtained from the department’s child abuse hotline reports and a criminal history from the Florida Department of Law Enforcement (FDLE). At this early stage in the case, this information may not have been gathered on all parents or caregivers. Prior to the amendment of the Keeping Children Safe Act in 2011, the existence of a child abuse hotline report alleging sexual abuse of any child by a parent or caregiver would have been enough to create a rebuttable presumption of detriment to a child. The amendment to the statute removed this criteria and replaced it with the requirement that **a court of competent jurisdiction has found probable cause exists that a parent or caregiver has sexually abused a child as defined in §§ 39.01 and 39.0139(3)(a)1.**

The court should determine whether any person before the court who seeks to begin or resume contact with the child victim fits the criteria listed in the Keeping Children Safe Act. If so, that person has the right to an evidentiary hearing at which the court determines whether there is clear and convincing evidence that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by visitation with the parent or caregiver. § 39.0139(4). The burden is on the parent to rebut the presumption of detriment. § 39.0139(4)(c). The visitation or contact with the child cannot occur without a hearing and order by the court. § 39.0139(3)(c).

At the hearing on the issue of visitation, the court may receive and rely upon any relevant and material evidence submitted, including written and oral reports or recommendations from the child protection team, the child’s therapist, the child’s guardian ad litem or the child’s attorney ad litem, to the extent of its probative value in the court’s effort to determine the action to be taken with regard to the child, even if these

reports, recommendations, and evidence may not be admissible under the rules of evidence. § 39.0139(4)(b).

If the presumption of detriment is not rebutted, the court must enter an order prohibiting or restricting visitation or other contact with the child (see discussion of the conditions that must be placed on the visitation below). § 39.0139(4)(d). If the presumption is rebutted by clear and convincing evidence, the court should enter an order setting forth findings of fact allowing visitation or other contact with any conditions it finds necessary to protect the child. § 39.0139(4)(c).

Visitation is also an issue at arraignment and disposition hearings. Any order for visitation or other contact entered at these hearings must conform to the provisions of §§ 39.0139; 39.506(6); and § 39.521(3)(d).

The court is required, pursuant to § 39.822, to appoint a guardian ad litem at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding. If one has not already been appointed, § 39.0139(4)(a) requires that either a guardian ad litem or an attorney ad litem be appointed for the child before the hearing on visitation. Guardians ad litem or attorneys ad litem appointed to these cases must have special training in the dynamics of child sexual abuse.

PRACTICE TIP: The Clearinghouse on Supervised Visitation has developed a training manual on child sexual abuse referrals for training its staff. While this manual has extraneous material that deals specifically with the operation of supervised visitation centers, it also has extensive materials about the dynamics of sexual abuse. A certificate can be obtained after completion of the training materials. These training materials can be found at <http://familyvio.csw.fsu.edu/SV/Manuals.php>

CONDITIONS PLACED ON THE PARENT'S VISITATION

When a parent or caregiver does not overcome the presumption of detriment, certain conditions must be placed on the visitation including, as described in § 39.0139(5):

- supervision by a person who has received special training in the dynamics of child sexual abuse; or
- conducting the visit in a supervised visitation program, provided certain requirements are met by the program. (Programs that accept sexual abuse cases must have the following on file: agreements with the court regarding child sexual abuse cases, annual Affidavits of Compliance, agreements with the department, documentation of staff training through the Clearinghouse on Supervised Visitation specifically in child sexual abuse dynamics, and protocols for obtaining background information on sexual abuse case referrals.) § 39.0139(5).

A judge is not able to appoint a family member or other person to supervise a parent or other caregiver who is required to have supervised visitation pursuant to § 39.0139, unless that person has received special training in the dynamics of child sexual abuse. It would be incumbent on the judge to make an inquiry of any proposed supervisor as to that person's training in this area.

PRACTICE TIP: For information about supervised visitation programs, their locations, and contact information, the Clearinghouse on Supervised Visitation at Florida State University (850/644-6303) or visit the website at <http://familyvio.csw.fsu.edu>.

PROTECTION AGAINST INFLUENCING TESTIMONY

Once a rebuttable presumption of detriment has arisen under § 39.0139(3) or if visitation is ordered under §39.0139(4), a party or participant who becomes aware of attempts by a person to influence the child's testimony may inform the court of such an incident. § 39.0139(6)(a). The party or participant may become aware of these attempts to influence the child through either direct communication with the child or other firsthand knowledge. The court must then have a hearing within 7 business days and determine whether it is in the best interests of the child to prohibit or restrict visitation or other contact. Id.

PROTECTION OF A CHILD'S THERAPY PROGRESS

If the child's therapist reports that the visitation or other contact between the child and parent or caregiver is impeding the child's therapeutic progress, the court should convene a hearing within 7 business days to review the terms, conditions, or appropriateness of continued visitation or other contact. § 39.0139(6).

GRANDPARENTS' VISITATION

Presently, pursuant to § 39.509, a grandparent whose grandchild has been adjudicated dependent and is not in the physical custody of a parent is entitled to reasonable visitation unless the court finds that such visitation is not in the best interests of the child or the visitation would interfere with the goals of the case plan. Under the Keeping Children Safe Act, if a grandparent fits the criteria in § 39.0139(3)(a), the rebuttable presumption would be created and the court would conduct the same type of hearing described in this chapter.

GUARDIAN AD LITEM PROGRAM

Only guardians ad litem with specialized training in the dynamics of sexual abuse training can be assigned to cases which arise under § 39.0139.

PRACTICE TIP: The program attorney should review any information available at shelter, arraignment, or disposition hearings, looking for evidence that a parent or caregiver fits any of the criteria in § 39.0139(3)(a). This information will most likely be available only through the department. Further investigation may uncover additional information which the program attorney will need to bring to the court's attention.

If the guardian ad litem receives information from a child which indicates that a person is attempting to influence the testimony of the child or has other firsthand knowledge that this is occurring (for example, the guardian ad litem might overhear a conversation between a child and another person about the child's testimony), the program attorney should file a motion for a hearing, pursuant to § 39.0139(6). It is suggested that a sworn affidavit signed by the guardian ad litem be attached to the motion. The court shall hold a hearing within 7 business days to determine whether it is in the child's best interests to prohibit or restrict visitation or other contact with the person who is alleged to have influenced the testimony of the child. Note that the language in § 39.0139(6)(a) is not restricted to parents or other caregivers who attempt to influence a child's testimony, but uses the word "person." Thus, it would seem that a child's contact with anyone who attempts to influence the child's testimony could be stopped pursuant to this section.

It is likely to be the guardian ad litem volunteer who hears from a child's therapist that the child's therapeutic progress is being impeded by visitation with the abuser. If this occurs, the program attorney should file a motion, with the therapist's written recommendation attached, requesting a hearing within 7 business days to allow the court to review the terms, conditions, or appropriateness of continued visitation or other contact, pursuant to § 39.0139(6)(b).

KEEPING CHILD SAFE ACT: APPELLATE CASES

MAHMOOD v. MAHMOOD, 15 SO. 3D 1 (FLA. 4TH DCA 2009).

The Fourth District Court of Appeal held that the Keeping Children Safe Act only applies to Chapter 39 proceedings.

LENEVE v. LENEVE, 64 SO. 3D 196 (FLA. 4TH DCA 2011).

The Fourth District Court of Appeal cited Mahmood v. Mahmood, and held that the Keeping Children Safe Act could not be used to modify a final judgment for a Chapter 61 dissolution of marriage.

W.W. v. GUARDIAN AD LITEM PROGRAM, 159 SO. 3D 999 (FLA. 1ST DCA 2015).

After a father was denied visitation pursuant to the Keeping Children Safe Act, he filed a motion to reinstate supervised visitation, which was denied by the trial court. He filed a petition for writ of certiorari, but the District Court of Appeal held that it would only review the case by appeal, and not writ of certiorari.

ZAMPERLA v. POPE, 120 SO. 3D 132 (FLA. 2D DCA 2013)

Citing Mahmood v. Mahmood, the court held that the two provisions governing compliance with child support orders entered in dissolution of marriage proceedings do not govern compliance with dependency orders [such as the Keeping Children Safe Act].

IN RE R.T., S.T. AND K.T. v. DEPARTMENT OF CHILDREN AND FAMILIES AND GUARDIAN AD LITEM PROGRAM, 164 SO. 3D 11 (FLA. 2D DCA 2015)

The trial court entered a no contact order against the children's stepfather pursuant to the Keeping Children Safe Act. The trial court denied the Mother's motion to amend the safety plan to eliminate the no contact order with the stepfather, but also ordered *sua sponte* the teenage stepsons to undergo therapeutic assessments to determine their self-defense capabilities. The court held that requiring the sons to undergo the assessments was a violation of the mother's due process rights because this was not in her pleadings, and quashed this portion of the motion.

DEPARTMENT OF CHILDREN & FAMILIES v. P.F., 107 SO. 3D 1123 (FLA. 5TH DCA 2012)

The maternal grandfather was given access to his grandchild following a Keeping Child Safe Act hearing. The department and the Father petitioned for a writ of certiorari to quash the order allowing the grandfather's access to the child. The Fifth District Court of Appeal held that the trial court failed to conduct an evidentiary hearing to determine whether the grandfather's actions were appropriate as required by the Keeping Children Safe Act when it only considered a child protection interview between an investigator and the child. It therefore quashed the decision and remanded to the trial court.

IN THE INTEREST OF S.C. v. DEPARTMENT OF CHILDREN AND FAMILIES AND GUARDIAN AD LITEM PROGRAM, 83 SO. 3D 883 (FLA. 2D DCA 2012)

The court entered an order under the Keeping Children Safe Act that prohibited the paternal grandfather from seeing his grandson, and that the child should remain with his paternal grandmother. The grandparents filed a writ of certiorari, and the Second District Court of Appeal quashed the order because the Keeping Children Safe Act did not apply because the grandson had not been sexually abused.

DYNAMICS OF CHILD SEXUAL ABUSE: AN OVERVIEW

PRACTICE TIP: This overview should be used in conjunction with the online Child Sexual Abuse Curriculum for supervised visitation Providers available at <http://familyvio.csw.fsu.edu/clearinghouse/manuals-and-materials/>

If the court orders supervised visitation between a parent and child under § 39.0139, such visitation can only be with a person who has had special training in the dynamics of sexual abuse or at a supervised visitation program that has complied with certain requirements. Programs that accept sexual abuse cases must have the following on file:

- Agreements with the court regarding child sexual abuse cases;
- Annual affidavits of compliance;
- Agreements with department;
- Documentation of staff training through the Clearinghouse on Supervised Visitation specifically in child sexual abuse dynamics; and
- Protocols for obtaining background information on sexual abuse case referrals

THE RISK OF CONTACT

When considering family reunification, the Association for the Treatment of Sexual Abusers standards state: “Renewed contact between clients and family members at risk for being sexually abused requires careful monitoring and supervision. Clients continue to pose some level of risk for reoffending even after completing treatment or supervision. The main priority in considering family reunification is the emotional and physical safety of potential victims. [Mental health professionals] should only recommend contact with familial victims or family member under the age of 18 when a non-offending parent or another responsible adult is adequately prepared to supervise the contact, the victim or minor is judged to be ready for such contact by another professional who can monitor their safety, and clients have made substantial progress in their treatment.”¹⁰

INAPPROPRIATE BEHAVIOR DURING VISITATION

Florida’s supervised visitation providers have observed a number of examples of inappropriate behavior by alleged sexual offending parents during scheduled visits. These behaviors include the parent:

¹⁰ Association for Treatment of Sexual Abusers Standards, 2001, <https://www.atsa.com/pdfs/COE.pdf>, last visited February 14, 2016

- Attempting to whisper to the child or to speak privately to the child so that the visit monitor can't hear what is said.
- Playing with toys or other objects near the offending parent's genitals or in the lap of the parent so the child will reach for them and have physical contact.
- Tickling the child, or encouraging other physical contact.
- Exposing genitals.
- Leaving pants unzipped "accidentally."
- Using apparent code words.
- Masturbating.
- Choosing certain toys that have meaning to the child's abuse and/or were used to sexually abuse the child.
- Displaying photographs of individuals, trips, or locations to the child that depict aspects of the child's victimization experience.

Also cause for concern among Florida's supervised visitation providers has been behaviors observed in children with histories of child sexual abuse during court-ordered visits with their alleged offending parent including:

- Toileting accidents (not developmentally expected) during, immediately prior to, or immediately after court-ordered visits.
- Crying beyond what typically occurs during the provision of court-ordered supervised visitation services.
- Exhibiting unusual clinging behavior towards residential, non-offending parent or caretaker.
- Engaging in head banging, or other types of self-injurious behavior.
- Exposing genitals in a developmentally inappropriate manner.
- Attempting to engage in sexually explicit play with other children, visiting parent, or staff during visits.
- Using sexually explicit language during visits.
- Drawing sexually explicit pictures during visits or using dolls or toys in a sexually suggestive manner.

EFFECTS OF CHILD SEXUAL ABUSE ON CHILD VICTIMS

Children who have experienced sexual abuse often display physical, behavioral, and emotional effects of their experiences. Some of these effects are listed in the following chart. While these effects are consistent with child sexual abuse, they may also be attributed to other conditions as well.

PHYSICAL, BEHAVIORAL, AND EMOTIONAL EFFECTS OF CHILD SEXUAL ABUSE

Physical	Behavioral	Emotional
Genital injuries Sexually transmitted diseases Urinary tract problems Difficulty walking or sitting Preoccupation with genitals Toileting accidents	Nightmares Sleep disturbances Changes in behavior Withdrawal Lack of interest in activities Self-injurious behavior Fears (of taking baths, of being alone) Eating disorders Acting out Unusual sexual knowledge for age Promiscuity	Fear Depression Guilt Shame Numbness Dissociation Post-Traumatic Stress Syndrome

ACCOMODATION SYNDROME

Children who have experienced sexual abuse often display a pattern of behavior and emotional response to help them deal with their abusive experiences. Researcher Roland Summit (1983) referred to this pattern as the Child Sexual Abuse Accommodation Syndrome. Summit’s work was groundbreaking in that it allowed readers to see sexual abuse from the point of view of the child. The sequence of behaviors of the offending parent and the child’s reaction are presented below. It is important for guardians ad litem, attorneys, judges, and supervised visitation providers to become familiar with this syndrome.

CATEGORY ONE		
Secrecy	Offender’s Behavior	Child’s Reaction
	The offender, either overtly or covertly, informs his or her victim that his/her sexual behavior is a secret. Overtly, the offender may say things like “If you tell, they’ll put me in jail,” or “If you tell, I will kill your mother.” In a more covert manner, the offender may remind the victim either through words or behavior of the stigma associated with sexual behaviors. The offender uses isolation and intimidation and takes advantage of a child’s helplessness in the face of an authoritative adult.	The victim may be confused, scared, or ambivalent. She may feel guilty about enjoying the special attention that she has received, or frightened that “something bad will happen” if she tells anyone. The victim may comply with her abuser’s demands out of fear that whatever the overtly or covertly implied consequences of telling are, they will indeed come to pass.

CATEGORY TWO		
Helplessness	Offender's Behavior	Child's Reaction
	Offender takes advantage of the natural power and authority that adults hold over children. He exerts power and control over his victim, telling her that "no one will believe you" or that no one cares.	As a result of the adult's power and authority or in response to the threats made by the offender, the victim feels helpless or powerless to stop the abuse.
CATEGORY THREE		
Entrapment & Accommodation	Offender's Behavior	Child's Reaction
	Offender lies about or distorts his actions towards victim, telling her that this is something all daddies do, or that he is only teaching her how to be a good wife. He repeatedly engages in the sexual victimizing behaviors.	Trying to survive, the child tries to "get used to" the abuse. Accommodation is part of the child's survival skills. It is her response to repeated sexual victimization. She may "accommodate" to the abuse by denying her feelings, withdrawing, denying what is happening, dissociating from abuse. This may explain why some sexually abused children may interact with an abusive parent at supervised visitation in a seemingly appropriate manner.
CATEGORY FOUR		
Disclosure	Offender's Behavior	Child's Reaction
	Offender may deny abuse if disclosure is made, calling victim liar, mentally ill, or manipulated by other parent into creating a story. Further threatening of victim may occur.	<p>Much sexual abuse is never disclosed. Disclosure may be accidental, may come through anger, or may result from prevention education. As Summit wrote: "Unless specifically trained and sensitized, average adults...cannot believe that a normal, truthful child would tolerate incest without immediately reporting..." This is the crux of the Accommodation Syndrome.</p> <p>During this stage, victim may "drop hints" to the non-offending parent, to her relatives, friends, or teachers about the abuse. Depending on the reaction she receives, she may fully disclose, or stop any discussion.</p>

CATEGORY FIVE		
Recantation	Offender's Behavior	Child's Reaction
	Offender may continue to deny allegations, convince non-offending parent that abuse did not occur. Offender may also put increasing pressure on child to "take it back," blaming her for problems now facing family.	Not all child victims recant or change their account of the abuse, but some do, in part because they are not believed, or because by disclosing they are subject to out-of-home placement, medical exams, and constant interviews with protective service workers and/or law enforcement. Thus, the child faces deep loss with disclosure: loss of peace in her life, security, her familiar environment, her friends, and her family.

NON-OFFENDING PARENTS

Characteristics of non-offending parents include:

- Drug and alcohol dependency problems,
- Heightened levels of depression, and
- Heightened levels of anxiety.

These problems may have *developed in response to the circumstances* under which the non-offending parent resided and the abuse occurred. Clinical research does not support the view that the non-offending parent should be blamed for the abuse.

POSSIBLE REACTIONS OF NON-OFFENDING PARENTS	
Reaction	Reaction to Investigation and Supervised Visitation
Denial of Sexual Abuse	Even with findings of sexual abuse, the parent may make statements saying there has been a big mistake, someone is making all of this up, etc. The parent may also try to convince the visit monitor that the alleged abuse couldn't have happened. The non-offending parent may express denial of any knowledge of the sexual abuse of the child(ren) to visit monitors.
Rationalization	Even with confirmation of sexual abuse, non-offending parents exhibiting rationalization may try to involve the staff in convincing DCF or the court that the allegations are inaccurate by statements such as, "Can you please tell the judge or my DCF investigator how nice my husband is to Casey? He's just a very affectionate father."
Minimization	Minimization may be demonstrated by the non-offending parent in statements they make to supervised visitation staff which indicate an effort to diminish the

	sexual abuse. For example, statements like, “it only happened once or twice,” “it was only fondling, it could have been much worse” indicate minimization of the abusive experience.
Defensiveness	Non-offending parents may also exhibit signs of defensiveness to visit monitors. They may tell staff repeatedly that they had no role in the abuse nor were they aware that it was happening and seek some kind of affirmation from staff about their parenting skills.
Guilt	Parents may experience guilt for not recognizing symptoms of sexual abuse in their children, and may express this guilt to supervised visitation staff. Parents may tell staff that they feel just terrible. “How could the abuse happen?” they may ask staff.
Ambivalent Feelings Toward Offending Parent	Non-offending parents may still have ambivalent feelings toward their offending partner. They may express anger, fear, disgust as well as caring, concern and protectiveness toward the other parent. They may fear what will happen to their relationship as a result of the abuse investigation. During investigations and supervised visitation services, this ambivalence may result in a nonoffending parent being angry toward the other parent one week and tearful the next.
Ambivalent Feelings Toward Child(ren)	Non-offending parents may also exhibit ambivalent feelings toward their children. Investigators, GALs, attorneys, and visitation staff may observe the non-offending parent being both very concerned and at times frustrated and angry toward the child(ren) for reporting the abuse, having to come to a visitation program, etc.
Sadness or Depression	Non-offending parents may express sadness or exhibit signs of depression (weeping, flat affect, sighing, slowed body motions) during their interactions with staff. They may start crying as they leave their child for a visit.
Fear	Non-offending parents may be very fearful that their child(ren) will not be protected during visits with the offending parent. They may make such statements as “Are you sure your staff will not let anything happen?” and “What if my spouse tries to do something else during the visit?”
Anger	Non-offending parents may also be very angry at both the offending parent as well as the child(ren) reporting the abuse. This may result in angry outbursts during interviews, intake at visitation programs, or at other times.

THE GUARDIAN AD LITEM AT SUPERVISED VISITATION

The guardian ad litem may:

- Request that the court order supervised visitation.
- Review records.
- *Observe* visits.
- Interview supervised visitation staff.

If a guardian ad litem requests to observe a supervised visit, the program will do the following prior to the first observed visit:

Obtain a copy of the court paperwork appointing the guardian ad litem. The Order of Appointment and the Oath of Acceptance are two documents which are essential for visitation program records.

Contact the guardian ad litem to review program rules. The guardian ad litem should have a clear understanding of the supervised visitation program's goal: to facilitate safe contact between the parent and child. The guardian ad litem's presence at the visit should not in any way interfere with the visit, unless otherwise ordered by the court.

The guardian ad litem should be wary of drawing conclusions about the visit.

PROTOCOL FOR VISIT OBSERVATIONS

Guardians ad litem, the department, caseworkers, therapists, parenting evaluators, and others may ask to observe the visits at the supervised visitation program. In the absence of a court order to the contrary, their presence should not interfere with the visit. During a visit, these personnel *should not*:

- Interview the child, or ask questions relating to the court case;
- Interview the parent or ask questions relating to the court case;
- Interact with the parent or child – the visit is the *parent's* time to interact with the child;
- Talk with staff in the presence of the child, except when absolutely necessary;
- Redirect parent-child interaction – it is the supervised visitation staff's responsibility to facilitate and redirect interaction; or
- Supervise the visit. Unless the court has ordered otherwise, supervised visitation staff, not other personnel, are responsible at all times for controlling the visit –the presence of other personnel does not change the level of supervision required by the Supervised Visitation Program for a particular case.

During a visit, guardians ad litem, caseworkers and other personnel *should*:

- Remain passive observers to the visit.
- Stay as unobtrusive as possible.

SUPERVISED VISITATION RULES

Any supervised visitation program accepting referrals of cases involving sexual abuse must have specific visit rules already established and available for review by all parties. Typical visit rules for cases involving child sexual abuse include:

RATIO OF STAFF TO VISITING FAMILIES

There should be one visit monitor to each visiting family in child sexual abuse cases. In cases of large families, a supervised visitation program may use more than one monitor to ensure that all family members are supervised adequately.

Rationale. This visit rule allows: the monitor to focus on one family, reducing distractions; the monitor to remain in the room at all times; the monitor to see and hear all interaction between parent and child; the child to feel protected; the allegedly abusive parent to be aware of the close scrutiny; the non-abusive parent to feel more comfortable with the visit; and the court to know that the child is being adequately protected.

LANGUAGE REQUIREMENTS

The visit supervisor should have fluency (both spoken and understanding) in the language of the child and the visiting parent. If the parent or child is hearing impaired, the program should obtain the services of a neutral sign-language interpreter for every visit. The issue of language should be discussed at intake, so parents are put on notice as to prohibitions on the use of a language that the monitor does not understand.

Rationale. It is imperative that the visit monitor understand what is being said between a visiting parent, residential parent, and child in order to prevent possible victim-blaming, threats, etc.

PHYSICAL SEPARATION

Families in which a sexual abuse allegation has been made should not be in the same room as non-sexual abuse cases. The potential for involving other families in the abusive family's dynamics is greatly lessened with physical separation from other families.

Rationale. By having families with sexual abuse histories in a private room, the visit monitor is less likely to be distracted, any potential for involvement with other children is reduced, and the risk for other children is minimized.

PHYSICAL CONTACT

Physical contact between the visiting parent and the child should be closely scrutinized, and subject to the following restrictions:

Any physical contact should be brief and should only be, if at all, initiated by the child. However, any physical contact which appears inappropriate or sexualized will be stopped by staff immediately, even if the child does not appear distressed. Children who have been "groomed" as part of their sexual abuse experience may initiate physical contact. Grooming is the process by which the abuser uses secrecy and power and control over their victims—as well as rewards—to condition a child to accept increasing levels of sexual contact. This can begin with such contact as backrubs, hair combing, bathing, stroking, lap sitting, etc. Staff should be aware of this dynamic.

No object – furniture, office equipment, toys, etc. – should block the view of the visit monitor.

The following types of physical contact should be prohibited:

Tickling	Lap-sitting
Rough-housing	Prolonged hugging or kissing
Tongue kissing	Kissing on any area below the chin
Stroking	Hand holding
Hair combing	Changing diapers or clothes

Rationale. This rule reduces the possibility of sexual abuse or physical abuse occurring during visits or of misinterpretations of contact (e.g., false allegations of abuse).

The following additional behaviors should also be prohibited:

Whispering	Passing notes	Hand signals or body signals
Photographing the child		Audio taping or videotaping the child
Exchanging gifts, money, or cards		

Rationale. This reduces the possibility of verbal threats, minimizes trigger events for the child and enhances staff control of the visit environment. Triggers can include reminders of the sexual abuse and can be as varied as the abuse experience itself. They may include anything from the cologne or clothing the abuser wears to books, songs, references, or any other item associated with the abuse.

PROHIBITIONS ON ITEMS BROUGHT TO VISITS

The visitor should not bring any items to the visit, including:

Toys	Games	Books
Written material	Food	Additional clothing
Photographs	Drinks	Music
Tapes (audio or video)	Dolls	Jewelry
Pets (except necessary service animals)		Household items

Rationale. This reduces the possibility of a perpetrator bringing to the visit covert or overt reminders of the child's abusive experience. It also reduces the possibility of "bribes" to the child for recanting.

TOILET RULES

Each program should have written rules relating to the use of toilet facilities during visits, and parents and the child (depending on the age of the child) should be made aware of these rules prior to the first visit.

- Children must use the toilets on their own, or, if a child is not old enough to use the toilet on his/her own, he/she should be accompanied by staff. Parents may not accompany their children to the toilet in sexual abuse cases.
- Children may not accompany their siblings or other children to the bathroom.

- Babies who wear diapers or training pants (i.e. Pull Ups) should be changed by staff in a room separate from the visiting parent.

Rationale. This reduces the possibility of physical or sexual abuse incidents during visits or the misinterpretation of the visiting parent's behavior during toileting.

OFF-SITE VISITS

There should be no off-site visits in cases with sexual abuse allegations.

Rationale. This rule reduces a heightened risk of the child being re-victimized in an uncontrolled setting; reduces exposure to an uncontrollable and unpredictable environment outside of a program; and reduces the potential for the monitor to be unable to effectively intervene if anything prohibited happens.

CASE EXAMPLE

CRAYONS

A father was court-ordered to a visitation program with his 4-year old daughter. There was an allegation of sexual abuse, but the program was not provided with any details or background information. At each visit, the father brought over-sized crayons for his daughter to use during the visit. He sought permission from the program director to bring crayons and construction paper, and she allowed their use. At each visit the man and his daughter sat quietly at a table and drew pictures. Staff believed the interaction was positive. Sometime later, the department staff informed the supervised visitation staff that the father had used such crayons to penetrate his daughter's rectum.

Guardians ad litem should endeavor to learn about and understand the dynamics of child sexual abuse in order to help insure that children who are in the dependency system are not further victimized by a parent or caregiver during visitation or other contact. Being aware of the signs of sexual abuse could save a child from continuing victimization.

PSYCHOTROPIC MEDICATIONS FOR CHILDREN & YOUTH IN FOSTER CARE

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PROGRAM

This chapter highlights some of the main points to be aware of regarding psychotropic medication. Information contained in this chapter is by no means comprehensive. It is recommended to review the sources as well as the psychotropic medication training cited at the conclusion of the chapter.

Foster care youth are prescribed psychotropic medications at rates significantly higher than their same-aged peers. According to the United States Government Accountability Office, it is estimated that 20-39% of children in state foster care are prescribed psychotropic medications. They are 4 to 8 times more likely than their non-foster care peers to be prescribed these medications¹¹. As of January 2016, there were 2,503 children ages 0-17 in Florida who were in out-of-home care prescribed psychotropic medications¹². These numbers are staggering and illustrate the importance of advocacy.

WHAT ARE PSYCHOTROPIC MEDICATIONS?

Psychotropic medication is a technical term for psychiatric medicines that alter chemical levels in the brain which impact mood and behavior. They affect a person's mental state as well as how a person processes information and perceives his or her surroundings. Psychotropic medications can be used for diagnoses such as ADHD, schizophrenia, post-traumatic stress disorder, depression, and anxiety. When you try to determine if a medication is psychotropic you must determine the purpose of the medication – is it being prescribed to alter the child's mood or behavior? Different classes of psychotropic medications, common side effects as well as normally prescribed medications can be found in the ***Information Sheet for Psychotropic Medications***.¹³

¹¹ ACF and CMS Demonstration to Address Over-Prescription of Psychotropic Medications for Children in Foster Care (3/5/2014) specifically citing the Government Accountability Office Report (GAO-13-15) – available at:

http://qucchdtacenter.georgetown.edu/Activities/TrainingInstitutes/2014/Resources/Inst_17_8_R1_Final%20Demo%20ACF%20Psychotropicinitiative%20FAQs%20031214.pdf, last visited February 11, 2016

¹² DCF Psychotropic Medication Listing (Weekly Updates); Office of Child Welfare Date Reporting Unit, 01/27/16 - available at: <http://www.dcf.state.fl.us/initiatives/GMWorkgroup/reports.asp>

¹³ *Information Sheet for Psychotropic Medications*, available at: <http://guardianadlitem.org/training-advocacy-resources/conferences-training/>, last visited February 11, 2016

There are some medical conditions, such as epilepsy, where a psychotropic medication is prescribed to control seizures. In this instance the medication is not considered psychotropic as it is not being used to control the child's mood or behavior. While psychotropic medication can be very effective in the treatment of many mental health diagnoses, they also carry very serious side effects.

Additionally, some of the psychotropic medication prescribed may come with a "FDA Black Box Warning Label." This warning is reserved for prescription drugs that pose significant risk of serious or life threatening adverse effects based on medical studies. For example, some children may be prescribed certain psychotropic medication for depression or anxiety but the Black Box warning could indicate a side effect of suicidal ideation, the very thing we are hoping to prevent and treat. This reinforces the advocacy needed to raise awareness and knowledge about medications foster children are taking, especially if they come with a Black Box warning label.

A determination to administer psychotropic medication should occur only after a comprehensive assessment and mental health evaluation has occurred. The evaluation should consider a plan for treatment of the child's needs by both medical and non-medical means. It is also important that a child/youth have a voice in this process. If a child does not *assent* to the psychotropic medication, an attorney ad litem must be appointed for the child pursuant to § 39.01305(3)(b). If a child is prescribed and administered psychotropic medication, it is important to note a therapeutic component is also necessary in the treatment of a child's mental health diagnosis. Medication alone is typically not the answer.

SECTION 39.407 OF THE FLORIDA STATUTES

Section 39.407 - governs the administration of psychotropic medication in dependent youth.

CONSENT

- The prescribing physician shall attempt to obtain express and informed consent of parents or legal guardians. The department must continue to try to get consent. § 39.407 (3)(a)(1).
- If no consent or if parents or legal guardians are unavailable, or parental rights are terminated, then department may seek court authorization (after consultation with prescribing physician).
- The department must provide the evaluating physician all pertinent medical information to continue or initiate psychotropic medication. § 39.407(3)(a)(2).
- What is express and informed consent? "Express and informed consent" means consent voluntarily given in writing, by a competent person, after sufficient explanation and disclosure of the subject matter involved to enable the person to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion. § 394.455(9)

CONTINUATION OF PSYCHOTROPIC MEDICATION – PRE-SHELTER HEARING § 39.407(3)(B)(1)

- The department may take possession of the psychotropic medication and continue to provide it to the child until the shelter hearing if:
 - the psychotropic medication is in its original container; and
 - it is a current prescription for the child.
- The department must inform parents or legal guardians that the drug is being administered. The child's official departmental record must include:

- reason parent's authorization not obtained; and
- why the psychotropic medication is necessary for the child's well-being. § 39.407(3)(b)(2).

CONTINUATION OF PSYCHOTROPIC MEDICATION – SHELTER HEARING TO ARRAIGNMENT HEARING § 39.407(3)(B)(3)

- If advised by a licensed physician, the department shall request court authorization of continuation of psychotropic medication at shelter hearing. The department shall provide any pertinent information to court.
- Authorization is granted at shelter hearing only until arraignment hearing or 28 days following the child's removal (whichever is first).

CONTINUATION OF PSYCHOTROPIC MEDICATION – BEFORE FILING OF DEPENDENCY PETITION. § 39.407(3)(B)(4)

- Before the filing of the dependency petition, the department must have child evaluated by a licensed physician to determine appropriateness of continuing psychotropic medication.
 - **If continuing psychotropic medication is appropriate, *the department must file a motion at the same time as the dependency petition or within 21 days after shelter hearing.***
- **Contents of the Department's Motion.** The motion seeking the court's authorization to initiate or continue psychotropic medication must include the following § 39.407(3)(c):
 - Report written by the department including the efforts made to enable the prescribing physician to obtain the parent's consent, and treatment considered for the child or recommended for child; and
 - Prescribing physician's signed medical report which must include:
 - The name of the child, the name and range of the dosage of the psychotropic medication, and that there is a need to prescribe psychotropic medication to the child based upon a diagnosed condition for which such medication is being prescribed;
 - A statement indicating that the physician has reviewed all medical information concerning the child which has been provided;
 - A statement indicating that the psychotropic medication, at its prescribed dosage, is appropriate for treating the child's diagnosed medical condition, as well as the behaviors and symptoms the medication, at its prescribed dosage, is expected to address;
 - An explanation of the nature and purpose of the treatment; the recognized side effects, risks, and contraindications of the medication; drug-interaction precautions; the possible effects of stopping the medication; and how the treatment will be monitored, followed by a statement indicating that this explanation was provided to the child if age appropriate and to the child's caregiver; and
 - Documentation addressing whether the psychotropic medication will replace or supplement any other currently prescribed medications or treatments; the length of time the child is expected to be taking the medication; and any additional medical, mental health, behavioral, counseling, or other services that the prescribing physician recommends.
 - The department must notify parties of the motion to obtain court authorization in writing or other method within 48 hours after motion is filed. § 39.407(3)(d)(1).
 - ***If a party objects then that party must file objection within 2 working days of the department's notice of motion. § 39.407(3)(d)(1).***

- Court shall hold hearing as soon as possible.
 - **Burden of Proof is Preponderance of the Evidence.** § 39.407(3)(d)(2).
 - Court authorization of initiation or continuation of psychotropic medication. § 39.407(3)(d)(1).
 - The court can authorize based on department's motion, medical report and child's best interests.
 - Court shall ask what other services are being provided to the child for child's medical condition.
 - The court may order additional medical consultation:
 - MedConsult Line at the University of Florida; or
 - May require second opinion (not to exceed 21 days).
 - The department must make referral for second opinion within one working day.
 - Court may not discontinue psychotropic medication if contrary to the prescribing physician unless the following are true: § 39.407(3)(d)(1).
 - If licensed psychiatrist or licensed physician states that "more likely than not, discontinuing psychotropic medication would not cause significant harm to the child".
 - Unless the prescribing physician specializes in mental health of children and adolescents.
 - Can discontinue if required opinion is also from physician who specializes in mental health of children and adolescents.
 - Court may discontinue psychotropic medication if treating physician states that continuing psychotropic medication would cause significant harm to child due to diagnosed non-psychiatric condition. § 39.407(3)(d)(1).

EMERGENCIES WHEN PSYCHOTROPIC MEDICATION MUST BE GIVEN BEFORE COURT AUTHORIZATION. § 39.407(3)(E)(1)

- **Significant Harm.** Child's prescribing physician certifies in a signed medical report that delay would cause "significant harm." Medical report must contain:
 - Why child may experience significant harm; and
 - Nature and extent of harm.
- The department must submit motion to continue psychotropic medication within **3 working days** after commencing psychotropic medication.
- The department shall seek order at next regularly scheduled court hearing or within **30 days** after date of prescription (whichever is sooner).
- If any party objects to the departments motion, the court shall hold a hearing within **7 days**.

HOSPITAL, CRISIS STABILIZATION UNITS AND STATEWIDE INPATIENT PROGRAMS. § 39.407(3)(E)(2)

- Must seek court authorization within **3 working days** after medication begun.
- Must follow same motion process:
 - Must file motion with written report, physician report;

- Notify other parties within 48 hours; and
- Objections must be filed within 2 working days.

JUDICIAL REVIEWS § 39.407(3)(F)(1)

- The department must inform court, as part of the social services report, of child's medical and behavioral status.
- The department shall provide pertinent medical records since the last hearing.
- Court may review child's status more frequently on motion or good cause shown by any party.
- Court may order the department to obtain medical opinion regarding whether continued use of the psychotropic medication under the circumstances is "safe and medically appropriate." § 39.407(3)(f)(2).

PREPARING FOR THE HEARING

- The issue: Do the potential benefits outweigh the risks of medications for THIS child?
 - Benefit – Risk Analysis: for example, weigh the risks of behavior vs. risks of medication, i.e. Paxil not approved for children as there is an increased risk of suicide.
 - Have all other therapeutic interventions been ruled out?
 - Individual therapy, group therapy, other behavior modification plan. Has behavior modification been attempted by someone who is licensed?

QUESTIONS TO CONSIDER OR ASK IN COURT

PRACTICE TIP: Most of these questions should be answered prior to attending court, if possible, and may be found in the department's motion, particularly the prescribing physicians signed medical report. Not all of the questions may apply to every medication issue. Also, keep in mind that some children may benefit from the administration of psychotropic medications.

- Is parent available?
- Is child mature minor? If no, court acting in loco parentis?
- Have you reviewed the child's Resource Record and Medical Passport?
- Are you aware of the medications attempted in the past?
- What is the name of the medication? Is it known by other names / generic names?
- What is known about the helpfulness with other children having similar condition to the child?
- In your opinion, how will medication help the child? How long before there is an improvement?
- Has the medication been approved by the FDA for this condition for pediatric use or is this an off label use?
 - Is there an FDA Medwatch¹⁴ related to the medication?

¹⁴ U.S. Food and Drug Administration MedWatch, available at: www.fda.gov/medwatch/index.html, last visited February 11, 2016

- If not, on what research are you relying for choosing this medication?
- What are the side effects that may occur with this medication?
- What are the extreme, serious or irreversible side effects?
- Is the medication addictive? Can it be abused?
- What is the requested dosage and range for the medication? How often?
- Are there any laboratory tests that need to be done before the child begins taking the medication?
- Will a child and adolescent psychiatrist be monitoring the child's response to the medication and make dosage changes if necessary? How often will progress be checked? By whom?
- Are there any foods or other medications the child should avoid while taking this medicine?
- Are there any activities the child should avoid while taking the medication? Any precautions recommended for other activities?
- How long does the child need to take this medication? How will the decision be made to stop this medication?
- What should be done if a problem develops (illness, doses missed, or side effects develop)
- Does the child's school nurse need to be informed about the medication?

PRACTICE TIP. Ask the court to direct the agency to submit regular progress reports (at least monthly) on the child's progress with the prescription – to be made available before review hearings. The department must inform the court of the child's medical and behavioral status at Judicial Reviews. If the child's status should be monitored more often, the court may review more frequently on motion or good cause shown. § 39.407(3)(f)(1).

RED FLAGS

Red Flags for children and adolescents taking psychotropic medication that are critical to address:

- A child under six years of age has been prescribed a psychotropic medication;
- More than three psychotropic medications are administered to a child in out-of-home care; or
- More than one psychotropic medication is being administered from one of the following classifications of psychotropic medication:
 - Stimulants
 - Mood stabilizers
 - Anti-depressants
 - Anti-anxiety
 - Anti-psychotics

PRACTICE TIP. Ensure that all required pre-medication medical testing and post-testing occur, which should be indicated on the medical report.

The Florida Administrative Code, the Department of Children Families Operating Procedure as well as GAL Standards can be used as guides in ensuring medications are provided appropriately and ONLY when a need exists. As the requirements and steps are statutorily time specific, it is recommended to use the *Psychotropic Medication Checklist*¹⁵ as your guide in appropriately advocating for the children's best interest as it pertains to the administration of psychotropic medication.

APPLICABLE LAW

- § 39.407 (3)a-g:
http://leg.state.fl.us/Statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=39.407&URL=0000-0099/0039/Sections/0039.407.html
- § 39.01305(3)(b):
http://leg.state.fl.us/Statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=39.01305&URL=0000-0099/0039/Sections/0039.01305.html
- Rule of Juvenile Procedure 8.355:
[http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E2AD7DEF01F6F90685256B29004BFA7E/\\$FILE/Juvenile.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/E2AD7DEF01F6F90685256B29004BFA7E/$FILE/Juvenile.pdf?OpenElement)

ADDITIONAL RESOURCES

- Psychotropic Medication Checklist and specific assistance regarding psychotropic medications:
<http://guardianadlitem.org/training-advocacy-resources/conferences-training/>
- Florida Administrative Code 65C-35: <https://flrules.org/gateway/ChapterHome.asp?Chapter=65C-35>
- Children and Families Operating Procedure 175-40 (Chapter 3):
[http://www.dcf.state.fl.us/admin/publications/cfops/175%20Family%20Safety%20\(CFOP%20175-XX\)/CFOP%20175-40,%20Services%20for%20Children%20with%20Mental%20Health%20and%20Any%20Co-Occurring%20Substance%20Abuse%20or%20Developmental%20Disability%20Treatment%20Needs%20in%20Out-of-Home%20Care%20Placements.pdf](http://www.dcf.state.fl.us/admin/publications/cfops/175%20Family%20Safety%20(CFOP%20175-XX)/CFOP%20175-40,%20Services%20for%20Children%20with%20Mental%20Health%20and%20Any%20Co-Occurring%20Substance%20Abuse%20or%20Developmental%20Disability%20Treatment%20Needs%20in%20Out-of-Home%20Care%20Placements.pdf)
- Florida Guardian ad Litem Program Standards, #7: <http://guardianadlitem.org/2015-standards/>
- **University of Florida Med Consult Line:** <http://dcf.psychiatry.ufl.edu/>

¹⁵ *Psychotropic Medication Checklist*, available at: <http://guardianadlitem.org/training-advocacy-resources/conferences-training/>, last visited February 14, 2016.

INFORMATION SHEET FOR PSYCHOTROPIC MEDICATIONS

This guide reflects different classes of psychotropic medications, common side effects as well as normally prescribed medications. It is for informational purposes only and not intended to be comprehensive. Medication should only be taken under the careful consideration of a physician.¹⁶

STIMULANTS

Commonly used to treat Attention-Deficit Hyperactivity Disorder (ADHD). Symptoms of ADHD may interfere with a child functioning at school and in daily living characterized by short attention span, inability to stay still, and/or being impulsive.

- **Positive Effects:** May help improve the ability to concentrate, control impulses, plan ahead, and follow through with tasks.
- **Negative Effects:** May cause decreased appetite, weight loss, headaches, stomach aches, trouble getting to sleep, jitteriness, social withdrawal, tics (sudden repetitive movements or sounds), aggressive behavior or hostility, psychotic or manic symptoms.
- **NOTE:** Along with the medication, it is important for lifestyle changes to occur that includes regular exercise, a healthy diet, and sufficient sleep.
- **Commonly Used Medications (Generic Names):**

Adderall (Amphetamine)

Focalin (Dexmethylphenidate)

Concerta (Methylphenidate)

Dextrostat (Dextroamphetamine)

Methylin (Methylphenidate)

Vyvance (Lisdexamfetamine)

Adderall XR (Amphetamine)

Focalin XR (Dexmethylphenidate)

Dexedrine (Dextroamphetamine)

Metadate (Methylphenidate)

Ritalin (Methylphenidate)

ANTIDEPRESSANTS

Used to treat depression and other symptoms such as school phobias, panic attacks, eating disorders, Autism, ADHD, bedwetting, Disorders such as (Anxiety, Obsessive-Compulsive, Post-traumatic Stress, Personality), and sleeping problems.

- **Positive Effects:** Can help improve mood, help with sleeping better, and increase appetite and concentration.
- **Negative Effects:** Trouble sleeping, irritability, weight changes, headaches, nausea, upset stomach, dry mouth, and/or extreme sweating.
- **NOTE:** Caregivers should monitor children taking these medications for depression that is getting worse and thoughts about suicide. The caregiver should immediately talk to the doctor if this happens.

¹⁶ Guide to Psychiatric Medications for Children and Adolescents by Glenn S. Hirsch, M.D., available at: http://www.dfps.state.tx.us/Training/Psychotropic_Medication, last visited February 11, 2016

Commonly Used Medications (Generic Names):

Celexa (Citalopram)	Lexapro (Escitalopram)
Luvox (Fluvoxamine)	Paxil (Paroxetine)
Prozac (Fluoxetine)	

ANTIPSYCHOTICS

Used to treat a number of conditions in children, such as Psychosis, Bipolar disorder, Schizophrenia, Autism, Tourette's syndrome or severe aggression.

- **Positive Effects:** Antipsychotic medications are not a “cure” for mental illness but can be an effective part of treatment. They help to restore the brain’s natural chemical balance to reduce or get rid of the psychotic symptoms.
- **Negative Effects:** May cause sleepiness or tiredness, dizziness, constipation, dry mouth, blurred vision, difficulty urinating, sensitivity to lights, weight gain, change in menstrual cycle.
- **NOTE:** A person should begin to feel better within six weeks of starting to take antipsychotic medication. However, it can take several months before they feel the full benefits.

Commonly Used Medications (Generic Names):

Abilify (Aripiprazole) *	Seroquel (Quetiapine) *
Zyprexa (Olanzapine)	Risperdal (Risperidone)
Clozaril (Clozapine) *	Fazaclo (Clozapine) *
Geodon (Ziprasidone)	Invega (Paliperidone)
Fanapt (Iloperidone)	Saphris (Asenapine)
Latuda (Lurasidone)	

* Abilify, Seroquel, and Clozapine come with “Black Box Warnings” by the Food and Drug Administration. This means the medication can cause serious undesirable effects (such as a fatal, life-threatening or permanently disabling adverse reaction) to the potential benefit from the drug; or a serious adverse reaction can be prevented, reduced in frequency, or reduced in severity by proper use of the drug.

MOOD STABILIZERS

Used to treat children with mood disorders, such as bipolar disorder. Children with bipolar disorder have extreme mood swings (manic or depressed states). In the "manic" state, they may be very active, talk too much, have a lot of energy, and sleep very little. They may also be angry, irritable, or feel overly self-important. Children in the "depressed" state may feel hopeless or helpless, have a loss of energy, have changes in appetite, gain or lose weight, not enjoy activities they used to enjoy, or have thoughts of suicide.

- **Positive Effects:** Mood stabilizers may be used to treat sudden manic episodes. Continued use can eliminate extreme mood swings of depression and mania and improve a child's quality of life. A physician may prescribe mood stabilizers with other medicines (such as antipsychotics) for more effective reduction of mood swings.
- **Negative Effects:** Lamictal can cause dizziness, problems sleeping, drowsiness, blurred vision, vomiting, constipation or stomach aches. Depakote may cause indigestion, nausea/vomiting,

drowsiness, hair loss, weight changes, changes in menstrual cycles or constipation. Tegretol may cause dizziness, drowsiness, nausea, unsteadiness or vomiting and Lithium may cause fatigue, muscle weakness, nausea, stomach cramps, weight gain, urinating more often, slight hand tremor, thirst, low blood sugar, lower thyroid function, and hair loss.

- **NOTE:** Some medications used to treat mood disorders are also used to treat seizure disorders. If used to treat seizures, it is not considered a psychotropic medication.

Commonly Used Medications (Generic Names):

Carbatrol (Carbamazepine)

Depakote (Divalproex) *

Eskalith or Eskalith CR (Lithium) *

Lamictal (Lamotrigine)

Lithobid (Lithium) *

Tegretol or Tegretol XR (Carbamazepine) *

* Children taking Tegretol, Depakote or Lithium should have routine blood work. Levels are usually checked in the morning before the medication is given to the child.

ANTI-ANXIETY AGENTS (TRANQUILIZERS)

Used to treat people with severe anxiety that interferes with their daily activities.

- **Positive Effects:** Reduces panic anxiety or general anxiety symptoms. They are generally used for short term treatment.
- **Negative Effects:** Can cause dizziness, sedation, or nausea.
- **NOTES:** Ativan, Klonopin, and Xanax (known as Benzodiazepines) are addictive.
- **Commonly Used Medications (Generic Names):**

Ativan (Lorazepam)

Buspar (Buspirone)

Klonopin (Clonazepam)

Xanax (Alprazolam)

TRIAL ADVOCACY

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Dependency courts preside over a variety of issues relating to children. Although Chapter 39 fully references the statutory criteria for petitions of dependency and termination of parental rights, the protection of children necessitates filing many other types of pleadings consistent with manifest best interest principles. The commitment to motion practice on behalf of children should, at a minimum, address issues such as visitation, custody, medications, residential treatment, permanency, out-of-state placement, child hearsay, psychotropic medication, and the appropriateness of an adoptive placement. Every motion must incorporate a brief statement of facts, an analysis of the applicable law, and an explanation of the relief sought. Rule 8.235(a).

DISCOVERY

Program attorneys have an ethical and legal duty to thoroughly investigate all court-appointed dependency cases. Upon appointment, a demand for discovery should routinely be filed and served upon all parties except in extremely rare instances. A party may waive the client's right to participate in discovery for the purpose of securing a strategic advantage. The party to whom the demand is directed shall disclose and permit inspecting, copying, testing, or photographing matters material to a child's case. Rule 8.245(b)(1). Generally, the discovery process includes the exchange of witness lists, the disclosure of relevant documents, and the taking of depositions. Rule 8.215(e); 8.245(b). The responding party shall serve a written response within 15 days after service of the demand in normal situations. Rule 8.245(d)(2). Unless required by the court, a party shall not file any of the documents or items requested because their admissibility is still in question. Rule 8.245(d)(4). Work product and confidential communications are not discoverable; however, any claim of privilege must be made expressly to the other party without revealing its contents. Rule 8.245(a)(2); 8.245(2). As for obtaining discovery from a non-party, the issuance of a subpoena directing the production of documents and things is required after serving notice to the other parties. Rule 8.245(e). From the child's perspective, the method used to extract discovery poses a risk to the mental and emotional well-being of the child. To protect the child from undue annoyance or embarrassment, the court is authorized to issue a protective order on the motion of any party for good cause shown. Rule 8.245(f). Additionally, special rules exist to govern the depositions of children under 16 years of age. Rule 8.245(i).

MOTION PRACTICE

A motion is simply a request to the court for some form of relief. Pretrial motions are typically written and during trial may be oral or written. A motion typically has:

- A request for specifically named relief;
- The specific grounds for the motion; and

- The source of the facts upon which the motion is based, including any attached affidavits, and a reference to any accompanying legal memorandum.

A major objective of motion practice focuses on the protection of children who testify in the courtroom and the preservation of evidence for trial. Prior to a scheduled hearing, the program attorney customarily assumes the responsibility of shielding the child from any anticipated harm by having to testify in court. The court is authorized to examine the child outside the presence of the parties or allow the child to testify via close-circuit television or videotape, if certain conditions are met. Rule 8.255(d). Another pre-trial motion for consideration involves mental and physical examinations for children and parents. When the physical or mental condition of a parent or legal custodian is "in controversy," any person may request the court to order the person submit to a physical or mental examination by a qualified professional. Rule 8.250. Moreover, pursuant to the Florida Evidence Code, statements introduced under the child hearsay rule are inadmissible absent a written pre-trial motion. In contrast, a motion to invoke "the rule" of witness sequestration is made *ore tenus* at the start of trial, but essential nevertheless, to keep witnesses separated until called to testify. Rule 8.255(e).

PRE –TRIAL STIPULATIONS

In the final preparation for an adjudicatory hearing or trial, a program attorney should make every effort to narrow the issues which are truly in controversy. The general reason is to expedite judicial economy and to reduce the amount of time all parties need to spend in the actual hearing or trial. Practically speaking, this is accomplished through a pre-trial stipulation. A pre-trial stipulation is an agreement between the parties delineating uncontested facts and evidence (e.g. the child's date of birth, the parent's names, the date of removal, etc.). Copies of each exhibit which the parties intend to introduce at trial should be marked and discussed in an attempt to reach an agreement as to their admissibility. This is also the time when final witness lists are disclosed. Under some circumstances, opposing counsel may not be willing to agree to any stipulation. At such time, the program attorney should prepare and submit proposed pre-trial stipulations to the court with copies to all parties.

OPENING STATEMENT

The commencement of an opening statement is a key opportunity to educate the judge about the theory of your case prior to the introduction of any evidence. Although opening statements are sometimes waived in a non-jury setting in the interest of saving time on straightforward issues, they are extremely beneficial in complicated cases, such as in the sexual abuse or aggravated battery of a child. In fact, most dependency judges willingly accommodate any request to offer opening statements regardless of the complexity of the case. The basic structure of an effective opening statement simply conveys to the judge, in a chronological narrative, what evidence will be presented during the hearing. Discuss first, the most significant facts that are expected to be supported by the evidence, and then explain the issues in a clear and concise manner. One point of caution, however, is that opening statements tainted with argument inevitably invite objections from the opposing counsel and disrupt the flow of the entire presentation.

DIRECT AND CROSS EXAMINATION

Direct examination is the stage of the proceeding at which a petitioner calls its witnesses and introduces evidence at trial. Essentially, direct examination elicits factual information from either witnesses or writings

for the purpose of supporting the allegations in the petition. The order of your witnesses is especially important in dependency cases. If a child is participating as a witness, it may be best to present the child as the first witness in an effort to alleviate any anxiety associated with testifying. Otherwise, a chronological arrangement offers the best approach for reasons of clarity and "story telling."

Typically the order of examining witnesses is the following:

- Direct examination
- Cross-examination
- Redirect examination
- Recross examination
- Direct Examination

Of course the Judge can always interrupt to ask questions as well.

As a program attorney, witness preparation is an essential job function. After interviewing a witness it is important to decide exactly what information the witness will be giving. Prepare questions and anticipated answers. Witnesses need to know what questions will be asked on direct, as well as what questions will likely be posed on cross-examination. Unless the witness is very young, mentally challenged, or hostile, the rules of evidence consider leading questions to be improper. Questions should be open ended and invite the witness to elaborate, rather than answering in the form of yes or no. In theory, every direct examination question should begin with words of who, what, when, where, how, why, explain, or describe.

EXPERT TESTIMONY - DAUBERT STANDARD

Although still somewhat in flux, Florida now uses the *Daubert Test* (instead of *Frye*) when determining whether to admit expert testimony evidence at trial. The court is required to consider three elements when determining whether evidence is admissible at trial:

- the expert's testimony is based upon sufficient facts or data;
- the expert's testimony is the product of reliable principles and methods; and
- the expert applied the foregoing principles and methods reliably to the specific facts of the case.

The plain language of the rule asks the court to interpret and apply these three requirements in accordance with the four-part *Daubert* test, which aids in analyzing whether the principles and methods used by the expert are reliable. However, case law shows these four areas of interpretation are mere guidelines; hence, *Daubert* provides flexibility such that if an expert can show how their method is reliable and provide a rational explanation for the application of the method then they are an expert. Note that under the *Daubert* standard, theories and techniques do not have to be tested; theories and techniques do not require peer review or publication; it is not necessary to know the rate of error; and the theory or technique does not have to be generally accepted. The theory or technique can be based on experience and must be rational.

Four-Part Daubert Test Per Strict Reading of the Rule

- whether the theory or technique can, or has been, tested;
- "whether the theory or technique has been subjected to peer review and publication";
- "the known or potential rate of error" for a "particular scientific technique"; and

- whether the theory or technique is generally accepted in the relevant scientific community.

The Four-Part Test is merely a guideline. If your expert does not meet the Four-Part test, explain the following to the Court:

Daubert makes clear that the factors it mentions do *not* constitute a “definitive checklist or test.” Kumho Tire Co., Ltd. v. Carmichael, 526 US 137, 150 (1999.) Satisfaction of all four *Daubert* factors is not required, and the scope of the requirements has clearly been expanded to include disciplines not of a scientific nature. The court in Brown v. Crown Equip. Corp., 181 S.W.3d 268, 275 (Tenn. 2005) held: “A trial court... may conclude that an expert's opinions are reliable 'if the expert's conclusions are sufficiently straightforward and supported by a 'rational explanation which reasonable [persons] could accept as more correct than not correct.”

Florida Case

In Booker v. Sumter County Sheriff's Office/N. Am. Risk Services, 166 So.3d 189 (Fla. 1st DCA 2015), the court held that the **judge has broad discretion in determining how to perform its gatekeeping** function ... a judge's determination that an objection was not timely raised will be reviewed for abuse of discretion.

Booker cautions practitioners that “[t]he failure to timely raise a *Daubert* challenge may result in the court refusing to consider the untimely motion.” Booker makes clear that the burden of proof to establish the admissibility of the expert's testimony is on the proponent of the testimony. Booker advises practitioners that a *Daubert* challenge must be sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert's testimony. The challenge should provide a “specific basis” and “should include, for instance, citation to ‘conflicting medical literature and expert testimony.’” Setting forth unsubstantiated facts, suspicions or theoretical questions regarding the expert's qualifications are not sufficient.

Prior to the completion of direct examination, it is imperative that all of petitioner's exhibits be admitted into evidence. Pursuant to § 90.612(1), the court has the discretion to deny admission of evidence introduced after the petitioner has concluded its case-in-chief. Postponing evidence until after the completion of one's case-in-chief invariably risks its total exclusion by the trial court.

PRACTICE TIP: The standard of review regarding each element of the Daubert test have often been misinterpreted to create a draconian and set list of criterion which must be met in some capacity by the witness and the evidence presented by the witness in order for the testimony to be admissible expert testimony. The U.S. Supreme Court explained, when it expanded the Daubert principal to all areas of expertise in Kumho Tire Co., Ltd. v. Carmichael, 526 US 137, 150 (1999), that a flexible and nuanced approach to the requirements detailed in Daubert is necessary. If none of the testing criteria applies, then ask questions to show how the expert had a reasonable method, which was rationally applied to the facts of the case. You will need to meet with the witness ahead of time to understand their method and application. If you anticipate a Daubert objection to an expert, it should be handled as a motion in limine.

MOTION FOR JUDGMENT OF DISMISSAL

Following the close of petitioner's evidence, opposing counsel may execute a motion for judgment of dismissal in all cases involving dependency petitions, termination of parental rights petitions, or any other pleadings for relief. Rule 8.330(e); 8.525(h); 8.235(b). If the court is of the opinion that the evidence is insufficient to support the petition, it may enter an order dismissing the petition. *Id.* The failure to timely make such a motion is deemed a waiver of the argument, thus precluding appellate review. To survive a motion for judgment of dismissal, the petitioner must establish a prima facie case in support of its petition, in light of the applicable standard of review. Therefore, the trial court usually expects to hear oral arguments from both the proponent and challenger before issuing its ruling on the sufficiency of previously admitted evidence.

CROSS EXAMINATION

The Due Process Clause of the Fourteenth Amendment guarantees the right of cross examination in all civil proceedings, including dependency cases. The bulk of cross examination conducted by a guardian ad litem attorney is frequently directed at the child's parents, and commonly features past criminal history, prior bad acts against children, case plan progress, poor decision making, bonding and attachment issues, and the future ability to safely care for children. The recipe for successful cross examinations mandates plenty of preparation, including thorough research into possible bias and conflicting statements, and most importantly, the use of short and clear, leading questions. A tactical advantage of cross examination not only includes the use of leading questions, but encompasses the ability to introduce otherwise non-admissible hearsay to impeach the credibility of witnesses. The line of attack for proper impeachment takes into consideration prior criminal convictions, improper motives or biases, inconsistent statements and bad character evidence through reputation in the community. Consequently, the discovery process is crucial to mounting a meaningful cross examination.

CLOSING ARGUMENT

The delivery of a closing argument is quite different than an opening statement. During closing argument, the evidence should be discussed in the most persuasive manner, constantly weaving the best supporting facts into the theory of the case. Similar to jury trials, the trier of fact is usually most attentive at the beginning of your argument. For that reason, the introduction must grab the interest of the court with one or two lines illustrating the entire case from your perspective. For example, "this is a case about willful neglect and not poverty" or "this father has chosen drugs over his children." The middle of the argument basically presents the facts and the law in the light most favorable to your case. Remember to focus on your strongest facts and to merge those details with relevant citations from Chapter 39 and the Florida Rules of Juvenile Procedure, pertinent case law, and federal law as it relates to children. Refer to the appellate practice section of this manual for additional information on preserving the record for appeal. The final part of the closing argument instructs the trial judge what remedy is sought and why the trial judge must accept your conclusion. This is a perfect opportunity to briefly mention the strongest points of your case.

POST JUDGEMENT RELIEF

REHEARING

Upon the entry of a ruling, the Florida Rules of Juvenile Procedure describe two methods to obtain post-judgment relief. The first method is to move for rehearing. Rule 8.265. A motion for rehearing is authorized only if based on one or more of the following grounds: (1) the court erred in the decision of any matter of law arising during the hearing; (2) a party did not receive a fair and impartial hearing; (3) any party required to be present at the hearing was not present; (4) there exists new and material evidence, which, if introduced at the hearing would probably have changed the court's decision and could not with reasonable diligence have been discovered before and produced at the hearing; (5) the court is without jurisdiction of the proceeding; and (6) the judgment is contrary to the law and the evidence. Further, a motion for rehearing must be made within 10 days of the entry of the order. Rule 8.265(b)(1). A motion for rehearing shall not toll the time for the taking of the appeal. Rule 8.265(b)(3). Program attorneys considering appeal must be mindful of the prohibition against tolling as it relates to dependent children.

APPELLATE REVIEW

The second method of redress from a trial court's decision is appellate review. Any party affected by an order entered from a dependency court may appeal to the appropriate district court of appeal in the time and manner prescribed by the Florida Rules of Appellate Procedure. § 39.815(1). The notice of appeal must be filed within 30 days from the date the order is entered. The time requirements for submitting the initial brief, as well as constructing the record, vary widely depending on whether the appeal is filed under a writ of certiorari, or challenging the entry of a final order or non-final order. As a result, program attorneys are instructed to follow the Program's procedure for notifying the appellate team as soon as any party to the case, including the GAL program attorney, contemplates filing an appeal. The taking of an appeal does not act as a supersedeas¹⁷ in any dependency case unless ordered by the court. § 39.815(3). However, placement for adoption is suspended pending the appeal of an order terminating the parental rights. Id.

Effective trial advocacy never begins on the day of the hearing, but originates from the date of appointment. The discovery process is the foundation of a pyramid of legal research and analysis, preservation of evidence, preparation of witnesses, and the organization of facts and ideas. All phases of legal representation for the Program should reflect the loyalty and commitment of serving the best interest of the child. For this reason, program attorneys strive to achieve a workable knowledge of Chapter 39, the Florida Rules of Juvenile Procedure, the Florida Evidence Code, and even federal law relating to dependent children. Program attorneys zealously urge the dependency court to heavily weigh the best interests of children. And most importantly, the child is given a voice through our program attorneys, especially when competing interests fail to place the child's best interest at the center of the controversy.

¹⁷ A supersedeas is a writ that suspends the authority of a trial court to issue an execution on a judgment that has been appealed. It is a process designed to stop enforcement of a trial court judgment brought up for review. The term is often used interchangeably with a stay of proceeding.

BASIC OBJECTIONS

There are more potential objections than those listed below, e.g. in opening statement, you might object to counsel arguing the case, in direct or cross-examination, you might object to the opponent making disparaging remarks, not addressed to the court, while you are questioning a witness.

- **ARGUMENTATIVE** - in content and tone without asking for new information; using his/her question to argue the case.
- **ASSUMING FACTS NOT IN EVIDENCE** - loaded question that prevents the witness from having the opportunity to deny the existence of the assumed fact.
- **BADGERING** - also, quarreling with, arguing with, shouting at, bullying, looming over, and threatening the witness.
- **BEST EVIDENCE RULE** - requirement of original.
- **BEYOND SCOPE** - answer exceeds the scope of question and constitutes a volunteered statement by the witness.
- **BEYOND SCOPE OF DIRECT** – if the subject matter of cross is beyond the testimony of direct examination.
- **CHAIN OF CUSTODY NOT PROPERLY ESTABLISHED** - particularly when item is easily alterable and no single witness can identify the item with personal knowledge (e.g. department case file).
- **COMPOUND QUESTION** - contains two or more questions within a single question.
- **CUMULATIVE** - fails to add to the probity of previously admitted evidence or testimony – also referred to as ‘asked and answered’ or ‘repetitious’ or ‘duplicious’.
- **DISCOVERY VIOLATION** – e.g. items not disclosed via response to demand for discovery or witness list.
- **DISPLAYING EVIDENCE PRIOR TO ITS INTRODUCTON**
- **EXPERT TESTIMONY INADMISSIBLE** - underlying facts or data insufficient; field of scientific, technological or other specialty of expertise not reliable and/or relevant) factors such as: (1) whether the principle has been tested, (2) the results of published peer review, (3) error rates and (4) general acceptance.
- **FACTS NOT IN EVIDENCE**
- **HEARSAY** – question calls for an out of court statement which goes to the truth of the matter asserted. includes hearsay within hearsay and evidence based upon hearsay.
- **IMMATERIAL** - in that it is of no consequence to any issue in the case (couple with irrelevant).
- **IMPROPER IMPEACHMENT** - improper opinion or reputation character evidence, improper foundation for proof of witness' prior inconsistent statement.
- **IMPROPER AUTHENTICATION/PREDICATE** - for admission of testimony, exhibit, or document (predicate) failure to identify item of evidence (e.g., writing, and show its logical relevance) also referred to as failure to lay proper foundation.
- **INCOMPETENCY OF WITNESS** - lack of perception/memory, inability to understand nature and obligation of oath, inability to communicate in language of court (may apply to child witness).

- **IRRELEVANT** - it does not make a fact of consequence to the case anymore or less likely.
- **LACK OF PERSONAL KNOWLEDGE** - witness, other than expert, does not have first-hand information.
- **LAY WITNESS OPINION IMPROPER** - not helpful to clear understanding of witness' testimony or determination of fact in issue, not rationally based on perception of witness.
- **LEADING** - question suggests or coaxes desired answer.
- **LEGAL CONCLUSION** - questions calls for or answer contains a legal conclusion.
- **MISSTATEMENT** - mischaracterization of evidence by counsel or witness.
- **NON-RESPONSIVE ANSWER** – may also apply to narrative testimony.
- **PRIVILEGED COMMUNICATION** - attorney-client; doctor-patient; clergy; spousal or marital communication.
- **RELIGIOUS BELIEFS** - of witness inadmissible to show witness' credibility impaired or enhanced.
- **SEQUESTRATION OF WITNESSES** – called "the rule" witnesses may not speak to each other about testimony provided to the court until conclusion of proceeding.
- **SPECULATION** - conjecture, guess.
- **UNDUE DELAY** – applies generally to continuances and request for recess.
- **UNFAIRLY PREJUDICIAL** - potential danger of "unfair" prejudice substantially outweighs probative value - objecting party has burden of proof; object that the otherwise arguably relevant evidence unfairly exaggerates the truth and attempts to improperly sway the court even though arguably relevant.
- **VAGUE**

COMMON OBJECTIONS¹⁸

OBJECTIONS TO QUESTIONS	<ul style="list-style-type: none">• calls for irrelevant answer• calls for immaterial answer• witness is incompetent• violates the best evidence rule• calls for a privileged communication• calls for a conclusion• calls for an opinion (by an incompetent witness)• calls for a narrative answer• calls for a hearsay answer• leading• repetitive (asked and answered)• beyond the scope (of the direct, cross or redirect)• assumes facts not in evidence• confusing/misleading/ambiguous/vague/unintelligible• speculative• compound question• argumentative• improper characterization• misstates evidence• cumulative• improper impeachment
OBJECTIONS TO ANSWERS	<ul style="list-style-type: none">• irrelevant• immaterial• privileged• conclusion• opinion• hearsay• narrative• improper characterization• violates parol evidence rule• unresponsive/volunteered
OBJECTIONS TO EXHIBITS	<ul style="list-style-type: none">• irrelevant• immaterial• no foundation• no authentication• violates original documents (best evidence) rule• contains hearsay/double hearsay• prejudice outweighs its probative value

¹⁸ Thomas A. Mauet, *Trial Techniques*, 6th ed. (New York: Aspen Publishers, 2002) 472.

PREPARING FOR AN IMPORTANT HEARING

RESEARCH THE ISSUES

- Review statutes and rules.
- Review related case law – stay on top of latest cases.
 - Case summaries and Legal Briefs Newsletter available at www.GuardianadLitem.org
- Identify factors to be considered.
- Identify the elements that must be established by evidence at the hearing.

MAKE A LIST OF FACTS THAT SUPPORT AND DO NOT SUPPORT YOUR POSITION

- Know timelines and details.
- Look at your position from the opposing side to make sure you have covered all of your bases.
- Think about what evidence you will need and how/who you will bring it in.

PREPARE

- Prepare a list of questions you will ask witnesses – only as a guide.
- Know foundation, objections.
- Use a cheat sheet.
- Have your statute book with you.

SUMMARIZE

- Keep it simple.
- Don't get sidetracked.
- Have a theme.
- Tie in expert's opinion with the issue involved.

OBJECTIONS

WHY OBJECT¹⁹

- Protect the record - Preserve any error on appeal.
- Keep the court from hearing improper evidence.

¹⁹ Thomas A. Mauet, Trial Techniques (Sixth Edition) p.465-470

HOW TO OBJECT

TIMELINESS

- If a question is improper, the objection should be made before the answer to the question is given.
- If the question itself is prejudicial as well as improper, object right away.
- Can't "unring the bell."

LEGAL BASIS

- State legal basis.
 - The question calls for a hearsay answer.
 - The question is unresponsive.
- Insist on a ruling or the error may be waived on appeal "Your honor, may we have a ruling on the objection?"
- Have the answer struck.
- If an objection is sustained against you, see how you can overcome.

PROCEDURE

- Stating a specific ground for your objection.
 - If you state a ground for an objection but it is not proper, the court can overrule even if there is a proper legal basis for objecting.
 - More than one legal ground may exist.

CROSS-EXAMINATION OF AN EXPERT WITNESS

SUMMARY CHECKLIST²⁰

Must I cross-examine this witness?

- Has the witness hurt my case?
- Is the witness important?
- What are my reasonable expectations?
- What risks do I need to take?

What favorable testimony can I elicit?

- What parts of the direct helped me?
- What parts of my case can the witness corroborate?
- What must the witness admit?

²⁰ Thomas A. Mauet, *Trial Techniques*, 6th ed. (New York: Aspen Publishers, 2002) p. 306.

- What should the witness admit?

What discrediting cross-examination can I conduct?

- Can I discredit the testimony? (perception, memory, communication)
- Can I discredit the witness' conduct?

What impeachment can I use?

- Can I show bias, interest and motive? § 90.608(1)(b)
- Can I use prior convictions?
- Can I use prior bad acts?
- Can I use prior inconsistent statements? § 90.608(1)(a)
- Can I show contradictory facts? § 90.608(1)(e)
- Can I show bad character for truthfulness? § 90.608(1)(c)
- Can I use treatises?
- How will I prove up the impeachment if necessary?

PRACTICE TIP: Use your own expert to learn more; read the literature in the field – they are also sources of potential impeachment; read articles the expert has published; review the expert's resume to show weakness in education training and experience and if their area of expertise is the one involved in this case; and review the written report.²¹

POSSIBLE STRATEGIES²²

- Qualifications – expert not qualified in the pertinent area.
- Bias and interest.
- Date relied on.
- Assumptions – would opinion be change if assumptions were different?
- Prior inconsistent statements – commit the witness to the direct examination that you want to attack, credit, or build up the reliability of the prior statement, confront the witness by reading the statement, then stop.
- Treatises – expert can be impeached by treatises.

²¹ Thomas A. Mauet, *Trial Techniques*, 6th ed. (New York: Aspen Publishers, 2002) p. 379.

²² Thomas A. Mauet, *Trial Techniques*, 6th ed. (New York: Aspen Publishers, 2002) p. 378-395.

DIRECT EXAMINATION OF AN EXPERT § 90.702

DAUBERT QUESTIONS FOR EXPERT WITNESS²³

Expert Qualifications: Name? Address? Occupation? Present employment? Past employment? Educational Background? Current professional involvement? Membership in professional societies? Field of expertise? Purpose and nature of consultation? Research? What scientific testing did you undertake? Findings and opinions? Definitions?

Proposed Testimony is Sufficiently Tied To Facts of Case So That It Will Aid The Finder of Fact in Resolving Factual Dispute: What does your testimony concern? In your opinion, how does that testimony relate to the nature of this suit (or underlying issues)? Do you believe the research you have done could have been done by the average lay-person (without your type of education or experience)? Do you consider the research you have done to be decipherable by the average lay-person? Do you feel your testimony will better aid the finder of fact to understanding the work you will present?

Expertise Based on Experience: In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. If relying on experience, the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. How long have you had experience in (the underlying issue)? How many cases/children/clients have you worked with? How many of those were court ordered? How many times have you observed (the underlying issue)? How does your experience apply to this situation?

Testing of the Theory or Technique (Falsifiability): What theory/technique did you use in your research? How often do you use this theory/technique? Do you use this theory/technique in other subject areas, or is it unique to the subject matter addressed in this case? How did you test this theory/technique? Did you use the same testing method every time to test for accuracy? Did anyone, other than you, test your theory/technique for accuracy? What test did that person use? When did that person do his/her testing? What were the results?

Extent to Which the Technique Relies Upon the Subjective Interpretation of The Expert: Does the technique you used generally require subjective or objective interpretation among others in the field? Was the technique used in your research interpreted subjectively or objectively? Do you feel another person in your field would have interpreted your technique in the same you have? Is there a way to cross-check the subjective interpretation for accuracy? Did such cross-checking take place? What were the results?

Whether the Theory/Technique Has Been Subjected To Peer Review or Publication: Has your theory/technique been published? Where was it published? When was it published? Were there any criticisms? What were the nature of the criticisms? Has your theory/technique been reviewed by your peers? By whom was it reviewed? When was it reviewed? What was their opinion of your technique after having reviewed it?

The Theory/Technique's Known or Potential Rate of Error: Does your theory/technique have a known or potential rate of error? What is that rate of error? How did you arrive at that rate of error? Is that rate of

²³ Daubert Questions for Expert Witness, National Center on Domestic and Sexual Violence, available at <http://www.ncdsv.org/images/Daubertexpwtwnsquest.pdf>, last visited February 8, 2016

error common for the theory/technique you used? Did you carefully consider alternative causes or theories? What makes yours the best to use or most reliable?

General Acceptance of the Theory/Technique by the Relevant Scientific Community: Have you used this theory/technique outside the purposes of litigation? In what instances? When? Where? Was the theory/technique used, consistent from those instances until now? Was the theory/technique altered this time because of the litigation?

IMPEACHMENT OF A WITNESS § 90.608

IMPEACHMENT – PRIOR INCONSISTENT STATEMENTS²⁴

- Most common method of impeachment.
- The argument is not that the prior statement is true and the testimony in court is false, but that because the witness had made two different statements concerning a material fact, the court should not place great weight on the in-court testimony.
- Examples of types of statements Florida courts have admitted – witnesses own tax returns, letters, sworn extrajudicial statements, depositions, signed medical records, testimony at a previous trial.
- Must be statement of the witness testifying.
- Not “nit-picking” must be a significant fact.
- Inadmissible if probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury, or needless presentation of cumulative evidence § 90.403.
- Did the witness make the prior statement – time, place occasion and person?
- If written or oral reduced to writing, the court, upon motion of counsel, must order the statement be shown or contents disclosed to the witness.

IMPEACHMENT – PROOF OF BIAS OR INTEREST § 90.608(1)(B)²⁵

- The underlying bias must be relevant.
- The subject need not have been brought up on direct.
- If witness admits facts giving rise to the bias or interest, counsel may not introduce extrinsic evidence to prove the bias or interest. If the witness does not admit, then he or she may be contradicted by introduction of other evidence showing bias or interest.
- No foundation needs to be laid.

IMPEACHMENT – CONTRADICTION § 90.608(1)(E)

- During cross the examiner may point out the facts which are contrary to the witness’s testimony on direct examination – the credibility of the witness’s direct testimony will be in doubt.²⁶

²⁴ Ehrhardt, Florida Evidence, § 608.4 (2002 Edition)

²⁵ Ehrhardt, Florida Evidence, § 608.5 (2002 Edition)

²⁶ Ehrhardt, Florida Evidence, § 608.6 (2002 Edition)

Other grounds of impeachment include: Defects in Mental or Sensory Capacity § 90.608(1)(d), Proof of Character using Reputation Testimony § 90.609, Conviction of Certain Crimes as Impeachment § 90.610. See Florida Evidence Code.

BUSINESS RECORDS § 90.803(6)

HOW TO OFFER A BUSINESS RECORD INTO EVIDENCE

- What is your occupation?
- Does your job involve working with records of your organization or agency?
- **Have the exhibit marked.**
- **Show the exhibit to opposing counsel.**
- **Ask permission to approach the witness.**
- **Show exhibit to witness.**
- **Establish foundation.**

FOUNDATION ELEMENTS²⁷

It is necessary to call a witness that can show that each of the foundation requirements is present – not necessary to have person who actually made entry.

- The report was prepared by a person with a **business relationship** with the company (not necessarily an employee).
- The informant (the source of the report) had a business **duty to report** the information.
- The written report was **prepared “at or near the time”** with the facts or events.
- It was a **routine practice** of the business to prepare such reports.
- The report was reduced to **written form**.
- The report was made in the **regular course of business**.

SAMPLE QUESTIONS:

- I am handing you what has been marked guardian ad litem exhibit 1.
- Can you identify it?
- What kind of record is it?
- Is this report stored at your organization or agency?
- Where is it stored?
- Would this report be prepared by an agent of your organization or agency?
- Does that agent have a duty to prepare this report?

²⁷ Edward J. Imwinkelried, Evidentiary Foundations (2nd ed. 1989) p. 262-263

- Would that agent have personal knowledge of the information contained in the report?
- Would this report have been prepared “at or near the time” of the event described in the report?
- Is the making of the report a regular practice of your organization or agency?
- Would the report have been “kept in the course of a regularly conducted business activity?”
 - Offer the exhibit into evidence.
 - Have exhibit marked in evidence.
 - Have witness mark/explain exhibit.
 - Ask permission to show or read exhibit.
 - Show or read exhibit.

YOU CAN OBJECT TO PORTIONS OF THE RECORD

- Lack of foundation
- Relevance
- Lack of trustworthiness: § 90.803(6) when the sources of information or other circumstances show lack of trustworthiness” business records are not admissible i.e. made in preparation for litigation.
- Double hearsay: Qualifying the business record only eliminates the first level of hearsay (not needing to have the person that made the record on the stand). It does not eliminate the double hearsay of statements made by not employees of the business. For example, if a parent says something during a visitation that is reported in the visitation record. You can object to the parent’s statement as hearsay unless another hearsay exception applies.

Response: “This statement is admissible as a business record pursuant to § 90.803(6). I have shown through the testimony of (the witness) who is a custodian of the record or person who has knowledge of the record keeping system, that the statement is contained in a:

- Memorandum, report, record, or data compilation;
- recording acts, events, conditions, opinions, or diagnoses, made at or near the time the acts or events took place;
- by or from information transmitted by one with personal knowledge of the act or event;
- where such record is kept in the course of a regularly conducted business activity; and
- it was the regular practice of the business to make such a record.”²⁸

²⁸ Anthony Bocchino and David Sonenshein, *Federal Rules of Evidence with Objections*, 6th ed.(NITA 2003)74

HOW TO REFRESH MEMORY ON DIRECT § 90.613

WHEN WITNESS SAYS, “I DON’T REMEMBER”

- Elements:²⁹
 - Witness knows the facts, but has a memory lapse on the stand.
 - Witness knows the report (or other document or exhibit) will jog their memory.
 - Witness is given and reads the pertinent part of their report.
 - Witness states their memory has now been refreshed.
 - Witness now testifies to what he knows, without further aid of the report.

PRACTICE TIPS: Remember to ask “Do you recall or do you remember”; mark the exhibit (it should be marked for identification purposes even though it is not offered into evidence – no need to lay foundation for the document); show to opposing counsel, they are entitled to inspect the writing and cross-examine the witness concerning it § 90.613.

Be sure to get the exhibit back from the witness before you ask the questions (otherwise opposing counsel can object that the witness is just reading from the from the report)

SAMPLE QUESTIONS TO REFRESH MEMORY ON DIRECT

- Do you recall ...?
 - Would anything refresh your memory? What would that be?
 - Your Honor, I ask this _____ be marked as guardian ad litem Exhibit 2
 - I am showing the _____ to opposing counsel _____
 - May I approach the witness?
 - Do you recognize this?
 - What is it?
 - Please read paragraph...
 - Get the exhibit back from the witness.
 - Re-ask the question, which drew the original failure of memory.

Refreshing recollection must be distinguished from past recollection recorded. If the witness has no present memory of the fact after examining the document or notes, the witness will not be permitted to read from the document or notes unless they are admitted into evidence. Since writing are typically hearsay, they will not be admitted unless they qualify as an exception to the hearsay rule.³⁰

²⁹ Thomas A. Mauet, Trial Techniques (Sixth Edition) p.145.

³⁰ Charles W. Ehrhardt, Florida Evidence (2002 Edition) p. 561

OBJECTIONS TO REFRESHING RECOLLECTION UNDER § 90.613³¹

- I object to the attempt to refresh the witness's recollection in the absence of a demonstrated failure of memory (remember to ask: "Do you recall or do you remember").
- I object to the witness's reading from the exhibit used to refresh recollection because it is not in evidence and because it is hearsay (remember to take the exhibit away from witness before you continue to ask questions).

RESPONSES

- The witness has shown a failure of memory and I am attempting to refresh his or her recollection pursuant to § 90.613.

ADMISSIBILITY OF A LEARNED TREATISE CHECKLIST § 90.706

The Florida Evidence Code does not provide for a specific learned treatise exception to the hearsay rule however, permits certain literature to be used during cross-examination of an expert witness regardless of whether the expert relied on the treatise in forming his or her opinion.

This rule applies to the following publications:

- Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing.
- The trial court can allow the learned treatise to be used for cross-examination if:
 - The expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative; OR
 - Notwithstanding the recognition by the expert witness of the authoritativeness of the writing, the trial court makes a finding that the author or the treatise, periodical, book, dissertation, pamphlet or other writing to be authoritative AND relevant to the subject matter.

ADMISSIBILITY OF LEARNED TREATISE – CROSS-EXAMINATION OF AN EXPERT WITNESS

- Section 90.706 allows cross-examination of an expert witness with statements of fact and opinion in a learned treatise, if the expert witness recognizes either the author or the treatise as being authoritative.
- However, the court has the discretion to find writing authoritative despite an expert's failure to recognize the writing or the author. In such situations, the court must give the party proffering the article an opportunity to establish that the writing is authoritative through the testimony of other witnesses.³²
- The expert need not have relied on the publication in forming their opinion for trial § 90.706(1).
- Section 90.706 does not allow statements in a learned treatise to be used as substantive evidence since the treatise is hearsay if it is offered as substantive evidence.³³

³¹ Anthony Bocchino and David Sonenshein, *Federal Rules of Evidence with Objections*, 6th ed.(NITA 2003) 136-137.

³² *Fravel v. Haughey*, 727 So.2d 1033, 1034 (Fla. 4th DCA 1999)

³³ *Green v. Goldberg*, 630 So.2d 606, 609 (Fla. 4th DCA 1993)

VIDEOTAPES AND MOTION PICTURES § 90.401(3)

FOUNDATION

- The videotape is relevant
- The witness is familiar with the object or scene
- The witness explains the basis for his or her familiarity with the scene.
- The witness recognizes the object or scene in the videotape or motion picture.
- The witness recognizes the voices on the tape, locations and persons seen on the tape.
- The videotape or motion picture is a “fair and accurate representation” of a material fact or issue.

STEPS

- Have the exhibit marked.
- Show exhibit to opposing counsel.
- Ask permission to approach witness.
- Show exhibit to witness.
- Establish foundation.
 - Do you recognize Guardian ad Litem Exhibit #1?
 - What do you recognize it to be?
 - Your Honor, at this time we offer Guardian ad Litem Exhibit #1 into evidence.
 - Establish that the operator replayed the video after recording it and the tape had accurately recorded the sounds and images.
 - May I the witness unseal Guardian ad Litem Exhibit #1 and play it for the court? (establish chain of custody).
 - Play a few moments of the tape.
 - Can you identify who said “Hello”?
 - Can you identify who said “It’s me”?

If there is an audio portion of the videotape, its admissibility will be determined separately from that of the video portion. If it contains statements by a person it is hearsay if it is for the truth of the matter asserted. However, the audio portion of the videotape may be admissible under an exception to the hearsay rule.

PRACTICE TIP: Be sure that the court reporter makes a stenographic record of what is said in the videotape.

FEDERAL LEGISLATION

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INDIAN CHILD WELFARE ACT (ICWA)

In response to the alarming number of Indian children being removed from their homes, the United States Congress in 1978 passed the Indian Child Welfare Act (ICWA). Congress's twofold intent under this Act was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

ICWA provides Indian American and Alaskan Native parents greater protections. It allows Indian tribes to exercise control over or to have input into placement decisions, mandates compliance with extensive notice procedures, and requires "active efforts" to provide remedial services and rehabilitative programs to the family in an effort to keep the family intact. 25 U.S.C. § 1912 (d). Failure to follow these and other requirements under ICWA could invalidate State court decisions.

ICWA applies to child custody proceedings involving involuntary foster care placements, petitions to terminate parental rights, pre-adoptive placements, and adoptive placements. 25 U.S.C § 1903.

To place an Indian child in foster care, a court must find by clear and convincing evidence that continued placement with the parent or custodian is likely to result in serious emotional or physical harm. The parental rights of an Indian parent or custodian may not be terminated without a finding beyond a reasonable doubt that continued placement with the parent or custodian is likely to result in serious emotional or physical harm. Both foster care placements and termination of parental rights determinations require testimony by a qualified expert witness. 25 U.S.C. § 1912 (e), 25 U.S.C. § 1912.

There are two federally recognized tribes in Florida: the Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida. Although these are the only federally recognized tribes located in Florida, 307 tribes, bands and groups are represented in the total AI/AN population of 117,880 (Source: The Florida Governor's Council on Indian Affairs, Inc. at <http://www.fgcia.org/>).

NOTICE

For involuntary termination of parental rights (TPR) or foster care cases, the party petitioning for TPR or foster care placement must notify Indian parents or custodians, tribes, and the Bureau of Indian Affairs (BIA) by registered mail prior to each proceeding. The notice must include information about the tribe's right to intervene. Tribes and Indian parents or custodians must be given 10 days from the date of their receipt of the notice to prepare for each proceeding, and must be given an additional 20 days if requested. 25 U.S.C. § 1912(a). Proceedings may be invalidated if the parties do not strictly adhere to notice requirements. Awareness of a proceeding does not overcome the strict notice requirements. *In re Kathleen W.*, (1991) 233 Cal.App.3d 1414. If a parent or custodian is not likely to understand written English, notice should also be sent to the BIA asking it to arrange for translation.

PRACTICE TIP: The responsibility to send this letter is with the department. As a program attorney it is important at Shelter's Hearing that this question is addressed by your Judge or in your shelter order.

INTERVENTION

A tribe may intervene as a party at any time in any foster care or TPR proceeding involving an Indian child. 25 U.S.C. § 1911(c). When a tribe is a party, the court cannot ignore the tribe's interests in the Indian child, even where the tribe's interests conflict with those of the parents. The tribe's interests may even outweigh the parents' interests. Matter of an Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988).

JURISDICTION

Indian tribes with established judicial systems have *exclusive* jurisdiction over "any child custody proceeding" where:

- The child's resides on the tribe's reservation;
- The child is domiciled on the reservation; or
- The child is a ward of the tribal court. 25 U.S.C. § 1911(a).

If a Florida circuit court invokes emergency jurisdiction over a child who fits the above criteria, the case must either be dismissed or transferred to the tribe as soon as the imminent threat has abated or as soon as the tribe requests jurisdiction, whichever is earlier. 25 U.S.C. § 1922.

In all other cases, jurisdiction is concurrent, but presumptively tribal. Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989). State courts *must* transfer jurisdiction to a tribal court if cases involve foster care placement or TPR of an Indian child where:

- A parent or custodian requests transfer; or
- A tribe requests transfer.

State courts *may* decline to transfer a case if:

- Either parent or custodian objects to the transfer;
- The tribe declines jurisdiction; or
- There is good cause not to transfer the case. 25 U.S.C. § 1911.

The burden of establishing good cause not to transfer jurisdiction is on the party opposing the transfer. Good cause may exist where the case is at an advanced stage; where the tribe, parent, or custodian delayed requesting transfer; where the child objects to the transfer; where evidence could not be presented without hardship; or where it would not be in the child's best interests. *Guidelines for State Courts, Indian Child Custody Proceedings*, 44 Fed. Reg. 67590-91 (Nov. 26, 1979). Good cause may not be based on perceived adequacy of tribal social services or judicial systems. Id.

LEVEL OF EFFORTS

Absent an emergency, the court must be satisfied that the department used "active efforts" to provide remedial and rehabilitative services to prevent the breakup up the Indian family in a case involving foster care placement or TPR. 25 U.S.C. § 1912(d). Arguably, active efforts may require more on-going social work than the "reasonable efforts" typically required. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978). The efforts must take into account the prevailing social and cultural conditions and way of life of the tribe. *Guidelines*, 44 Fed. Reg. 67582(D)(2).

EXPERT WITNESSES AND STANDARDS OF EVIDENCE

In Non-Emergency Foster Care Cases

- The court must find by clear and convincing evidence that the child's continued custody by the parent would cause serious emotional or physical damage to the child; and
- This finding must be supported by the testimony of at least one expert witness. 25 U.S.C. § 1912(e).

In TPR Cases

- The court must find *beyond a reasonable doubt* that the child's continued custody by the parent would cause *serious* emotional or physical damage to the child; and
- This finding must be supported by the testimony of at least one expert witness.

Temporary emergency custody cannot extend beyond 90 days, absent extraordinary circumstances, unless:

- The court finds by *clear and convincing evidence* that custody of the child by the parent would cause *serious* emotional or physical damage to the child; and
- This finding is supported by the testimony of at least one expert witness. *Guidelines*, 44 Fed. Reg. 67588 (B)(7)(d).

In all cases, the referring or investigating social worker should not be used as the expert. H.R. Rep. No. 1336 at 22. The expert's qualifications must extend "beyond the normal social worker qualifications." *In re Adoption of TRM*, 525 N.E.2d 298, 311 (1988). If the case involves issues of cultural bias, the expert witness must have expertise in the social and cultural aspects of Indian life or in the placement of Indian children. *In re C.W.*, 479 N.W.2d 105 (Neb. 1992). Failure to have an expert witness is reversible error.

To be clear and convincing, evidence must show a causal relationship between the likely harm and the particular condition in the home. Evidence of poverty, inadequate or crowded housing, or non-conforming behavior will not suffice. 44 Fed. Reg. *Guidelines*, 67582-3 (D)(3).

CONSENT

If a parent or custodian of an Indian child wishes to consent to either foster placement or TPR, the consent is only valid if made in writing before a judge and recorded in the case file. 25 U.S.C. § 1913. A certificate from the judge that the consent was made with the parent's full understanding of the legal issues must also be in the case file. *Id.* The legal issues must be explained to the parent in detail and in the parent's native language if the parent is not fully fluent in English. *Id.* An Indian parent may withdraw his or her consent to TPR at any time prior to the final TPR order. *Id.*

Placement Preferences

Indian children placed in foster care must be placed:

- In the least restrictive, family-like setting that can meet the child's special needs;
- In close proximity to the child's home;
- Absent good cause, in the following order of priority placements:
 - The child's extended family (as defined by tribal law or custom);
 - A foster home specified by the child's tribe (Indian tribes may license foster homes according to tribal criteria);

- An Indian foster home;
- An institution approved by the child's tribe.

If the tribe passes a resolution changing the prioritization of placements, the tribe's priorities must be followed. 25 U.S.C § 1915 (c).

Absent good cause, Indian children placed in adoptive homes must be placed in the following order of priority placements:

- With the child's extended family (as defined by tribal law or custom);
- With other members of the child's tribe;
- With other Indian families.

If the tribe passes a resolution changing the prioritization of placements, the tribe's priorities must be followed. 25 U.S.C § 1915 (c).

In applying the placement preferences, the applicable standards are the social and cultural standards of the Indian community. 25 U.S.C § 1915 (d). Where appropriate, the placement preferences of the Indian child or parents should be considered. 25 U.S.C § 1915 (c).

If an Indian child is placed in a non-Indian home, a finding must be made that the department made diligent efforts to locate an Indian home. Guidelines, 44 Fed. Reg. 67584 (F)(3). The court must articulate that it is following the ICWA placement preferences or make specific findings regarding the good cause for departing from the priorities. The ICWA gives no definition of good cause for departing from the placement priorities. Good cause is a matter of discretion for the trial court. In re Maricopa County, 667 P.2d 228, (1983). In all placement decisions, the placement priorities must give way to the child's best interests. Id.

FLORIDA REPORTED CASES

Seminole Tribe of Fla. v. Dep't of Children & Families, 959 So. 2d 761 (Fla. 4th DCA 2007)

In re T.D., 890 So. 2d 473 (Fla. 2d DCA 2004)

ONLINE RESOURCES

University of South Florida Center for Child Welfare Tools and Forms for ICWA

<http://centerforchildwelfare.fmhi.usf.edu/IndianChildWelfareAct/ToolsandForms.shtml>

Indian Child Welfare Act of 1978 (25 U.S.C. §§ 190163) **www.tribal-institute.org/lists/chapter21_icwa.htm**

National Conference of State Legislatures – NCSL's Indian Child Welfare Resources

<http://www.ncsl.org/research/human-services/ncsl-state-tribal-institute-intersection-ec-cwp.aspx>

National Indian Welfare Association **www.nicwa.org**

THE ADOPTIONS AND SAFE FAMILIES ACT (ASFA)

The Adoptions and Safe Families Act (ASFA) was passed by the United States Congress in 1997. Using safety and permanency as its primary goals, ASFA amended prior foster care law.

ASFA is found at 42 U.S.C. §§ 620-679, with regulations relating to ASFA are at 45 C.F.R. § 1356.

WHAT ASFA REQUIRES

Contrary to the Welfare Findings

When a child is removed from the home, ASFA requires that the court make a finding that it is contrary to the child's welfare to remain in the home. 42 U.S.C. § 671(a)(15)(B)(i); 45 C.F.R. § 1356.21(c). The contrary to the welfare finding must be, 1) made at the first court hearing that sanctions, even temporarily, the child's removal; 2) explicitly documented by reference to facts; and 3) made on a case-by-case basis. 45 C.F.R. § 1356.21(c)-(d).

Reasonable Efforts to Prevent Removal Findings

ASFA requires that the court make a finding that reasonable efforts were made by the department to prevent the child's removal. 42 U.S.C. § 671(a)(15)(B)(i); 45 C.F.R. § 1356.21(b)(1).

The Reasonable Efforts to Prevent Removal Finding must be 1) made within 60 days of the child's removal; 45 C.F.R. § 1356.21(b)(1); 2) explicitly documented by reference to facts; 45 C.F.R. § 1356.21(d); and 3) made on a case-by-case basis. Id.

CASE PLANS

ASFA requires that the department must develop a case plan "within a reasonable period" which can be no more than 60 days after the removal of the child. 45 C.F.R. § 1356.21(g)(2). The department must involve the parents in the case plan development. 45 C.F.R. § 1356.21(g)(1). If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process.

The Case Plan Must Include Services for the Child, The Parents, and The Foster Parents to: 1) Assure that the child receives "safe and proper care" and address the child's needs; 2) "[I]mprove conditions in the parents' home;" and 3) Facilitate the child's reunification or other permanent placement. 42 U.S.C. § 675(1)(B).

The Case Plan Must Also:

- Be a written document. 42 U.S.C. § 675(1)(A);
- Describe the child's placement, including its safety and appropriateness, how it is the most family-like possible, and if the goal is reunification, how the placement is as near the family's home as possible. The plan must take into consideration the distance of the child's placement from the child's school. 42 U.S.C. § 675(1)(A), 42 U.S.C. § 675(1)(C), 45 C.F.R. § 1356.21(g)(3);
- Include the child's health and education records, including contact information for providers, a copy of the child's school record and immunizations, and information about the child's medical conditions and medications. 42 U.S.C. § 675(1)(C);

- Provide services, “where appropriate,” to help children 16 and over to transition to living independently, even if the goal is not independent living. 42 U.S.C. § 675(1)(C);
- Document the steps the department is taking to achieve the case plan goal where the goal is not reunification. 42 U.S.C. § 675(1)(D);
- Describe services offered by the department to prevent the removal of the child and to reunify the family (i.e. attach past case plans). 45 C.F.R. § 1356.21(g)(4); and
- Include “child-specific” recruitment efforts where the goal is adoption. At a minimum, these efforts should include the use of state, regional, and national adoption registries. 45 C.F.R. § 1356.21(g)(5).

Compliance with the case plan must be “reviewed periodically,” but not less than every six months (typically at judicial review hearings. 42 U.S.C. § 675(5)(B). Additionally, the case plan goal, or permanency plan, must be reevaluated and determined at a permanency hearing to be held no less than 12 months after the child has been removed. 42 U.S.C. § 675(5)(C).

Reasonable Efforts to Reunify Families

ASFA requires that the states make reasonable efforts to reunify families. 42 U.S.C. § 671(a)(15)(B). However, the regulations do not require specific findings that these efforts were made. Reasonable efforts are not required to reunify families where:

- The child is an abandoned infant. 42 U.S.C. § 675(5)(E).
- The parent has subjected the child to “aggravated circumstances” such as torture, chronic abuse, sexual abuse, or abandonment. 42 U.S.C. § 671(a)(15)(D)(i).
- The parent has committed, or assisted in the committing of, the murder or voluntary manslaughter of one of the parent’s other children. 42 U.S.C. § 671(a)(15)(D)(ii).
- The parent has committed a felony assault resulting in serious injury to the child or another child of the parent. 42 U.S.C. § 671(15)(D)(ii).
- The parent had his or her parental rights involuntarily terminated to another child. 42 U.S.C. § 671(a)(15)(D)(iii).
- The state has determined that another reason exists that justifies not using reasonable efforts to reunify the family, with the child’s health and safety as the paramount concern. 42 U.S.C. § 671(a)(15)(A), 42 U.S.C. § 671(a)(15)(D)(i), 65 Fed. Reg. 4060 (Jan. 25, 2000).

A permanency hearing must be held within 30 days of a court order that reasonable efforts to reunify the family are not required. 42 U.S.C. § 671(a)(15)(E)(i).

The department must file a termination of parental rights (TPR) petition for abandoned infants, siblings of a child murdered by a parent, and children whose parent has committed a felony assault resulting in injury to the child or the child’s sibling, unless:

- The child is in the care of a relative. 42 U.S.C. § 675(5)(E)(i);
- The department has documented a “compelling reason” why TPR is not in the child’s best interests. 42 U.S.C. § 675(5)(E)(ii);

- “Adoption is not the appropriate permanency goal for the child.” 45 C.F.R. § 1356.21(i)(2)(ii)(A);
- There are no grounds for TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(B);
- The child is an unaccompanied refugee. 45 C.F.R. § 1356.21(i)(2)(ii)(C); or
- “International legal obligations” or “compelling foreign policy reasons” prevent TPR. 45 C.F.R. § 1356.21(i)(2)(ii)(D).

Reasonable Efforts to Finalize the Permanency Plan

The department must use reasonable efforts to “place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.” 42 U.S.C. § 671(a)(15)(C).

The finding that reasonable efforts were used to finalize the permanency plan must:

- Be made regarding the permanency plan in effect (as opposed to previously abandoned plans). 45 C.F.R. § 1356.21(d); 65 Fed. Reg. 4052 (Jan. 25, 2000);
- Be “as meaningful as possible and child specific,” and made on a case-by-case basis. 45 C.F.R. § 1356.21(d)(3); 65 Fed. Reg. 4056 (Jan. 25, 2000); and
- Reference specific facts of the case. References to state statutes are insufficient. References to a court report, without citing specific facts from the report, are insufficient. 45 C.F.R. § 1356.21(d)(3); 65 Fed. Reg. 4056 (Jan. 25, 2000).

TPR after 15 Months Out Of the Home

ASFA states that when a child has been in foster care for 15 of the last 22 months, the department “shall file a petition to terminate the parental rights of the child’s parents” unless the child is being cared for by a relative, the state has documented a “compelling reason for determining that filing such a petition would not be in the best interests of the child,” or the state has not made the reasonable efforts necessary to achieve the goal of the case plan where the goal is reunification. 42 U.S.C. § 675(5)(E).

Adoption Planning Concurrent with the TPR Filing

ASFA is explicit in requiring the department to begin identifying, recruiting, processing, and approving qualified families for adoption **concurrently** with filing or joining the petition for TPR. 42 U.S.C. § 675(5)(e); 45 C.F.R. § 1356.21(i)(3).

WHAT ASFA ALLOWS

Concurrent Planning

Recognizing that concurrent planning improves children’s lives, ASFA specifically allows for the practice. 42 U.S.C. § 671(a)(15)(F); 45 C.F.R. § 1356.21(b)(4); 45 C.F.R. § 1356.21(i).

TPR Prior To the Child Being In Care for 15 of 22 Months

While ASFA is written to require the department to file for TPR when a child has been out of the home for 15 of the last 22 months, ASFA does not preclude filing for TPR sooner when the circumstances and the best interests of the child necessitate doing so.

Preference for Placement with a Relative

ASFA requires that the department “consider giving preference to an adult relative over a non-related caregiver” when making placement decisions. 45 § U.S.C. (a)(19). However, nowhere does ASFA state that children must be placed with relatives. ASFA supports relative placement without adoption by permitting the department to withhold filing for TPR when the child is with a relative. 42 U.S.C. § 675(5)(E)(i). However, in order to promote permanent placements for children, HHS does not allow the case to be closed when a child is with a relative and a permanency option such as adoption or guardianship has not been finalized. 65 Fed. Reg. 4060 (Jan. 25, 2000).

Additional Resources

<https://www.socialworkers.org/archives/advocacy/updates/1997/safeadop.htm>

<https://www.childwelfare.gov/topics/permanency/legal-court/fedlaws/>

ADOPTION ASSISTANCE AND CHILD WELFARE ACT 1980

The Adoption Assistance and Child Welfare Act (Act) established adoption assistance; improved foster care assistance for needy and dependent children; and improved the child welfare, social services, and aid to families with dependent children programs. The Act:

- requires states to make adoption assistance payments;
- defines a child with special needs;
- requires state agencies to make “reasonable efforts” to prevent removal of the child from the home and return those who have been removed as soon as possible;
- requires the state agency to place a child in the least restrictive setting and, if the child will benefit, one that is close to the parent’s home;
- requires the court or agency to review the status of a child in any nonpermanent setting every 6 months to determine what is in the best interest of the child, with most emphasis placed on returning the child home as soon as possible; and
- requires the court or administrative body to determine the child’s future status, whether it is a return to parents, adoption, or continued foster care, within 18 months after initial placement into foster care.

<https://www.govtrack.us/congress/bills/96/hr3434>

MULTIETHNIC PLACEMENT ACT (MEPA) 1994

The Multiethnic Placement Act (MEPA) was passed in 1994 and requires any state receiving federal funding ensure placements of dependent children are not denied based on color, race or national origin of the child or prospective foster parents. Some of the provisions of MEPA are as follows:

- MEPA prohibits state agencies (that receive Federal funding) from delaying, denying, or otherwise discriminating when making a foster care or adoption placement decision on the basis of the parent or child’s race, color, or national origin.

- MEPA prohibits state agencies from denying any person the opportunity to become a foster or adoptive parent solely on the basis of race, color, or national origin of the parent or the child.
- MEPA requires states to develop plans for the recruitment of foster and adoptive families that reflect the ethnic and racial diversity of children in the State.
- MEPA allows the state agency to consider the cultural, ethnic, or racial background of a child and the capacity of an adoptive or foster parent to meet the needs of a child with that background when making a placement.

<https://www.govtrack.us/congress/bills/103/hr4181>

MCKINNEY-VENTO HOMELESS ASSISTANCE ACT (2002)

McKinney –Vento Homeless Assistance Act ensures that each child of a homeless individual and each homeless youth has equal access to the same free appropriate public education. Homeless children are defined as:

- children and youth who lack a fixed, regular, and adequate nighttime residence;
- children staying in other people's homes, hotels, and shelters; and
- children abandoned in hospitals or awaiting foster care placement.

Homeless children can stay in their home school; do not need required documentation; and are entitled to school supplies, case management, transportation, and other services as needed. See Education Chapter.

<http://www.nationalhomeless.org/publications/facts/McKinney.pdf>

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

The Fostering Connections to Success and Increasing Adoptions Act of 2008 (Act) included important changes to the child welfare system. The following are some of the provisions provided by the Act:

CONNECT FOSTER CHILDREN WITH THEIR RELATIVES

The Act requires that *state agencies* exercise due diligence in identifying and providing notice to relatives of the child within 30 days after the child is removed from his or her parents' custody.

- In Florida, identifying a possible relative placement is an ongoing duty for parents. § 39.402(17).

SIBLINGS

The Act requires that reasonable efforts are made to place siblings together (unless contrary to the safety and well-being of the siblings). If the siblings are not placed together the state agency must document why and give the siblings frequent visitation.

- In Florida, the department must make reasonable efforts to place the siblings together in out-of-home placement unless not in the best interest of the child. § 39.402(8)(h)5.
- In Florida, if siblings who are removed from the home cannot be placed together, the department shall provide to the court a recommendation for frequent visitation or other ongoing interaction between the siblings unless this interaction would be contrary to a sibling's safety or well-being. § 39.402(9)(b).

- Visitation between siblings should occur at least once a week and visitation with parents should occur at least once a month, unless the court orders otherwise. §§ 39.4085(15), 39.4085(16). See § 39.001(1)(k).

TRANSITION PLANS FOR YOUNG ADULTS

During the three month period immediate prior to the child turning 18 (or greater as the State may elect) a caseworker must provide the child with assistance and support in developing a transition plan.

- In Florida, the department must assist the child in developing a transition plan within the 180 day period after a child turns 17. § 39.6035(1). “The transition plan must address specific options for the child to use in obtaining services, including housing, health insurance, education, and workforce support and employment services.” § 39.6035(1). The plan must also consider establishing and maintaining naturally occurring mentoring relationships and other personal support services.

EXTENDING FOSTER CARE

The state has the option to extend foster care and adoption assistance programs to any child up to age 21 if certain requirements are met.

- In Florida, Extended Foster Care is the automatic extension of court jurisdiction that allows a young adult to remain in foster care until their 21st birthday (or 22nd birthday if they have a documented disability) if the young adult meets certain requirements. § 39.013(2). Young adults can leave and re-enter foster care at any time and as many times as they want between their 18th and 21st birthday (22 if they have a documented disability).

EDUCATION AND HEALTH CARE

Educational Stability. The Act requires that a case plan include a plan for ensuring the educational stability of the child in foster care.

- In Florida the case plan requires assurances that the placement of the child takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement. § 39.6012.
- Florida Statute § 39.0016 provides that there must be interagency agreements to provide for continuing the enrollment at the same school if possible. The School Board, the Department of Education, and the Department of Children and Families (the department) are also charged with assisting with transportation to maintain stability.

Health Care. The Act requires the state will develop a plan, in consultation with pediatricians and other experts, a plan for the oversight and coordination of health care services for foster care youth. The plan must also include consideration of mental health and dental health needs.

- In Florida, this includes requirements in § 39.407(1) authorizes the department to have a medical screening performed; Case Plans § 39.6012 requiring medical and mental health information; and Psychotropic Medication requirements of § 39.407(3)(a)1 explaining the procedures for children who are prescribed psychotropic medications. See Psychotropic Medication Chapter and Case Plan Chapter.

ADOPTION

The Act Enhances adoption subsidies and supports to older youth in foster care; requires the “state agency” to inform prospective adoptive parents about the adoption tax credit; and increases financial subsidies to states to find adoptive placements for children – including teens, children with disabilities and children with special needs. See Adoption Chapter.

INDIAN TRIBES

The Act gives equitable access for foster care and adoption services for Indian children in tribal areas. All Indian tribes are allowed direct access to funding for foster care, adoption and independent living.

<https://www.gpo.gov/fdsys/pkg/BILLS-110hr6893enr/pdf/BILLS-110hr6893enr.pdf>

PREVENTING SEX TRAFFICKING AND STRENGTHENING FAMILIES ACT OF 2014

REASONABLE PRUDENT PARENT STANDARD

Just like Florida’s § 39.4091, The Preventing Sex Trafficking and Strengthening Families Act of 2014 (Act) adopts the Reasonable Prudent Parent standard for caregivers to follow when determining if a child can participate in an age-appropriate activity. See Normalcy and Independent Living chapter.

CASE PLANNING

The Act further requires consultation with foster children age 14 and older in the development of or revision to his or her case plan and requires the case plan to include a document describing the rights of the child to education, health, visitation and court participation; the right to stay safe and avoid exploitation.

The department has issued a memo regarding case planning for children 14 and older. The case plan or any revisions must be completed in consultation with the child. The foster child may also choose two more people to attend (who are not the case worker or foster parent) the case plan meeting. If the person chosen by the child is someone the department believes would not act in the best interest of the child, the department shall document reasons for excluding that person.

<http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/CasePlanning-UpdatedReq092515.pdf>

ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT

The Act eliminates Another Planned Permanent Living Arrangement (APPLA) as a permanency goal for children under 16 and adds additional case plan and case review requirements for older youth who have a permanency goal of APPLA. The legislation also requires certain documentation at permanency hearings when APPLA is the permanency goal for a child.

The department has issued a memo regarding APPLAs and how the APPLA requirements will be addressed by the department.

- The department will identify children under 16 with a permanency goal of APPLA and will determine an appropriate alternative permanency goal to APPLA.

The memo goes on to require the following findings in a permanency hearing order if the permanency goal for a child under 16 is APPLA.

- Efforts to reunify the child, or secure a placement with a fit and willing relative, a legal guardian, or an adoptive parent;
- The court's inquiry of the child about their desired permanency outcome;
- The court's determination why APPLA is the best permanency plan for the child and why it is not in the child's best interest to return home, be adopted, or be placed with a legal guardian or fit and willing relative;
- How the child's current placement is following the reasonable prudent parent standard; and
- The child's opportunities to participate in age appropriate activities.

<http://centerforchildwelfare.fmhi.usf.edu/kb/policymemos/APPLA092515.pdf>

Florida has not adopted a similar statute to the Act.

PRACTICE TIP: Always be sure that any permanency goal is in the best interest of the child. The best option may be APPLA.

DOCUMENTS FOR CHILDREN AGING OUT OF FOSTER CARE

The Act also requires certain documents be provided to foster children aging out of care. The Act is similar to § 39.701(3) which requires Medicaid care and information on Medicaid program sufficient to prepare the child to apply for coverage; birth certificate, driver's license or identification card, social security card, open bank account or necessary documents to open a bank account, educational records, health and mental health records.

PREVENTING SEX TRAFFICKING

The Act requires states to develop policies and procedures to identify, document, screen and determine appropriate services for children under the child welfare agency's care and supervision, who are victims of, or at risk of, sex trafficking. Florida statutes have codified this requirement in § 409.1754(1)(a).

The Act requires State child welfare agencies to immediately report children in their care identified as sex trafficking victims to law enforcement.

The Act includes various reporting from states to Health and Human Services and Health and Human Services to Congress.

Requires state child welfare agencies to report missing youth to law enforcement, within 24 hours, for entry into the National Crime Information Center and to the National Center for Missing and Exploited Children. In Florida the applicable statute is § 39.202(4).

<https://www.congress.gov/113/plaws/publ183/PLAW-113publ183.pdf>

INDIAN CHILD WELFARE ACT (ICWA) CHECKLIST

DOES ICWA APPLY?

- Are the proceedings are **child custody proceedings** as the ICWA defines that term 25 U.S.C. § 1903(1); **and**
 - child custody proceedings are Foster care placements; Termination of parental rights; Pre-adoptive placements; and Adoptive placements. 25 U.S.C. § 1903(1)(iv)
- Is the **child an “Indian child”** as the ICWA defines that term under 25 U.S.C. § 1903(4).
 - He or she is an unmarried person who is under the age of 18, **and**
 - child is a member of a federally recognized Indian tribe; or
 - The child is the biological child of a member of a federally recognized Indian tribe and child is eligible for membership in any federally recognized Indian tribe.

NOTICE

- Notice of the proceeding shall be sent to:
 - the parents and Indian custodians; and
 - any tribes that may be the Indian child’s tribe
- by registered mail with return receipt requested. If the identity or location of the parent or the tribe cannot be determined, such notice shall be given to the Secretary. 21 U.S.C. §1912.

No foster care placement or termination of parental rights proceeding shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or Secretary. The tribe, parents or Indian custodians can request an additional twenty (20) days to prepare for such a proceeding.

BURDENS OF PROOF

- Foster Care Placement Order: must be supported by *clear and convincing evidence*, including testimony of **qualified expert witnesses (caseworker is not a qualified expert witness)**, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- Termination of Parental Rights: must be supported by evidence *beyond a reasonable doubt*, including testimony of **qualified expert witnesses**, that the continued custody of the child by the parent or Indian custodian is likely to result in *serious emotional or physical damage* to the child

FOSTER CARE PLACEMENT

- Active Efforts.** Did the department make active efforts to provide remedial services and rehabilitative programs, designed to prevent the breakup of the Indian family; and those efforts unsuccessful
- Consent.** Consent to foster care placement (or TPR) must be in writing, recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms were fully explained and understood by the parent or Indian custodian.
- Placement must be **least restrictive setting** that best approximates a family and which may met his special needs.
- Placement preference shall be given (in the absence of good cause to the contrary) to a placement with:
 - a member of the Indian child’s extended family
 - a foster home licensed, approved, or specified by the Indian child’s tribe
 - an Indian foster home licensed or approved by an authorized non-Indian licensing authority or
 - an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.

BEST INTERESTS OF THE CHILD

- Has the court considered the child’s cultural and tribal identity when determining the best interests of the child? 25 U.S.C. 1901(5).

JURISDICTION

- If the child is not living on the reservation, the tribe and the state court have concurrent jurisdiction, but the preference is for tribal jurisdiction.

INTERVENTION

- In any state court proceeding for foster care placement of, or termination of parental rights to an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any stage of the proceeding.

Tribal Contact Information & Additional Contacts	
<p>Miccosukee Indian Tribe Billy Cypress, Chairman Tamiami Station, P.O. Box 440021 Miami, FL 33144 Phone: (305) 223-8380 Fax: (305) 223-1011 http://www.miccosukeetribe.com/ <i>Presently, this tribe has three reservation areas in the State of Florida: Tamiami Trail, Alligator Alley and Krome Avenue.</i></p>	<p>Seminole Tribe of Florida Mitchell Cypress, Chairman 6300 Stirling Road Hollywood, FL 33024 Phone: (954) 966-6300 Fax: (954) 967-3486 http://www.seminoletribe.com/ <i>The Seminole Tribe of Florida has five reservations at Hollywood (formerly Dania), Big Cypress, Brighton, Immokalee, and Tampa.</i></p>
<p>Muscogee Nation of Florida Formerly Florida Tribe of Eastern Creek Indians 278 Church Road Bruce, FL 32455 Phone: (850) 835 2078 FAX (850) 835 5691 http://www.muscogeeefl.com/</p>	<p>Perdido Bay Tribe of Lower Muscogee Creeks 3300 Beloved Path. Pensacola, FL 32507 Phone: (850) 453-7382 Email: bearheart1@cox.net and perdidobaytribe@aol.com http://www.perdidobaytribe.org/</p>
<p>Florida Governors Council on Indian Affairs, Inc. 1341 Cross Creek Circle Tallahassee, Florida 32301 Phone: (850) 488-0730 Phone: (850) 487-1472 Toll Free (800) 322-9186 Email info@fgcia.com http://www.fgcia.com</p>	<p>Nashville Area Indian Health Service <i>(Health services for American Indians and Alaska Natives in the Southern and Eastern United States)</i> Richie Grinnell, Director 711 Stewarts Ferry Pike Nashville, TN 37214-2634 Office Hours: 7:00 - 5:00 P.M. Phone: (615) 467-1500 FAX: (615) 467-1501 http://www.ihs.gov/FacilitiesServices/AreaOffices/Nashville/</p>
<p>Bureau of Indian Affairs - Eastern Agency Franklin Keel, Regional Director 545 Marriott Drive, Suite 700 Nashville, TN 37214 Phone: 615-564-6700 Fax: 615-564-6701 <i>(Regional office that covers programs administered in eastern area)</i></p>	<p>For more information contact the National Indian Child Welfare Association at (503) 222-4044 or visit their website at www.nicwa.org</p>

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

WENDIE COOPER, ESQ., APPELLATE DIRECTOR, STATEWIDE GUARDIAN AD LITEM PROGRAM

The Interstate Compact on the Placement of Children (ICPC) was created to safeguard children who were placed across state lines for foster care or adoption. The ICPC is a uniform law which has been adopted by all 50 states as well as the District of Columbia and the Virgin Islands. Each signatory state has codified the compact verbatim into its statutes and has appointed an administrator to govern the application of the compact. **The purpose of the ICPC is to ensure that children who are placed outside of their home state receive services and supervision, and that the placement is in their best interests.**

LEGAL SIGNIFICANCE

Interstate compacts are binding agreements between the signatories. A compact is enacted into law by the state legislature, and has the effect of statutory law. Michael L. Buenger, *Interstate Compacts*, 2004, <http://www.csg.org/knowledgecenter/docs/ncic/Buenger-InterstateCompacts-2004.pdf>, last visited 2/3/15. Additionally, when the states enter a compact, the compact becomes a contract between the parties and is not subject to unilateral amendment or modification. Nebraska v. Cent. Interstate Low-Level Radioactive Waste Comm'n., 207 F.3d 1021, 1026 (8th Cir. 2000). A state may not enact legislation which would burden the compact without approval of the other parties. *Id.*

As such, a compact is both binding state law and a contract between the member states, and the terms of the compact take precedence over contrary state statutes and state constitutional provisions. See Bruener (citing McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991); Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1318 (4th Cir. 1983)). In essence, the states have contractually agreed that the terms of the compact supersede any conflicting state law. See Bruegner. Finally, because a state is required to enforce the compact, no court has the authority to provide relief that is inconsistent with the terms of the compact, but can merely interpret the compact. See Bruegner (citing Texas v. New Mexico, 462 U.S. 554, 103 S.Ct. 2558 (1983)).

APPLICATION OF THE ICPC

The text of the ICPC has been codified into statute at § 409.401. The ICPC consists of 10 articles that define its application, establishes the procedures to place children interstate, and sets the responsibilities of each participant in the process. In addition, 12 Regulations have been developed to assist the states in applying the articles.

In the dependency arena, several types of placements are covered by the ICPC:

- Intact placement relocation. Reg. No. 1;
- Placements preliminary to possible adoption. Reg. No. 2;
- Placements into foster care. Reg. No. 2;
- Placements with a parent or relative, when the child is not sent by a parent or relative. Reg. Nos. 2, 3 and 7; and
- Group or residential placements, including for children adjudicated delinquent. Art. VI; Reg. Nos. 3 and 4.

Article VIII specifically states that the ICPC does not apply when a parent, stepparent, grandparent, adult brother or sister, adult aunt or uncle, or his guardian brings or sends the child into the receiving state to any such relative. Art. VIII; Reg. No. 3. However, if the parents' rights have been diminished, and they no longer have legal custody of their children, the ICPC applies. Dep't of Children & Fams. v. C.T., 144 So. 3d 684 (Fla. 1st DCA 2014); Dep't of Children & Fams. v. T.T. & J.R., 42 So. 3d 962 (Fla. 5th DCA 2010). Placements include family free or boarding homes, and therefore relative placements, other than those expressly excluded, are subject to the ICPC. Art. II(d); Reg. No. 3. Also excluded from the ICPC are placements in medical facilities, mental health facilities, boarding schools or any institution that is primarily educational in nature. Art. II(d); Reg. No. 4.

After it is determined that the placement falls under the ICPC, it must be determined whether the participants are required to comply. Article II defines sending agency and receiving state. A sending agency is a party state, including officers or employees; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to a party state. Art. II(b). A receiving state is the state to which the child is sent, brought, whether by public authorities or private person or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons. Art. II(c). **Basically, when custody of the child is placed with an agency, and the agency seeks to place the child across state lines for either relative placement or foster care, or the child is being placed for adoption, the ICPC is triggered, and the placement must be in compliance with its terms.**

The ICPC provides the family, the sending state, and the receiving state certain guarantees. When the compact has been complied with, all participants can be ensured that the placement is not contrary to the interests of the child. The sending agency is able to have the potential placement evaluated by having the receiving state conduct a home study and a criminal background check. The receiving state is able to make certain that its laws and policies regarding placements have been followed. The sending state is able to obtain supervision of the child and services. Both states are able to fix the financial and medical responsibilities of each state prior to the placement taking place. And finally, the ICPC provides that the sending state retains jurisdiction over the child once the child leaves its borders. Art. V.

PROCEDURE

To initiate a placement under the ICPC, jurisdiction of the court in the sending state over the child must be established. In Florida, this is accomplished by the department motioning for the court to issue an Order of Compliance with the Compact. This is simply an order which designates the department as the sending agency and shows that the child has been adjudicated dependent. Once the order is obtained, the caseworker prepares the ICPC packet.

THE ICPC PACKET CONSISTS OF:

- District Compact Transmittal Form; the ICPC 100A form;
- three copies of the cover letter specifying the identification of the potential placement, ongoing needs of the child, any special requirements for the child, and a paragraph setting out the financial/medical plan;
- three copies of a social assessment of the child or the pre-dispositional study;
- three copies of the most recent court order showing dependency and the legal status of supervision; and
- Order of Compliance.

The packet may also contain:

- A permanency plan for the child; or
- Any other information about the child or the placement that the caseworker feels may aid the receiving state caseworker.

If the request is for an interstate adoption, the packet must contain:

- three copies of the TPR order or the order setting the adjudicatory hearing; and
- adoption home study application, or a copy of the home study if it has already been completed.

Once the local caseworker has completed the packet, they send it to the District Family Safety and Preservation Compact Specialist. The District Specialist will review the packet for completeness and either forward the packet to the ICPC Administrator's Office in Tallahassee or request more information from the caseworker. When the Administrator's office receives the packet, they must review the packet for completeness, sign off on the ICPC 100A form, and forward the packet to the ICPC Administrator's Office in the receiving state within 3 business days of receipt. CF Operating Procedure No. 175-54.

Upon receipt of the packet in the receiving state compact administrator's office, the packet will be reviewed for completeness, and forwarded to the local office where the potential placement resides. A caseworker in the local office will then conduct the background checks and home study, make a recommendation regarding the placement and write a report. *Home studies and placements are determined in compliance with the law of the receiving state.* The caseworker in the receiving state will send their report and recommendation to the receiving state compact administrator. If the placement is approved, the compact administrator will sign the ICPC 100A form and send it and the home study to the sending state compact office. If the placement is denied, then the placement cannot be made until the situation that resulted in the denial is remedied. The sending state compact office will forward the documents to the local department office. At that point, the local caseworker and the caseworker in the receiving state will finalize arrangements for supervision, funding, and travel. CF Operating Procedure 175-54.

PRACTICE TIP: To expedite the processing of the ICPC request, the department recommends that the caseworker in Florida stay in contact with the caseworker in the receiving state, so that decisions can be communicated and preparations begun before the official paperwork is received. CF Operating Procedure 175-54.

PRACTICE TIP: The department also encourages the caseworker in the receiving state to fax a copy of the home study to the local office at the same time as they fax their compact office if it is allowed by the receiving state. CF Operating Procedure 175-54.

If the approval is verbal, no formal placement action can take place until a signed copy of the ICPC 100A form is received, either by fax or hard copy. The completed ICPC 100A form, signed and dated by the receiving state compact administrator, is a legal document that is evidence the child can legally be placed, as long as placement occurs after the date it is signed. CF Operating Procedure 175-54. The approval is valid for 6 months from the day the receiving state compact administrator signs the form. Reg. No. 6.

SEVERAL ISSUES ARE IMPORTANT TO KNOW WHEN DEALING WITH THE ICPC

First, the sending state must maintain jurisdiction over the child while the child remains in the receiving state. The receiving state may recommend that supervision be terminated after 6 months, however, Florida, as the sending state must agree. If supervision is terminated, all that means is that the receiving state no longer has to monitor the placement. Florida will still be legally and financially responsible for the child. There are only three ways that jurisdiction may be terminated by the sending state: the child is adopted, the child reaches majority or the child becomes self-sufficient. Art. V(a). If a termination of jurisdiction is sought without one of the above events occurring, the compact administrator in the receiving state must concur.

Florida's continuing jurisdiction over the child is important for several reasons. The main reason is that the department and the Florida courts have the continuing authority to decide matters of custody, supervision, care, treatment and disposition of the child. Art. V(a). It is also important because the Florida court can have the child returned to the state and can reunify the child with the parent. Without maintaining jurisdiction, Florida could not compel services and supervision for the child in the receiving state, nor could it guarantee the child's return.

REGULATION NO. 7 EXPEDITED ICPC

Regulation No. 7 is the expedited ICPC request, known as priority placement. This regulation is applicable in limited circumstances and has strict time limits. Regulation No. 7 applies only in the following categories:

- there is an unexpected dependency due to a sudden or recent incarceration, incapacitation or death of a parent or guardian; or
- the child is 4 years of age or younger, including older siblings sought to be placed with the same resource; or
- the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement; or
- the child is currently in an emergency placement.

Reg. No. 7(5). Regulation No. 7 shall not apply if the child is already placed in violation of the ICPC, the intention of the sending state is for licensed or approved foster care or adoption, to ensure the court is placing the child with a parent for whom the child was not removed. Reg. No. 7(4). The procedure and timeframes for a Regulation No. 7 placement are set out in section 9 of the regulation.

PROVISIONAL PLACEMENTS ARE ALLOWED IF THE FOLLOWING CRITERIA ARE MET:

- A physical walk-through by a case worker in the receiving state is completed on the home of the proposed placement;

- The receiving state's child protective database is searched for prior reports/investigations on the proposed placement;
- A local criminal background check is completed on the proposed placement;
- Other agreed determinations by the sending and receiving state are performed; and
- A provisional written report on the appropriateness of the proposed placement is provided to the receiving state compact administrator. Reg. No. 7

The provisional placement is valid until the approval or denial of the receiving state is given, or the receiving state requires the child to be returned to the sending state. Reg. No. 7(6).

If a state is determined to be in non-compliance with the time limits of Regulation No. 7, the court that issued the order may provide the documents to a judge in the receiving state and request assistance. While it is frustrating that placements take so long, it is important that Regulation No. 7 requests be limited to those cases which truly need expedited placement. If all placements are labeled as priority, then Regulation No. 7 requests will become equally slow, and the process will be frustrated.

REASONS FOR DELAY

As anybody who has ever had a case that involved an ICPC request knows, the process takes a long time—approximately 6 to 9 months for a regular ICPC or 3 to 6 months for a Regulation No. 7 request. The recommended time for a receiving state to process the application is 30 working days or 6 weeks. However, for a variety of reasons, many ICPC requests take far longer.

PRACTICE TIP: It is crucial that the program attorney identify any potential out-of-state placements as early in the case as possible and ICPC is ordered as the process can take a long time. Follow-up is mandatory.

The American Public Human Services Association (ASPHA) conducted a detailed study in 2002, and discovered the most common causes of delay. *Understanding Delays in the Interstate Home Study Process*,

http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/Resources/home_study_report.pdf, last visited February 3, 2016. According to the study,

THE MOST COMMON REASONS FOR DELAY WERE:

- resolving the financial or medical issues;
- obtaining the criminal background and abuse checks;
- incomplete information of the family;
- the home study did not meet the needs for the child;
- missing court orders; and
- incomplete request packets. *Id.*

Additional important factors were staffing and workloads at the local levels, and that ICPC requests were given a low priority at the local level. *Id.* at 19. A final factor not included in the study that results in delay is the requirement of **many states that the potential placement become licensed as a foster parent.**

CRIMINAL BACKGROUND CHECKS

Of all of these factors, the criminal background checks are particularly important. Criminal background checks take a significant amount of time, and have been reported as taking two to four months.

Understanding Criminal Records Checks,

<http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/Resources/Survey-CRCF.pdf>, last visited February 3, 2016. The criminal records check is a critical and necessary portion of the home study process. As a guardian ad litem, we cannot effect the time it takes to process the check, so it is important we understand what excludes a person from being a placement in both Florida and the receiving state so time is not wasted.

HOW THE GUARDIAN AD LITEM PROGRAM CAN HELP

The guardian ad litem also cannot affect the funding or staffing issues. This is why it is extremely important to start the ICPC process early. A child must be adjudicated dependent before the placement occurs, however, the Guardian ad Litem Program can start identifying relatives and gathering information from the onset of the case. Additionally, a request can be processed with an Emergency Shelter Order, as long as the child is adjudicated dependent prior to the placement being approved and the order adjudicating the child dependent is forwarded to the sending state compact office. A guardian ad litem can help the process along by relaying to the caseworker that they should maintain contact with the caseworker in the receiving state. Many caseworkers do not understand the process and believe it is out of their hands once the packet is submitted. However, if the caseworkers stay in contact, a decision may become known sooner, or questions could be easily resolved. Finally, the guardian ad litem program attorney can become familiar with the ICPC requirements and request status hearing to monitor when the packet is filed and where the receiving state is in the approval process.

AVERAGE WAIT TIMES

Foster Care	Relative	Relative - Foster Care	Parent	Foster - Adopt	Adoption (Public)	Adoption (Private)	Adoption (Independent)
2-3 months	1-2 months	1-2 months	1-2 months	1-2 months	1-2 months	1- 30 days	1- 30 days

REGULATION NO. 9 - VISIT

One of the most common violations of the ICPC is the 30 day visit. A visit, as defined by Regulation No. 9, is not a placement under the ICPC, and is not subject to the compact. A visit is characterized by its duration, purpose and intention of the person placing the child.

Regulation No. 9 defines a visit as a stay of not more than 30 days, or longer if it is within the period of a school vacation, that is for the purpose of providing the child with a social or cultural experience. A visit may not be extended or renewed past 30 days or the school vacation period. If a visit does not have an express termination date or clearly defined duration, it will be deemed a placement and a violation of the ICPC. Reg. No. 9(5); cf. *R.F. v. Dep't of Children & Fams.*, 50 So. 3d 1243 (Fla. 4th DCA 2011)(17 year old child was permitted to stay with his uncle on an extended visit in violation of the ICPC until ICPC request was approved because there was a valid private home study done prior to the visit and it was in the child's best interest). Additionally, if there has been a request for a home study or supervision by the

sending agency which is pending at the time of the visit, there is a rebuttable presumption that the intent of the stay is a placement. Reg. No. 9(6).

OBJECT TO EXTENDED OR RENEWING VISITS

PRACTICE TIP: While it is frustrating that the ICPC process takes so long, it is important that the guardian ad litem object to extended or renewing visits. Because the visit is not subject to the ICPC, there is no safeguard of the child's interests. There is no home study of the home being visited and the child will not receive services. Moreover, since the ICPC has not been complied with, the court in the sending state has no mechanism to have the child returned, other than to sanction the parents. It is safest to allow the ICPC to take place, and only send children on true visits.

NON-CUSTODIAL PARENTS

A unique situation occurs when there is a non-offending, non-custodial parent who resides out of state. Regulation No. 3(3)(a) provides that the ICPC does not apply when the court transfers the child to a non-custodial parent with respect to whom the court does not have evidence before it that the parent is unfit, does not seek such evidence, and does not retain jurisdiction after the child is placed. However, under Florida law, the court must obtain a home study before it places a child with a non-offending, non-custodial parent. § 39.521(3)(b). The Florida courts have expanded this by holding that "[o]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately." Dep't of Children & Fams. v. Benway, 745 So. 2d 437, 439 (Fla. 5th DCA 1999). The court in Benway stated that the ICPC provided a good mechanism to evaluate the placement and keep an eye on it. *Id.*; see also M.A.C. v. Fla. Dep't of Children & Fams., 73 So. 3d 327 (Fla. 1st DCA 2011)(The ICPC requirements must be met before a change of placement including a positive home study and approval from the receiving state); Dept' of Children & Fams. v. Fellows, 895 So. 2d 1181 (Fla. 5th DCA 2005)(extending application of the ICPC to relatives); In the Interest of B.J.A., 539 So. 2d 540 (Fla. 1st DCA 1989) (step-relatives fall within the ICPC). The Fifth DCA summed this up by finding that the ICPC is applicable to the placement of a child with a non-resident parent with no previous custodial rights. H.P. v. Dep't of Children & Fams., 838 So. 2d 583, 586 (Fla. 5th DCA 2003); see also C.K. v. Dep't of Children & Fams., 949 So. 2d 336 (Fla. 4th DCA 2007)(same). The court explained that when a court takes jurisdiction, determines a child's residence and maintains supervision and authority over the child's custodian, the child is in a placement, and the parent is now like a foster parent. *Id.*; *cf.* Dep't of Children & Fams. v. L.G. and L.G., 801 So. 2d 1047 (Fla. 1st DCA 2001) (holding that when the court maintains a dependent child with the mother, it is not a placement within the definition of Art. III, and therefore the relocation of the family unit out-of-state did not need to comply with the ICPC). If a non-custodial parent receives a positive ICPC home study and there is no evidence the parent will endanger the child, the parent is entitled to custody of the child. In re K.M., 946 So. 2d 1214 (Fla. 2d DCA 2006).

The triggering event for the ICPC to apply to a non-resident parent is that the parent must be non-custodial. Where the parent holds a valid custody order in their state of residence, the state in which the order originated was the children's home state at the time it was entered, and the home state has not declined to exercise jurisdiction, the ICPC does not apply and the child should be returned to the out-of-state parent. See In the Interest of D.N. & K.N., 858 So. 2d 1087 (Fla. 2nd DCA 2003) (ICPC did not control proceeding where non-offending father in Hawaii with a valid custody order sought the return of his children). So, if there is a non-resident parent with a valid custody order, the child should be returned to them. However, if

there is no custody order, and the parent has no custodial rights, the ICPC should be complied with to guarantee the placement is in the children's best interests. Also, the court should order a placement, and the guardian ad litem should not agree with placing the child with the non-custodial parent and dismissing the action without an order. This would leave the child's custody in limbo, and possibly expose the child to the offending parent seeking the return.

CONCLUSION

The ICPC is a slow, detailed process. But currently, it is the only mechanism there is to ensure a child's best interests once they cross state lines. While it is frustrating that the placement process takes so long, it is important that the ICPC be complied with so the child receives services and the placement is determined to be safe. The new ICPC has been created and enacted by Florida, however, it will not enter into effect until it is ratified by 35 states. Currently only 11 states have enacted the new ICPC. So while it has been enacted in Florida, it is not binding law. Until the new ICPC enters into effect, the guardian ad litem can help the process along by making sure the ICPC is begun early, by being familiar with the procedure and the different states' requirements, and by not letting the dependency action stall while waiting on an ICPC request.

For an updated list of state assignments by the department on ICPC cases, visit:
www.icpcstatepages.org.

ATTORNEYS FOR CHILDREN WITH CERTAIN SPECIAL NEEDS

ELIZABETH DAMSKI, ESQ., SPECIAL COUNSEL, FLORIDA GUARDIAN AD LITEM PROGRAM

Legislation was passed in 2014 enacting § 39.01305, which requires appointment of attorneys to dependent children with certain special needs. § 39.01305. As with other court appointments, these appointments are pursuant to an attorney registry maintained by the Justice Administrative Commission (JAC).

Appointment of an attorney is required for a dependent child who:

- Resides in, or is being considered for placement in, a **skilled nursing facility**;
- Is prescribed a **psychotropic medication** and declines to assent to it;
- Has been diagnosed with a **developmental disability** as defined in § 393.063;
- Is being placed in, or is considered for placement in a **residential treatment center**; or
- Is a victim of **human trafficking** as defined in § 787.06(2)(d).

PRESCRIBED A PSYCHOTROPIC MEDICATION AND DECLINES TO ASSENT

- Assent is Informed Consent.
- 65C-35.001 Defines Assent. “Assent” when used in this chapter means a process by which a provider of medical services helps the patient achieve a developmentally appropriate awareness of the nature of his or her condition; informs the patient of what can be expected with tests and treatment; makes a clinical assessment of the patient’s understanding of the situation and the factors influencing how he or she is responding; and solicits an expression of the patient’s willingness to accept the proposed care.

DIAGNOSED WITH A DEVELOPMENTAL DISABILITY AS DEFINED IN § 393.063

- Developmental Disability is a disorder or syndrome that is attributable to:
 - intellectual disability;
 - cerebral palsy;
 - autism;
 - spina bifida; or
 - Prader-Willi syndrome.
- Must manifest before the age of 18; and
- Constitute a substantial handicap that can reasonably be expected to continue indefinitely.

PLACED IN, OR IS CONSIDERED FOR PLACEMENT IN A RESIDENTIAL TREATMENT CENTER

“Residential treatment” means placement for observation, diagnosis, or treatment of an emotional disturbance in a residential treatment center licensed under § 394.875 or a hospital licensed under chapter 395. § 39.407(6)(a)1.

HUMAN TRAFFICKING

Human trafficking means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. § 787.06(2)(d).

APPOINTMENT

Before appointing an attorney from the Children with Special Needs Registry (registry), the court must try to appoint an attorney who is willing to represent the child pro bono or without additional compensation, if one is available. The court must request a recommendation from the Guardian ad Litem Program. The Guardian ad Litem Program has up to 15 days to inform the court if there is an attorney willing to represent the child without compensation from the registry funds. If there is no attorney willing to represent the child without compensation, the court will appoint an attorney from the registry. A child does not need to be adjudicated dependent for purposes of appointing an attorney for children who meet the requirements of § 39.01305.

PRACTICE TIP: Review the file to ensure children who fall into the five categories have a registry attorney appointed. As the case progresses, review sources such as the comprehensive assessment, school records, Children’s Medical Services records, medical records, and subsequent assessments.

THE ORDER APPOINTING AN ATTORNEY FROM THE REGISTRY MUST CONTAIN THE FOLLOWING INFORMATION:

- The Judge has requested a recommendation from the Guardian ad Litem Program for an attorney that will take the appointment without additional compensation and the guardian ad litem has informed the Judge there is no attorney available.
- A finding that the child meets the criteria for at least one of the special needs identified in § 39.01305(3)(a)-(e), identifying the corresponding sub paragraph.
- Pursuant to § 27.40(4)(b), if the judge appoints an attorney out of order the judge must include a finding of good cause that supports the appointment.
- The order of appointment must reflect that the court was unable to appoint a pro bono attorney.

Once an attorney is appointed, the attorney continues representing the child until the attorney is allowed to withdraw or is discharged by court or until case is dismissed. § 39.01305(4)(b). Attorneys can represent a complete range of legal services from removal through all appellate proceedings. With court permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings.

ATTORNEY REGISTRY REQUIREMENTS

Attorneys must meet the minimum requirements established by the Chief Judge of the Circuit in which they wish to participate in the registry including any existing local requirements for court appointed attorneys representing children in dependency cases.

In addition to local requirements determined by the Chief Judge, every registry attorney must meet the following requirements:

- Have at least one year of experience representing children in dependency cases within the last five years; or
- Are currently supervised by an attorney that has at least one year of experience representing children in dependency cases; or
- Have observed at least thirty hours of hearings in dependency cases including at least one shelter hearing, one dependency adjudicatory hearing, one judicial review hearing, one hearing pursuant to either Rule 8.350 or 8.355, and one termination of parental rights trial; and
- Within the last two years, have attended at least ten hours of continuing legal education devoted to the legal needs of children at least five hours of which were devoted to representation of children with special needs or disabilities and at least one hour of which was devoted to ethics related to the representation of children or, complete the requisite CLE requirements within three months of being placed on the registry.

In order to receive payment registry attorneys must enter into an Agreement for Attorney Services with the JAC. See https://www.justiceadmin.org/court_app_counsel/index.aspx

SPECIAL IMMIGRANT JUVENILE STATUS

ELIZABETH DAMSKI ESQ., SPECIAL COUNSEL, FLORIDA GUARDIAN AD LITEM PROGRAM

WHAT IS SPECIAL IMMIGRANT JUVENILE STATUS?

Special Immigrant Juvenile (SIJ) Status is a way for certain immigrant juveniles to become permanent residents of the United States.

Department of Homeland Security (DHS) is the federal governmental agency responsible for enforcing immigration laws. There are no special provisions under immigration law for minor children to be safe from deportation, simply because they are minor children. Undocumented children in state custody are also at risk of being deported by DHS.

The immigration status of a child shall have no bearing on either the care or service rendered by the to a child or on judicial proceedings undertaken by the department on behalf of the child.

BENEFITS OF APPLYING FOR SPECIAL IMMIGRANT JUVENILE STATUS

- Permanent lawful permanent resident status— a green card
- Ability to live and work permanently in the United States
- Ability to travel in and out of the country
- Protected against deportation and are granted employment authorization until their cases are decided
- Obtain a state-issued ID or Driver's License
- Obtain a social security number
- Receive public benefits, such as Medicaid
- Receive financial assistance for college education
- SIJS may be the only means for a minor to ever obtain legal permanent resident status, which will ultimately get the minor on the path to becoming a U.S. citizen
- Many of the grounds of inadmissibility and deportability (i.e., the basis for deporting or denying immigration benefits to noncitizens) are often waived for SIJS applicants
- Application for SIJS allows the minor to remain in the U.S. and be temporarily protected from deportation, until a determination to grant or deny the application is made
- Employment authorization can be requested as soon as the application for adjustment of status is filed. This will allow a minor to work until application is adjudicated

DETERMINING IF THE CHILD IS A UNITED STATES CITIZEN

Department must determine whether the child is a United States citizen. § 39.5075(2)

- Was this child born in the United States?
- Does the child have birth certificate, passport, naturalization certificate or other evidence of U.S. citizenship such as death certificates of parents/guardian or custodians; baptismal records; educational records, or medical records.
- Anyone born in the U.S. or Puerto Rico is a citizen, and anyone born in Guam, American Samoa or Swain Island is a national who cannot be deported.

If the child is determined not to be a US citizen, the department or community-based care provider shall include in the case plan developed for the child a recommendation as to whether the permanency plan for the child will include remaining in the United States.

No extension of time to comply with Chapter 39's deadline for filing a dependency petition shall be sought by the department to ascertain a child's immigration status. 65C-9.003 F.A.C.

THE DEPARTMENT MUST INFORM THE COURT AT THE FIRST JUDICIAL REVIEW

At the first judicial review the department must inform the court:

- whether the child is a U.S. citizen; and
- steps that have been taken to address the child's citizenship or residency status (must let the court know whether a determination by an authorized legal services immigration provider has been made that the child may be eligible for SIJ status or other appropriate immigration benefits).

DETERMINING SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Visa is an immigrant visa available to a person who has been **declared dependent** by a juvenile court, who was **deemed eligible for long term foster care**, and for whom it has been determined that it would **not be in her best interest to return to her or her parents' previous country** of nationality or country of last habitual residence.

DEPENDENT

Child must be found dependent based on allegations of abuse, neglect or abandonment.

- Anyone can file a dependency petition. § 39.501. All proceedings seeking an adjudication that a child is dependent shall be initiated by the filing of a petition by an attorney for the department, **or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.**

ELIGIBLE FOR LONG TERM FOSTER CARE

- *Eligible for Long-Term Foster Care* means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will

normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in guardianship situation. 8 C.F.R. §204.11.

- In Florida, *Eligible For Long-Term Foster Care* means that reunification with a child's parent is not an appropriate option for permanency for the child. § 39.5075 (1)(a). **The child need not be in formal state foster care in order to be eligible for SIJ status.**

BEST INTERESTS DETERMINATION

Best interest determination can be based on such things as:

- Child fears retaliation by abusive family members;
- Child has no responsible family members to provide her with care and protection;
- Child will have no access to medical, educational or social services;
- Child is acculturated to life in the U.S.;
- All of child's personal ties, perhaps siblings, are here;
- Child has been educated in the U.S.;
- Country conditions of child's home country; and
- Child's unfamiliarity with home country.

THE CHILD REMAINS UNDER THE JURISDICTION OF THE JUVENILE COURT § 39.5075 (1)(B)4

In Florida, remaining under the jurisdiction of the court can mean dependency, delinquency, family (adoption, divorce, paternity, temporary custody of a minor) and probate court.

If the child is no longer under juvenile court jurisdiction because of "age" (i.e., turning 18), then he should not be denied SIJ status for this reason.

If the department determines the child may be eligible for SIJ status, the department shall petition the court for an order finding that the child meets the criteria for special immigrant juvenile status.

CASE PLAN

If the child is not a citizen, the department must include in the child's case plan a recommendation as to whether the permanency plan for the child will include remaining in the U.S. § 39.5075 (3). The case plan shall also include the determination of whether there is an option for a safe reunification with the parent or legal guardian who may be located in another country. This includes a consideration of whether the parents or legal guardian can successfully complete a case plan. 65C-30.007 F.A.C.

COURT ORDER

The ruling of the court on the departments petition for child's eligibility for SIJ status must include findings as to the express wishes of the child, if the child is able to express such wishes, and any other

circumstances that would affect whether the best interests of the child would be served by applying for special immigrant juvenile status.

Only when a court has signed this order is it then appropriate to petition for SIJ status. § 39.5075. This must be done before the child's 18th birthday.

Once the court determines the child is eligible for SIJ status and that applying for SIJ status is in the child's best interest, the department shall file a petition for SIJ status and the application for adjustment of status to the appropriate federal authorities on behalf of the child.

- No later than later than 60 days after the court order finding.
- Can be file directly or through directly or through volunteer or contracted legal services.

PRACTICE TIP: Can look to local legal aid agencies, law school legal clinics, national organizations, or local bar associations. Pro bono attorneys may be available through the GAL Program. Consult with the local Circuit Director to find a possible pro bono attorney who specializes in immigration.

RETAINING JUVENILE COURT JURSDICTION AND REVIEWS

- The court may retain jurisdiction over the dependency case solely for the purpose of allowing the continued consideration of the petition and application by federal authorities.
- Review hearings for the child shall be set solely for the purpose of determining the status of the petition and application.
- The court's jurisdiction terminates upon the final decision of the federal authorities.
- Retention of jurisdiction in this instance does not affect the services available to a young adult under § 409.1451.
 - A young adult who is otherwise eligible for these services remains eligible though the court has retained jurisdiction for purposes of establishing "special immigrant juvenile status under federal law" for the young adult. 65C-30.007 F.A.C.
- The court may not retain jurisdiction of the case after the immigrant child's 22nd birthday.

The child cannot assist parents with immigration status.

OTHER IMMIGRATION OPTIONS

T AND U VISAS — WAS THE CHILD A VICTIM OF HUMAN TRAFFICKING OR OF A SERIOUS CRIME?³⁴

The U visa is available to noncitizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity, including assault, domestic abuse, incest, etc. The applicant (or, if the applicant is under age 16, his or her parent, guardian or next friend) must possess information concerning the criminal activity and must have been helpful, currently be helpful or be likely to be helpful in the investigation or

³⁴ A Social Worker's Toolkit for Working with Immigrant Families, The Migration and Child Welfare National Network, *available at:* <http://www.americanhumane.org/assets/pdfs/children/pc-migration-sw-toolkit-exec-summary.pdf>, last visited February 23, 2016.

prosecution of the criminal activity. In order to qualify for the U visa, a judge, prosecutor, investigator or similar official must sign a certification regarding this requirement.

The T visa is more specialized. It is available to victims of severe forms of trafficking in persons (i.e., human trafficking). This includes (a) trafficked persons who were forced or defrauded into performing sex acts, or while under the age of 18 were induced to perform such an act, and (b) trafficked persons who were coerced or defrauded into involuntary servitude. The person must have complied with reasonable requests for assistance in investigation or prosecution of the offense (unless he or she is under the age of 16), and must show he or she has suffered extreme hardship.

ASYLUM³⁵

Children who fear returning to their home country because of an individualized fear of persecution can apply for asylum or withholding of removal. A person who fears torture by the home government for any reason can apply for benefits under the Convention Against Torture.

³⁵ A Social Worker's Toolkit for Working with Immigrant Families, The Migration and Child Welfare National Network, *available at:* <http://www.americanhumane.org/assets/pdfs/children/pc-migration-sw-toolkit-exec-summary.pdf>, last visited February 23, 2016.

THE GUARDIAN AD LITEM'S ACCESS TO RECORDS

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The Statewide Guardian ad Litem Office (“GAL”) was created by § 39.8296, Florida Statutes (2003). The GAL’s sole function is to represent the best interests of abused, neglected and abandoned children under the jurisdiction of Florida’s dependency courts including children that reside in foster care. In addition to representing the child’s best interests within these proceedings (See, § 39.4085(20) Florida Statutes (2015)). Florida has charged the GAL, as an intermediary, with the responsibility of providing critical information to dependency judges to fulfill their obligations to the children under their jurisdiction. To assist the court with carrying out this charge, Florida has placed with the GAL the responsibility for providing critical information and recommendations to the court as well as representing the minor’s best interests in these proceedings, See, *Id.*, § 39.822(4)), Fla. Stat. (2015); Fla. R. Juv. P. 8.215. The GAL is charged with the following responsibilities:

The guardian ad litem or the program representative shall review all disposition recommendations and changes in placements, and must be present at all critical stages of the dependency proceedings or submit a written report of recommendations to the court.

§ 39.822(4), Fla. Stat. (2015).

For this reason, the Florida Legislature mandated that upon presentation of an order of appointment, the party from whom the records are sought “shall allow the guardian ad litem to inspect and copy any records relating to the best interests of the child who is the subject of the appointment...” § 39.822(3), Fla. Stat. (2015).

WHAT RECORDS CAN BE ACCESSED?

The language of the access statute was broadly written, to ensure the courts receive all information necessary to determining a child’s best interest. The plain language of the statute allows the GAL to have any records related to best interests, and that the list of records contained within the statute is not meant to be exhaustive. Section 39.822(b) provides:

A person or organization, other than an agency under paragraph (a), shall allow the guardian ad litem to inspect and copy **any records related to the best interests of the child** who is the subject of the appointment, **including, but not limited to, confidential records.**

For the purposes of this subsection, the term “records related to the best interests of the child” **includes, but is not limited to**, medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records.

§ 39.822(b), Fla. Stat. (2015)(emphasis added).

The use of the terms “any records” related to the child’s best interest as well as the inclusion of catch-all provision “including, but not limited to” within the statutory language demonstrates the legislature intended the statute to be expansive. These terms “constitute clear, unambiguous, all-inclusive language that requires no interpretation of legislative intent.” *Cf., Conquest v. Auto-Owners Ins. Co.*, 637 So.2d 40, (Fla.2d DCA 1994), *aff’d* 658 So.2d 928 (Fla. 1995)(interpreting the term “any person” in § 624.155, Fla. Stat.).

The definition of best interests is broad, necessarily including a parent’s records:

Although there is no standard definition of “best interests of the child,” the term generally refers to the deliberation that courts undertake when deciding what types of services, action, and orders will best serve a child as well as who is best suited to take care of a child. “Best interests” determinations are generally made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being the paramount concern.

Child Welfare Information Gateway (2012). *Determining the Best Interests of the Child*, Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau.

As a best interest determination includes the parent or caregiver’s circumstances and capacity to parent, documents relating to those issues fall within the category of records relating to the best interest of the child.

A reading of related statutes further demonstrates the language in question encompasses a parent’s records. The statutory definition of “best interest” found in both § 39.810 and § 61.13 Florida Statutes helps to demonstrate this fact. These statutory provisions require the court to consider “all relevant factors,” § 39.810 and “all of the factors affecting the welfare and interests of the particular minor child and the circumstances of that family,” respectively.

Further, the legislature abrogated privileged communications in cases involving child abuse, abandonment or neglect, “between husband and wife and between any professional person and his or her patient or client, and any other privileged communication except that between attorney and client or the privilege provided in § 90.505. . .” Fla. Stat. 39.204 (2015). Having abrogated the privilege in cases involving known or suspected child abuse, abandonment or neglect, it follows the legislature would intend to allow the GAL access to a parent’s records when it allowed access to the best interest records in § 39.822(3).

Lastly, this interpretation comports with the dictates of the federal Child Abuse Prevention and Treatment Act (“CAPTA”), which mandates that every state have a guardian ad litem appointed in every case involving an abused or neglected child to represent the child and obtain, first-hand, a clear understand of the situation and the needs of the child. 42 U.S.C. § 5106a(b)(2)(B)(xiii)(2000). By mandating that GAL’s obtain their information first-hand the federal government was contemplating broad access to the information needed to have a clear understanding of not only the child’s needs but the “situation” as well. (emphasis added). In

keeping with these federal requirements the State of Florida mandates the GAL perform an investigative function rather than leaving the GAL to acquire the information second-hand through the discovery process. Pursuant to Rule 8.215(c)(1), Florida Rules of Juvenile Procedure, the GAL has the responsibility to gather information regarding the allegations of the petition and any subsequent matters arising in the case. This broad investigative requirement must certainly be read to include information related to the parents in literally every case. Given these broad information gathering requirements, it would not be rational to assume the legislature limited the GAL's access to only the child's records in § 39.822(3), or be left with only interviewing individuals.

THE ACCESS STATUTE DOES NOT VIOLATE THE CONSTITUTION

It is sometimes argued that the broad access to records violates Article I, section 23 of the Florida Constitution. Because the statute serves a compelling state interest and is narrowly tailored to achieve that interest, it is constitutional.

Article I, section 23 of the Florida Constitution provides:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Although more expansive than the corresponding federal provision, "this provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Florida Board of Bar Examiners v. Applicant*, 443 So.2d 71, 74 (Fla. 1983). The extent of an individual's privacy right "must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances." *Id.* "The right to privacy is not a wild card that, when played, suddenly renders any ordinance unconstitutional." *State v. J.P.*, 907 So.2d 1101, 1124 (Fla. 2004) (Cantero, J. dissenting). Rather, the issue to be determined is whether the scope of the right to privacy includes the right asserted: preventing a party appointed to investigate and report to the court on the child's best interest from obtaining medical records.

"The first issue in every case considering the constitutionality of a statute or ordinance is which standard applies." *Id.* at 1120. Here, a strict scrutiny standard applies. See *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 625 n. 16 (Fla.2003). A statute satisfies strict scrutiny when it serves a compelling state interest through the least intrusive means. *J.P.*, 907 So.2d at 1110.

Florida courts have steadfastly recognized the state's compelling interest in protecting children. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Schmitt v. State*, 590 So.2d 404 (Fla. 1991)(Kogan, J., concurring and dissenting.)(citations omitted). See also *Padgett v. Department of Health & Rehab. Servs.*, 577 So.2d 565 (Fla. 1991)(compelling interest in protecting all citizens, especially youth, against threat of abuse, neglect and death).

In addition to serving a compelling state interest, the statute is narrowly tailored to serve the best interest of the child as the GAL's access is limited to dependent children and requires the GAL seek only those records

that are in the child's best interest. The same factors, confidentiality and the limited scope of the information obtained, were relied upon by the Florida Supreme Court in *Florida Board of Bar Examiners v. Applicant*, to satisfy the least intrusive means portion of the strict scrutiny test. 443 So.2d 71 (Fla. 1983). The breadth of the access to information allowed in *Florida Board of Bar Examiners* is similar to the breadth of the access to information here. Applying the same principles, the statute is sufficiently tailored to this interest because it requires the GAL to guard the confidentiality of these records.

STATUTORY PRIVILEGES DO NOT LIMIT ACCESS

As discussed above, parent's statutory privileges were abrogated in § 39.204 Florida Statutes. In *S.C. v. Guardian ad Litem*, 845 So. 2d 953 (Fla. 4th DCA 2004) and *E.C. v. Guardian ad Litem*, 867 So.2d 1193 (Fla. 4th DCA 2004), the court was called upon to determine whether, in a dependency proceeding, a mature minor child could assert a § 90.503 privilege to deny guardian ad litem access to her therapeutic records. The fourth district found the minor could. See, *S.C.*, 845 So.2d at 957.³⁶ In analyzing the applicability of the privilege statute, the court specifically noted that the minor's privilege had not been abrogated by § 39.204 Florida Statutes. *Id.* at 957.

However, when the *S.C.* and *E.C.* cases were decided, the *S.C.* court recognized the legislature's authority to consider the compelling interests at stake in dependency proceedings and to adopt access legislation. *Id.* at 959-60. After this decision the Florida Legislature addressed the absence of statutory authority for access recognized by the *S.C.* Court by enacting § 39.822(3), specifically enabling the GAL to have access to all "medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records" relating to a child's best interests. Since the abrogation of privileges in § 39.204 applies and the exemption has now been adopted, neither *S.C.* nor *E.C.* prevent access by the GAL.

The enactment of § 39.822(3) also has the effect of abrogating any privileges which arise out of § 397.501(7)(establishing a right to confidentiality in records relating to substance abuse services). The text of § 397.501, Florida Statutes, itself, allows for enforcement of the access statute. In the introductory language of the section defining the rights of individuals, the statute provides: "Individuals receiving substance abuse services from any service provider are guaranteed protection of the rights specified in this section, **unless otherwise expressly provided**, and service providers must ensure the protection of such rights." § 397.501, Fla. Stat. (2015).³⁷ Section 39.822 expressly provides for access to substance abuse records. See, § 39.822(b), Fla. Stat. (2015). Because access is provided for within the access statute, there is no statutory privilege.

Further, because § 39.822 is both a more specific statute, and also because § 39.822 was enacted after § 397.501, principles of statutory construction require enforcement of the access statute over a parent's objections:

It is well-established that "where two statutory provisions are in conflict, the specific statute controls the general statute." *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1287 (Fla.2000) (citing *State ex rel. Johnson v. Vizzini*, 227 So.2d 205 (Fla.1969)). "[I]t also is well settled that when two statutes are in conflict, the more recently enacted statute

³⁶ In *E.C. v. the Fourth District* adopted and applied its holding in *S.C.*

³⁷ A provision is "express" when it is "clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous." See, *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651, 653 (1991), citing, *Black's Law Dictionary* 521 (5th ed. 1979).

controls the older statute.” *Id.* (citing *McKendry v. State*, 641 So.2d 45 (Fla.1994))

Dep’t of Rev. ex rel. Sherman v. Daly, 74 So. 3d 165, 168 (Fla. 1st DCA 2011).

In *CONART, Inc. v. Hellmuth, Obata + Kassabaum, Inc.*, 504 F.3d 1208 (11th Cir.2007), the United States Court of Appeals for the Eleventh Circuit discussed the distinction between general versus specific legislation. The *CONART* Court reasoned that “when presented with a potential overlap between the broadly sweeping terms of a statute of general application that appear to apply to an entire class, and the narrow but specific terms of a statute that apply to only a subgroup of that class, we avoid conflict between the two by reading the specific as an exception to the general.” *CONART* at 1210. Applying this rationale, § 397.501, is a general statute as it applies to the broad class of all individuals receiving substance abuse treatment, and § 39.822, is specific because it applies only to the subclass of individuals receiving substance abuse treatment that are also subject to the jurisdiction of dependency court and whose records are related to the best interest of the child. Applying this basic principal of statutory construction, the provisions of § 39.822 control.

FEDERAL REGULATIONS DO NOT PROHIBIT ACCESS

Title 42 of the United States Code is the statutory section dealing with public health, social welfare, and civil rights. Both the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act and Health Insurance Portability and Accountability Act (“HIPAA”) are contained within this title. However, both acts are found within different sections of title 42, and both have separate implementing regulations. Neither of these regulations prohibit GAL access to records related to the child’s best interests under § 39.822(3), Florida Statutes (2015).

The Public Health Service Act is captured under Chapter 6A (Public Health Service), subchapter III-A. Title 42 U.S.C. 290dd-2, and its implementing regulation, 42 CFR Part 2, establish confidentiality requirements for patient records that are maintained in connection with the performance of any federally-assisted specialized alcohol or drug abuse program. These confidentiality provisions are within the Comprehensive Alcohol Abuse Alcoholism Prevention, Treatment and Rehabilitation Act. See, 42 U.S.C. 290dd-2.

On the other hand HIPAA’s administrative simplification provisions, upon which the Privacy Rule is based, are found within Chapter 7, subchapter XI of Title 42, and is codified at 42 USC 1320d. In December, 2000, the Department of Health and Human Services (HHS) issued the “Standards for Privacy of Individually Identifiable Health Information” final rule (Privacy Rule), pursuant to the Administrative Simplification provisions of HIPAA. The implementing regulations for this provision are codified at 45 CFR Parts 160 and 164, Subparts A and E. 65 Fed. Reg. 82,462, 82, 527 (Dec. 28, 2000). Neither of those statutes prohibit access to records by the GAL in Florida.

The Public Health Service Act does not preempt state law. See 42 C.F.R. Ch. 1, § 2.20. To avail oneself of the substance abuse confidentiality requirements found within that act, the party must demonstrate the statutory criteria for asserting the privilege have been met. Specifically, the party must show:

- the records identify a patient as an alcohol or drug abuser;
- the information was obtained by a federally assisted alcohol or drug abuse program;
- as part of ongoing treatment; and

- for the purpose of treating, diagnosing or making a referral for treatment. 42 CFR 2.12(a).

Even if the provision applies, the records can be obtained upon a showing of good cause. Good cause exists pursuant to this statute when the information is essential to a resolution of the issues raised in the case. *Nelson v. Labor Finders*, 897 So.2d 501, 504 (Fla. 1st DCA 2005). Child abuse or neglect proceedings and the Court's duty to prevent harm have been found to be good cause for the releases of such records. See *Matter of Shirley A.S.*, 90 A.D.3d 1655 (2011); *Matter of Dwayne G.*, 411 N.Y.S. 2d 180, (1978); *Matter of Doe Children*, 402 N.Y.S. 2d 958 (1978); *State v. Andring*, 342 N.W. 2d 128 (1984). The principle underscoring these cases is equally applicable in Florida: in the context of dependency matters, the children's best interests reign supreme. *Padgett v. Department of Health & Rehab. Servs.*, 577 So.2d 565, 570 (Fla. 1991) (parental rights are not absolute and yield to ". . . the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.") By adopting the access statute, the legislature has weighed the interests and found that they weigh in favor of access.

Similarly, HIPAA does not prevent access. A basic understanding of HIPAA's purpose and its regulatory scheme is necessary in order to understand why it cannot operate to prevent the GAL's access to parent's medical records in dependency proceedings. HIPAA was passed in 1996 to govern the use and disclosure of personal health information. P.L. 104-191. *The Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule") governs the use and disclosure of individuals' health information (referred to as "protected health information" or "PHI"), by "covered entities." Covered entities include a health plan, a health care clearinghouse or a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. 164.104(a)(1)-(3)(2015). If disclosure is sought from any other party, HIPAA does not apply. *Leher v. Bailey*, No. 4:03CV000953 JMM/JFF, 4:03CV000954, 2006 WL 1307658, at *5 n.2 (E.D. Ark. May 10, 2006). For HIPAA's preemption provisions to apply, there must be a standard, requirement, or implementation specification which conflicts with § 39.822. See, 45 C.F.R. §160.203. In order to minimize conflict, HIPAA contains exemptions as well as exclusionary provisions permitting disclosure without an individual's authorization for Public Interest and Benefit Activities.

HIPAA's preemption provisions are codified at 45 C.F.R. §160.203. Generally, contrary state provisions are preempted: "[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law." 45 C.F.R. 160.203 (2015). However, the statute has several carve-out provisions which have the effect of exempting state statutes from preemption. Important to dependency proceedings is the exemption contained within § 160.203(c), which provides:

(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

This provision works to exempt state laws governing child abuse and neglect proceedings from HIPAA's provisions. As the official comments to the rule note:

...HIPAA expressly carved out state laws on child abuse and neglect from preemption or any other interference.... State laws continue to apply with respect to child abuse, and the final rule does not in any way interfere with a covered entity's ability to comply with these laws.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,527 (Dec. 28, 2000).

While the statute mentions only child abuse reporting, the statute should be read more broadly to allow record sharing of information concerning children as a public health matter:

Although not generally thought of as public health related functions, investigative and intervention responses to child maltreatment clearly are *public health matters*, even if government social services or law enforcement agencies play the lead roles.

Howard Davidson, *The Impact of HIPAA on Child Abuse and Neglect Cases* (2003).

This interpretation has been adopted in other states. The Board of Trustees of the Public Children Services Association of Ohio, a private, non-profit association of county agencies observed:

We, the Board of Trustees of the Public Children Services Association of Ohio, having studied and researched the Health Insurance Portability and Accountability Act, realize **this federal law was not intended for public child welfare.** (emphasis added).

HIPAA and Child Welfare, April 2003 Public Children Services Association of Ohio, page 1.

Likewise, in its Analysis of the HIPAA Privacy Rule and Selected North Carolina Statutes, prepared by the North Carolina Healthcare Information & Communications Alliance, Inc. (NCHICA) State Law Work Group Privacy and Confidentiality Focus Group, the group found that the child abuse statutes they reviewed were either exempt from prevention, or could be permissibly disclosed under the public interest and benefits exceptions found in § 45 C.F.R. 164.512.³⁸ This view should be adopted and this exemption applied to find the HIPAA provisions do not apply to dependency proceedings in Florida. That interpretation comports with the intent of the rule, as expressed in the comments, that "... HIPAA expressly carved out state laws on child abuse and neglect from preemption or any other interference. . ." *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82,462, 82,527 (Dec. 28, 2000).

Even if HIPAA's carve-out provision does not apply to dependency matters, the state statute is still not preempted because disclosure is permissible under HIPAA. The Privacy Rule permits use and disclosure of personal health information pursuant to its exception provisions, without the individual's authorization or permission for national priority purposes. 45 C.F.R. 164.512 (2015). Among the national priority exceptions recognized within the Privacy Rule are disclosures required by state law. See, 45 C.F.R. 164.512(a)(2015). Section 164.512(a) provides:

(1) **A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law** and the use or disclosure complies with and is limited to the relevant requirements of such law.

45 C.F.R. 164.512(a)(2015) (emphasis added).

³⁸ Available at: <http://www.nchica.org/HIPAAResources/Samples/Hipaasort.pdf>, last visited February 7, 2016

The Privacy Rule defines “required by law” as “a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law,” including statutes such as the GAL access statute. 45 C.F.R. 164.103 (2015). When the rule was adopted, the comments directed that this exception should be “read broadly,” stating it applies to “the full array of binding legal authority, such as constitutions, statutes, rules, regulations, common law, or other governmental actions having the effect of law.” *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82,462, 82,668 (Dec. 28, 2000). See also *Ohio Legal Rights Serv. v. Buckeye Ranch, Inc.*, 365 F. Supp. 2d 877, 890 (S.D. Ohio 2005) (stating that by virtue of the “required by law” exception, HIPAA “was generally meant not to interfere with...the requirements of...other laws”). This provision allows a covered entity to obey a state law mandate, as the “required by law” provision of HIPAA automatically renders the use or disclosure compelled by state law also compliant with HIPAA. 65 Fed. Reg. 82,462, 82,667. The required by law exception allows covered entities to provide records pursuant to § 39.822 and remain compliant with HIPAA.