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Empowering Foster Parents and Other Court-Appointed Custodians to Make the System Work Better for Children

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In 2014, the Daily Business Review (Miami-Dade County) named Mr. Mishael along with his co-counsel the *Most Effective Lawyers (Appellate Law)* for their success in the first appellate decision in Florida concerning same-sex co-parenting through adoption: *In the Matter of Adoption of D.P.P.*, 158 So. 3d 633 (Fla. 5th DCA), *rev. denied,* 148 So. 3d 769 (Fla. 2014). Mr. Mishael has been instrumental in helping reform Florida's child welfare system through impact litigation, statutory reform and administrative rule-making. He is Board-Certified in Adoption Law, AV-rated, and previously served on the Florida Bar Adoption Law Certification Committee. He represents private clients in dependency, termination of parental rights, and adoption matters, in trial and appellate courts, and before administrative agencies and contract providers.

Examples of his work include *In the Matter of the Adoption of John Doe*, 2008 WL 5070056 (Fla. 16th Jud. Cir. Aug. 29, 2008) (declaring gay adoption ban unconstitutional); *R. N. v. Florida Agency for Persons with Disabilities*, 944 So. 2d 301 (Fla. 2006) (upholding juvenile judge's authority to subpoena APD); *DCF v. J. C.*, 847 So. 2d 487 (Fla. 3d DCA 2002) (affirming judges' authority to stop DCF's unilateral disruption of long-term placements); *Occean v. Kearney*, 123 F. Supp. 2d 618 (S. D. Fla. 2000) (recognizing federal due process rights of aging-out foster children), and *Jane Doe v. James Towey, et al.*, Case No. 94-1696 (S.D. Fla. 1994) (successful civil rights suit attacking discrimination against dependent immigrant children, substantially authoring DCF's "Alien Children" Rule, Fla. Admin. C. § 65C-9.001-.03). In 2001, he drafted Florida's first open adoption statute involving adult biological relatives, *Fla. Stat.* §63.0427 (2002) and the 2004 law allowing juvenile judges to veto DCF's choice of adoptive placements, and prohibiting DCF's removal of children from pre-adoptive homes, without first providing notice and an opportunity to be heard. *Fla. Stat.* §39.812(4)-(5). He represented the Florida Adoption Counsel as amicus in *G. S. v. T. B.*, 985 So.2d 978 (Fla. 2008) (judge may not deny an adoption by one set of grandparents to regulate post-adoptive visitation by the other set of grandparents). Mr. Mishael was also co-counsel in the case leading to the 2010 initiative by DCF and APD to accelerate the movement of developmentally disabled foster children off the Waitlist and onto the Medicaid Waiver in order to facilitate permanency for these children with their birth families or in adoptive homes.

"You take the blue pill - the story ends, you wake up in your bed and
believe whatever you want to believe. . . .

You take the red pill –you stay in Wonderland
and I show you how deep the rabbit-hole goes."

The Matrix, Morpheus to Neo

Foster Parents are often told to (a) remain passive (b) that they have no rights (c) that the judge is not interested in hearing from them, (d) that they have no role until the child is available for adoption and (e) they will be violating duties owed to DCF if they exercise statutory rights or seek legal advice.

Such statements are inaccurate. The child welfare system is not an arm of a police state. Foster parents have many rights, though some would argue, too few. If a foster parent wants her rights to be honored, it is important that the foster parent first know what those rights are, that the foster parent attend as many hearings and staffings as they can and that when the foster parent wishes to be heard, that the foster parent take the initiative to raise her hand. If you do not want your identity disclosed to others in the courtroom, there may be ways to address that.

The course of a dependency case, from shelter to permanency, is often unpredictable. Last-minute filings, haphazard notice, informality of practice, backed-up calendars, revolving door judicial assignments, personality issues, people talking over one another in vying for attention, and lack of accountability are not conducive to thoughtful decision-making. It breeds surprise, mistake and unfairness. Meanwhile, the loving foster parent is typically more informed about the child's daily life and the history of the case than others in the courtroom. The foster parent's mere presence and articulate concern for how the case is proceeding often conveys to the judge the foster parent's bedrock commitment to the welfare of the child.

Through intelligent involvement, the foster parent can help keep in the forefront an awareness that, when all is said and done, the ultimate purpose of the proceeding is or should be to require the adults to accommodate the legitimate needs of the child, not to require the child to accommodate the needs of the adults or a bureaucracy that may have acquired a life of its own.

"***Why Didn't Anyone Tell Me About That Hearing???"***

Yes, the foster parent is supposed to be notified in advance of hearings. How frequently in practice does that happen? Even the most diligent and sympathetic case manager can forget to provide that notice. The surest way to stay on top of this is to keep asking and to attend hearings at which the next hearing will likely be scheduled. Take notes. Even then, it is not uncommon for hearings to be reset without notifying the foster parents. The CBC case manager, the DCF attorney (or where applicable, the Assistant Attorney General representing DCF/CBC in court), the Guardian Ad Litem Program, the Clerk of the Court and the Parents' counsel should have this information.

Rule 8.225(f)(3) of the Florida Rules of Juvenile Procedure ["Fla. R. Juv. P."] says:

> (3) *Notice of Hearings to Participants and Parties Whose Identity or Address are Known*. Any preadoptive parents, all participants, **including foster parents and relative caregivers**, and parties whose identity and address are known **must be notified of all proceedings and hearings**, unless otherwise provided by law. **Notice involving emergency hearings must be that which is most likely to result in actual notice. It is the duty of the petitioner or moving party to notify any preadoptive parents, all participants, including foster parents and relative caregivers, and parties known to the petitioner or moving party of all hearings, except hearings which must be noticed by the court.** Additional notice is not required if notice was provided to the parties in writing by the court or is contained in prior court orders and those orders were provided to the participant or party. **All foster or preadoptive parents must be provided at least 72 hours notice, verbally or in writing, of all proceedings or hearings relating to children in their care or children they are seeking to adopt to ensure the ability to provide input to the court. This subdivision shall not be construed to require that any foster parent, preadoptive parent, or relative caregiver be made a party to the proceedings solely on the basis of notice and a right to be heard.**

This is the general rule. More is required for judicial reviews ("JR's"). These are critically important hearings, for which preparation is essential. The JR statute is long but you may be surprised once you read it. Knowledge is power. Section 39.701, *Fla. Stat.*, provides:

> (f) Notice of a judicial review hearing or a citizen review panel hearing, and a copy of the motion for judicial review, if any, must be served by the clerk of the court upon all of the following persons, if available to be served, regardless of whether the person was present at the previous hearing at which the date, time, and location of the hearing was announced:
> 1. The social service agency charged with the supervision of care, custody, or guardianship of the child, if that agency is not the movant.
> 2. **The foster parent or legal custodian in whose home the child resides.**
> 3. The parents.
> 4. The guardian ad litem for the child, or the representative of the guardian ad litem program if the program has been appointed.
> 5. The attorney for the child.
> 6. The child, if the child is 13 years of age or older.
> 7. Any preadoptive parent.
> 8. Such other persons as the court may direct.
>
> (g) The attorney for the department shall notify a relative who submits a request for notification of all proceedings and hearings pursuant to s. 39.301(14)(b). The notice shall include the date, time, and location of the next judicial review hearing.
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> (2) REVIEW HEARINGS FOR CHILDREN YOUNGER THAN 18 YEARS OF AGE.—

(a) Social study report for judicial review.—**Before every judicial review hearing or citizen review panel hearing, the social service agency shall make an investigation and social study concerning all pertinent details relating to the child and shall furnish to the court or citizen review panel a written report that includes, but is not limited to:**

1. A description of the type of placement the child is in at the time of the hearing, including the safety of the child and the continuing necessity for and appropriateness of the placement.

2. Documentation of the diligent efforts made by all parties to the case plan to comply with each applicable provision of the plan.

3. The amount of fees assessed and collected during the period of time being reported.

4. 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.

5. A statement that either:

a. The parent, though able to do so, did not comply substantially with the case plan, and the agency recommendations;

b. The parent did substantially comply with the case plan; or

c. The parent has partially complied with the case plan, with a summary of additional progress needed and the agency recommendations.

6. A statement from the foster parent or legal custodian providing any material evidence concerning the return of the child to the parent or parents.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. Copies of the child's current health, mental health, and education records as identified in s. 39.6012.

(b) Submission and distribution of reports.—

1. **A copy of the social service agency's written report and the written report of the guardian ad litem must be served on** all parties whose whereabouts are known; to **the foster parents or legal custodians**; and to the citizen review panel, **at least 72 hours before the judicial review hearing** or citizen review panel hearing. The requirement for providing parents with a copy of the written report does not apply to those parents who have voluntarily surrendered their child for adoption or who have had their parental rights to the child terminated.

2. In a case in which the child has been permanently placed with the social service agency, the agency shall furnish to the court a written report concerning the progress being made to place the child for adoption. If the child cannot be placed for adoption, a report on the progress made by the child towards alternative permanency goals or placements, including, but not limited to, guardianship, long-term custody, long-term licensed custody, or independent living, must be submitted to the court. The report must be submitted to the court at least 72 hours before each scheduled judicial review.
3. In addition to or in lieu of any written statement provided to the court, the foster parent or legal custodian, or any preadoptive parent, shall be given the opportunity to address the court with any information relevant to the best interests of the child at any judicial review hearing.

(c) Review determinations.—The court and any citizen review panel **shall take into consideration** the information contained in the social services study and investigation and all medical, psychological, and educational records that support the terms of the case plan; testimony by the social services agency, the parent, **the foster parent or legal custodian**, the guardian ad litem or surrogate parent for educational decisionmaking if one has been appointed for the child, and any other person deemed appropriate; **and 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 received by the court in its effort to determine the action to be taken with regard to the child and may be relied upon to the extent of their probative value, even though not competent in an adjudicatory hearing. In its deliberations, the court and any citizen review panel shall seek to determine:
1. 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.
2. 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.
3. 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.
4. 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 s. 39.0016.
5. The compliance or lack of compliance of all parties with applicable items of the case plan, including the parents' compliance with child support orders.
6. 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.
7. 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.
8. 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.

9. Whether the child is receiving safe and proper care according to s. 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:
a. 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.
b. 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.
10. A projected date likely for the child's return home or other permanent placement.
11. 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.
12. 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.

There is an additional notice requirement when a TPR petition is filed. Although that proceeding is not open to the public, and foster parents may not watch the trial, *Natural Parents of J.B. v. DCF*, 780 So. 2d 6 (Fla. 2001), the legislature has provided that foster parents have a right of access to the pretrial proceedings:

> **(a) Notice of the date, time, and place of the advisory hearing for the petition to terminate parental rights and a copy of the petition must be personally served upon the following persons, specifically notifying them that a petition has been filed:**
>
> 1. The parents of the child.
> 2. The legal custodians of the child. . . .
> 4. **Any person who has physical custody of the child** ….

Section 39.801(3)(a), *Fla. Stat.* The government often fails to provide the petition and notice to foster parents, timely or otherwise. A foster parent may need to bring his right to the petition to the government's attention once it is announced that a petition will be filed. Often, the foster parent will be testifying at trial as a witness called by either DCF or the Guardian Ad Litem Program. Inquiring about this in advance of trial is critical.

But requesting one's right to the TPR petition is not the only part of the file the foster parent may request in a TPR case:

> "The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, custodians of the child and

> their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. . . . " (emphasis added)

Section 39.814(3), *Fla. Stat.* A number of courts in South Florida have read this to include foster parents and other court-appointed custodians (on the theory that had the legislature meant only "legal custodians," it would have specified "legal custodians" as it has elsewhere). Access to the record is likely to be crucial to the foster parent's ability to present effective advocacy. **Exercising this right may require being pro-active.** The foster parent may, citing the statute, ask the judge to enter an order directing the clerk to grant her access since the clerk may not be inclined to make that decision unilaterally. Foster parents must always comply with statutory confidentiality.

Access to the record may assist the foster parents *in deciding for themselves* what they think about how the case is being handled, and what they may wish to bring to the court's attention at future hearings.

Even if no TPR case has been filed, and even outside what must be provided to foster parents in connection with a judicial review hearing, the legislature has directed DCF to also provide the following information to foster parents *who make a point of requesting it, preferably in writing to the CBC legal counsel or DCF Chief Regional Counsel:*

> 39.00145 Records concerning children.—
>
> (1) The case record of every child under the supervision of or in the custody of the department, the department's authorized agents, or providers contracting with the department, including community-based care lead agencies and their subcontracted providers, must be maintained in a complete and accurate manner. The case record must contain, at a minimum, the child's case plan required under part VII of this chapter and the full name and street address of all shelters, foster parents, group homes, treatment facilities, or locations where the child has been placed.
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> (2) Notwithstanding any other provision of this chapter, all records in a child's case record must be made available for inspection, upon request, to the child who is the subject of the case record and to the child's caregiver, guardian ad litem, or attorney.
>
> (a) A complete and accurate copy of any record in a child's case record must be provided, upon request and at no cost, to the child who is the subject of the case record and to the child's caregiver, guardian ad litem, or attorney.
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> * * *
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> (c) If a child or the child's caregiver, guardian ad litem, or attorney requests access to the child's case record, any person or entity that fails to provide any record in the case record under assertion of a claim of exemption from the public-records requirements of chapter 119, or fails to provide access within a reasonable time, is subject to sanctions and penalties under s. 119.10.

(d) For the purposes of this subsection, the term "caregiver" is limited to parents, legal custodians, permanent guardians**,** or foster parents; employees of a residential home, institution, facility, or agency at which the child resides; and other individuals legally responsible for a child's welfare in a residential setting.

* * *

Similarly, subsection (s) of the following statute provides foster parents access to records.

39.202 Confidentiality of reports and records in cases of child abuse or neglect.—

(1) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, 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, shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by this chapter. Such exemption from s. 119.07(1) applies to information in the possession of those entities granted access as set forth in this section.

(2) Except as provided in subsection (4), access to such records, excluding the name of the reporter which shall be released only as provided in subsection (5), shall be granted only to the following persons, officials, and agencies:

* * *

(d) 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. This access shall be made available no later than 30 days after the department receives the initial report of abuse, neglect, or abandonment. However, any information otherwise made confidential or exempt by law shall not be released pursuant to this paragraph.

(e) Any person alleged in the report as having caused the abuse, abandonment, or neglect of a child. This access shall be made available no later than 30 days after the department receives the initial report of abuse, abandonment, or neglect and, when the alleged perpetrator is not a parent, shall be limited to information involving the protective investigation only and shall not include any information relating to subsequent dependency proceedings. However, any information otherwise made confidential or exempt by law shall not be released pursuant to this paragraph.

* * *

(s) Persons with whom the department is seeking to place the child or to whom placement has been granted, including foster parents for whom an approved home study has been conducted, the designee of a licensed residential group home described in s. 39.523, an approved relative or nonrelative with whom a child is placed pursuant to s. 39.402, preadoptive parents for whom a favorable preliminary adoptive home study has been conducted, adoptive parents, or an adoption entity acting on behalf of preadoptive or adoptive parents.

(8) A person who knowingly or willfully makes public or discloses to any unauthorized person any confidential information contained in the central abuse hotline is subject to the penalty provisions of s. 39.205. This notice shall be prominently displayed on the first sheet of any documents released pursuant to this section.

"But Our Worker Told Us We're Just Participants"

First, the basic definitions:

(50) "Participant," for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding, means any person who is not a party but who should receive notice of hearings involving the child, including the actual custodian of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child. A community-based agency under contract with the department to provide protective services may be designated as a participant at the discretion of the court. Participants may be granted leave by the court to be heard without the necessity of filing a motion to intervene.

Section 39.01(50), *Fla. Stat.*

(51) "Party" means the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child. The presence of the child may be excused by order of the court when presence would not be in the child's best interest. Notice to the child may be excused by order of the court when the age, capacity, or other condition of the child is such that the notice would be meaningless or detrimental to the child.

Section 39.01(51), *Fla. Stat.*[1] Actual practice in individual courtrooms may vary, but as a

[1] This outline focuses on statutory rights because most courts have been unwilling to accord constitutional protection to foster child-foster parent relationship, irrespective of duration, often on the notion that the interpersonal relationship is created by and therefore controllable by the state (without convincingly explaining how that is different from marriage or adoption). See, e.g., *In the Interest of A. W. R.*, 17 P. 3d 192, 196 (Colo. App. 2000)(canvassing cases); *Drummond v. Fulton County Dept. of Family and Children's Services*, 563 F. 2d 1200, 1209 (5th Cir. 1977), *cert. denied,* 437 U.S. 910 (1978) (divided en banc court declined to recognize a liberty interest in the two year long foster parent-foster child relationship in that case, stating that "This decision by its facts is necessarily applicable only to an infant of tender years placed in a foster home for the length of time and under the circumstances here involved. We cannot by decision here address every conceivable situation, in some of which a child may have acquired some interest, as alluded to in Justice Brennan's opinion in [*Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 n. 44 (1977)].") Cf. *Berhow v. Crow*, 423 So. 2d 371, 374 n.2 (Fla. 1st DCA 1982) (stating in the context of a foster placement supported by the birth parents, "[A]s the nature of the foster parent/child's 'familial relationship' become closer and stronger, so as to approach the level of the relationship between natural parents and their offspring, so too do the rights of the foster parents to preserve that relationship [under the Florida Constitution.]"); *Rivera v. Marcus*, 696 F. 2d 1016 (2d Cir. 1982) (half-sister entitled to procedural due process before termination of foster care agreement, and resulting removal).

general rule, the lack of "party" status means no right exists to subpoena witnesses or documents, to conduct pretrial discovery (for example, depositions), or, as a general rule, to appeal. See, e.g., *R. H. v.DCF*, 994 So. 2d 1153 (Fla. 3d DCA 2008) (court-ordered custodians who are not parties lack standing to appeal as of right). See also, Rule 8.210(b), Fla. R. Juv. P.

That does not mean that the right to be heard as a participant is not to be taken seriously or means the same thing in all circumstances. At times, the importance of the issue may lead a judge to allow more leeway. For example, when a parent or DCF propose that a child be removed from an existing quality placement, a number of courts in South Florida have been persuaded to allow non-party custodians through their legal counsel to examine witnesses, who voluntarily appear or who are otherwise in the courtroom, to cross-examine them, to offer their own evidence, and to make objections. Here is one way the argument has been made:

> "The Legislature and Supreme Court's determination that the juvenile court may allow a participant to be heard, Fla. R. Juv. P. 8.210(b); *Fla. Stat.* § 39.01(50), necessarily anticipates that the Court will determine how the participant may effectively do so.
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> When a person is afforded a right to be heard, through either a court's exercise of discretion or by due process right, the procedural incidents of that right will vary depending on the circumstances of the case and the nature of the interests at stake. *Goldberg v. Kelly*, 397 U. S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970)("'The fundamental requisite of due process of law is the opportunity to be heard.' ...In the present context, these principles require that a recipient have...an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally...In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.") It cannot be disputed that the evidentiary hearing regarding [the child's] placement is quintessentially fact-driven within the meaning of *Goldberg v. Kelly*, supra.
>
> The legislature is presumed to know the prior judicial construction of the phrase "to be heard" when enacting a statute using that same phrase. *City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000) ("the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law.") It must be presumed that both the Legislature and the Supreme Court intended that a participant's opportunity to be heard, if and when allowed, be reasonably meaningful and effective under the circumstances, as opposed to merely colorable or illusory. *City of No. Miami v. Miami Herald Pub. Co.*, 468 So. 2d 218, 220 (Fla. 1985)("'[i]n construing legislation, courts should not assume that the legislature acted pointlessly.'"); *Smith v. Piezo Tech. and Prof. Administrators,* 427 So. 2d 182, 184 (Fla. 1983)("It must be assumed that a provision enacted by the legislature is intended to have some useful purpose.")

> There is simply no meaningful or effective way for [the foster parents] to exercise their opportunity to be heard without allowing them the right to fully participate in the presentation of evidence, the examination of witnesses and the submission of legal argument."

If a court is more persuaded by this position than a self-serving appeal to suppress the dissenting views offered by the persons actually raising the child, "participant" status does not stand in the way of the court establishing a more level playing field by allowing the participants nearly the same procedural rights of DCF, the parents and the GAL, to call voluntary witnesses, cross-examine witnesses appearing in court, present evidence and make legal argument. As might be imagined, this type of argument often antagonizes DCF, provider agencies, parents' attorneys, the Guardian Ad Litem Program and others. But often it shouldn't: "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72, 71 S.Ct. 624, 647-49 (1951) (Frankfurter, J., concurring).

Sometimes "participant" status, however applied in practice, may fall short of effective advocacy. Although the statutory definition of a "party" includes only DCF, the parents, the Guardian Ad Litem Program, and the Child (who usually has no legal representation), Florida law, at the same time, allows *knowledgeable* private persons to file their own dependency petitions and termination of parental rights petitions, thereby acquiring party status (with the trial judge controlling whether the private petition should be consolidated with any existing case, inasmuch petitions regarding the same child bear the same case number.)

When a private petition is pursued, the participant may thereby transform himself into a party, and exercise much the same pro-active role as DCF, the Guardian Ad Litem Program, the birth parents and the child (whose party status is, again, typically, as a practical matter, a legal fiction because he has no lawyer).

> "(1) 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." 39.501(1), *Fla. Stat.* (emphasis added)

> "(1) All proceedings seeking an adjudication to terminate parental rights pursuant to this chapter must be initiated by the filing of an original petition 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), *Fla. Stat.* (emphasis added)

In January 2012, the Second District Court of Appeal in Tampa had this to say after the grandparents had filed a petition of their own:

> The Department contends that the grandparents lack standing to challenge the order because grandparents are generally participants but not parties. . . . Here, as the Department recognizes, the grandparents filed a private termination of parental rights petition and subsequently filed a private dependency petition. But the Department argues that although the grandparents are "essentially" parties they would need some kind of "additional standing" to challenge this order regarding placement.
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> Section 39.01(51), Florida Statutes (2010), defines "party" to include "the petitioner." Because the grandparents are petitioners in the trial court, they are not "essentially" parties, they *are* parties. Thus, we determine that they have standing to challenge the order. In addition, the effect of the order is to prohibit the grandfather from living with his wife, which affects his legal rights.

In the Interest of S.C., 83 So. 3d 883 (Fla. 2d DCA 2012) (underlining added).

IMPORTANT NOTE: The decision whether to take that approach in a given situation requires thoughtful and advance evaluation of many legal, strategic, interpersonal and economic considerations that will vary from case to case, **and should be preceded by first obtaining legal advice.**

Mounting a competently-prosecuted private TPR case will generally be extremely expensive. Among the many byproducts of acquiring party status are the opportunity to take pretrial discovery, to be the master of one's own case, (rather than sitting on the sidelines passively witnessing the accumulated DCF/CBC social work and legal advocacy unfold), to subpoena witnesses, to present evidence, and to appeal as of right unfavorable outcomes in your case. But there often at least as many reasons not to go down that road. Each case is factually and strategically different. And, remember this: the filing of a TPR petition in no way restricts the judge from making adverse placement decisions while that petition is pending.

In some situations, the Guardian Ad Litem Program may exercise its co-equal right as a pre-existing party to file a termination of parental rights petition of its own, either because DCF prefers a course different from termination of parental rights, or in an effort to assist DCF in achieving a successful outcome. In other situations, DCF may be amenable to filing a joint TPR petition with the foster parents and/or GAL. Conversely, when the government declines to view a risk as sufficient to warrant the filing of a dependency or TPR petition, it is possible for a knowledgeable private person to do so. As a practical matter, and because you do not want to lose precious time or finance reinvention of the wheel, thinking maturely about the wisdom of filing your own petition, and effectively litigating a private petition in any particular case requires experienced representation by lawyers comfortable with attempting to help steer

adversarial litigation under chapter 39. It is a good idea to ask for and contact relevant references before you hire any lawyer.

When Parental Rights May Be Terminated

Florida law expressly lists the legal grounds that must be proven by clear and convincing evidence in order for a court to terminate parental rights. When one or more of these grounds are established, it must additionally be proven that terminating parental rights is in the best interest of the child. There are additional conditions on the authority of the court to terminate the parental rights of one but not both parents.

> 39.806 Grounds for termination of parental rights.—
>
> (1) Grounds for the termination of parental rights may be established under any of the following circumstances:
>
> (a) When the parent or parents have voluntarily executed a written surrender of the child and consented to the entry of an order giving custody of the child to the department for subsequent adoption and the department is willing to accept custody of the child.
> 1. The surrender document must be executed before two witnesses and a notary public or other person authorized to take acknowledgments.
> 2. The surrender and consent may be withdrawn after acceptance by the department only after a finding by the court that the surrender and consent were obtained by fraud or under duress.
>
> ***(b) Abandonment as defined in s. 39.01(1) or when the identity or location of the parent or parents is unknown and cannot be ascertained by diligent search within 60 days.**
>
> ***(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. Provision of services may be evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency.**
>
> ***(d) When the parent of a child is incarcerated and either:**
> **1. The period of time for which the parent is expected to be incarcerated will constitute a significant portion of the child's minority. When determining whether the period of time is significant, the court shall consider the child's age and the child's need for a permanent and stable home. The period of time begins on the date that the parent enters into incarceration;**
> **2. The incarcerated parent has been determined by the court to be a violent career criminal as defined in s. 775.084, a habitual violent felony offender as defined in s. 775.084, or a sexual predator as defined in s. 775.21; has been convicted of first degree or second degree murder in violation of s. 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation of s. 794.011; or has been 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

3. 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, that termination of the parental rights of the incarcerated parent is in the best interest of the child. When determining harm, the court shall consider the following factors:

a. The 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, which may include the frequency of incarceration and the unavailability of the parent to the child due to incarceration.

e. Any other factor the court deems relevant.

(e) When a child has been adjudicated dependent, a case plan has been filed with the court, and:

1. The child continues to be abused, neglected, or abandoned by the parent or parents. The failure of the parent or parents to substantially comply with the case plan for a period of 12 months after an adjudication of the child as a dependent child or the child's placement into shelter care, whichever occurs first, constitutes evidence of continuing abuse, neglect, or abandonment 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. The 12-month period begins to run only after the child's placement into 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 court's approval of a case plan having the goal of reunification with the parent, whichever occurs first; or

2. The parent or parents have materially breached the case plan. Time is of the essence for permanency of children in the dependency system. In order to prove the parent or parents have materially breached the case plan, the court must find by clear and convincing evidence that the parent or parents are unlikely or unable to substantially comply with the case plan before time to comply with the case plan expires.

3. 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 s. 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.

***(f) The parent or parents 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 a nexus between egregious conduct to a child and the potential harm to the child's sibling is not required.**

1. As used in this subsection, the term "sibling" means another child who resides with or is cared for by the parent or parents regardless of whether the child is related legally or by consanguinity.
2. As used in this subsection, the term "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.

***(g) The parent or parents have subjected the child or another child to aggravated child abuse as defined in s. 827.03, sexual battery or sexual abuse as defined in s. 39.01, or chronic abuse.**

***(h) The parent or parents have committed the murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery that resulted in serious bodily injury to the child or to another child. Proof of a nexus between the murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery to a child and the potential harm to a child or another child is not required.**

***(i) The parental rights of the parent to a sibling of the child have been terminated involuntarily.**

***(j) The parent or parents have a history of extensive, abusive, and chronic use of alcohol or a 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 termination of parental rights.**

***(k) A test administered at birth that indicated that the child's blood, urine, or meconium contained any amount of alcohol or a controlled substance or metabolites of such substances, the presence of which was not the result of medical treatment administered to the mother or the newborn infant, and the biological mother of the child is the biological mother of 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 a controlled substance or alcohol as defined in s. 39.01, after which the biological mother had the opportunity to participate in substance abuse treatment.**

***(l) On three or more occasions the child or another child of the parent or parents has been placed in out-of-home care pursuant to this chapter, and the conditions that led to the child's out-of-home placement were caused by the parent or parents.**

***(m) The 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 s. 794.011, or pursuant to a similar law of another state, territory, possession, or Native American tribe where the offense occurred. It is presumed that termination of parental rights is in the best interest of the child if the child was conceived as a**

result of the unlawful sexual battery. A petition for termination of parental rights under this paragraph may be filed at any time. The court must accept a guilty plea or conviction of unlawful sexual battery pursuant to s. 794.011 as conclusive proof that the child was conceived by a violation of criminal law as set forth in this subsection.

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

***(2) Reasonable efforts to preserve and reunify families are not required if a court of competent jurisdiction has determined that any of the events described in paragraphs (1)(b)-(d) or paragraphs (1)(f)-(m) have occurred.**

(3) If a petition for termination of parental rights is filed under subsection (1), a separate petition for dependency need not be filed and the department need not offer the parents a case plan having a goal of reunification, but may instead file with the court a case plan having a goal of termination of parental rights to allow continuation of services until the termination is granted or until further orders of the court are issued.

(4) If an expedited termination of parental rights petition is filed, reasonable efforts shall be made 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.

Even when one of these grounds is proven, the court may not terminate parental rights unless it additionally finds that doing so is in the "manifest best interest of the child." The criteria considered are:

39.810 Manifest best interests of the child.--In a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child. This consideration shall not include a comparison between the attributes of the parents and those of any persons providing a present or potential placement for the child. For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

(1) Any suitable permanent custody arrangement with a relative of the child. However, the availability of a nonadoptive placement with a relative may not receive greater consideration than any other factor weighing on the manifest best interest of the child and may not be considered as a factor weighing against termination of parental rights. If a child has been in a stable or preadoptive placement for not less than 6 months, the availability of a different placement, including a placement with a relative, may not be considered as a ground to deny the termination of parental rights.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

(8) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(9) The depth of the relationship existing between the child and the present custodian.

(10) 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.

(11) The recommendations for the child provided by the child's guardian ad litem or legal representative. (emphasis added)

The parental rights of one but not both parents may be terminated by the court only if the above requirements are met and in addition:

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

(a) If the child has only one surviving parent;

(b) If the identity of a prospective parent has been established as unknown after sworn testimony;

(c) If the parent whose rights are being terminated became a parent through a single-parent adoption;

(d) If the protection of the child demands termination of the rights of a single parent; or

(e) If the parent whose rights are being terminated meets any of the criteria specified in s. 39.806(1)(d) and (f)-(l).

Fla. Stat. 39.811(6).

"The Birth Parents Don't Like Us and Have Chosen Someone Else to Adopt"
OR *"The Birth Parents and We Have Agreed That We Should Adopt But DCF Objects"*

Often, the birth parents named in a chapter 39 proceeding may decide that they are willing to voluntarily consent to the adoption of their child in DCF custody by persons they choose. If the child is not actually in DCF legal custody, one recent appellate decision holds that the adoption case may proceed as any other private adoption case. However, if the child is in DCF legal custody, and if the designated adoptive parents meet certain requirements and the court determinates that placement would be in the child's best interest, "the adoption entity [for example, the adoptive couple's attorney] may intervene in the dependency case as a party in interest," and "the court shall immediately order the transfer of custody … under the supervision of the adoption entity." **This is commonly referred to as "intervention."** Section 63.082(6)(b), (c), *Fla. Stat.* This is a complex and controversial area of law, attempting to balance a number of different public policies, and that may or may not benefit the foster parents depending on the particular fact-pattern.

> (6)(a) **If 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.**
>
> (b) Upon execution of the consent of the parent, the adoption entity shall be permitted to intervene in the dependency case as a party in interest and must provide the court that acquired jurisdiction over the minor, pursuant to the shelter or dependency petition filed by the department, a copy of the preliminary home study of the prospective adoptive parents and any other evidence of the suitability of the placement. The preliminary home study must be maintained with strictest confidentiality within the dependency court file and the department's file. A preliminary home study must be provided to the court in all cases in which an adoption entity has intervened pursuant to this section. 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, the home study provided by the adoption entity shall be deemed to be sufficient and no additional home study needs to be performed by the department.
>
> (c) **If an adoption entity files a motion to intervene in the dependency case in accordance with this chapter, 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.**
>
> (d) **Upon a determination by the court 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, the court shall immediately order the transfer of custody of the minor child to the prospective adoptive parents, under the supervision of the adoption entity.** The adoption entity shall thereafter provide monthly supervision reports to the department until finalization of the adoption. If the child has

been determined to be dependent by the court, the department shall provide information to the prospective adoptive parents at the time they receive placement of the dependent child regarding approved parent training classes available within the community. The department shall file with the court an acknowledgment of the parent's receipt of the information regarding approved parent training classes available within the community.

(e) **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.**

(f) The adoption entity shall be responsible for keeping the dependency court informed of the status of the adoption proceedings at least every 90 days from the date of the order changing placement of the child until the date of finalization of the adoption.

(g) In all dependency proceedings, after it is determined that reunification is not a viable alternative and prior to the filing of a petition for termination of parental rights, the court shall advise the biological parent who is a party to the case of the right to participate in a private adoption plan.

Construing this statute, in *P.K. v. DCF,* 927 So. 2d 131 (Fla. 5th DCA 2006), the court upheld the trial court's decision not to accept the birth mother's conditional surrender after considering the circumstances of the proposed adoptive parents. See also, *In the Interest of S. N. W.*, 912 So. 2d 368 (Fla. 2d DCA 2005).

"Our Worker Told Us We Don't Have a Right to Talk to a Lawyer"

One of the freedoms Americans enjoy is the constitutional right to seek legal advice.

The Supreme Court has said that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Citizens able to secure private counsel are not required to face the hazards of litigation without representation by counsel whom they have chosen because of confidence in counsel's integrity, ability and sound judgment.

A broad right to counsel antedating the Sixth Amendment was so well recognized that the framers [of the U.S. Constitution] took it for granted.

Melton v. State, 56 So. 3d 868, 8711 (Fla. 1st DCA 2011)(citations and footnotes omitted). In 2010, then-DCF Secretary George Shelton announced that DCF personnel would be prohibited from occasionally attempting to discourage foster parents from obtaining independent legal advice. In 2010, DCF indicated it would be promulgating rules on this subject. As of March 2015, proposed rules have not to our knowledge been published.

"What Relative Priority?"

Contrary to a widely-held assumption, under Florida law (a) non-parental relatives, specifically including grandparents, are not entitled, following the initial shelter hearing, to a strong preference in temporary, or following disposition, to any preference in temporary or adoptive placements, (b) the presence or absence of fault by the government in not having placed the child with relatives sooner is irrelevant, (c) the only factor that the legislature has itself specifically directed trial judges to consider post-disposition when determining what is in the child's best interest (when parental rights are not themselves at issue) is "the continuity of the child's placement in the same out-of-home residence," and (d) the legislature has recognized that six months of stability for a child in a foster home can be an important milestone when making permanency decisions for that child.

Psychological Underpinning of Current Law:

> "Unlike adults, children have no psychological conceptions of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered, borne, or given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of events leading to their births. What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached."

Wakeman v. Dixon, 921 So. 2d 669, 675 n. 6 (Fla. 1st DCA) (Van Nortwick, J., specially concurring) quoting Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (Free Press 1973) (hereinafter "Best Interests"), *rev. denied*, 931 So. 2d 902 (2006). As a matter of human nature, the highly intimate daily associations between a young child and the caregivers who consistently meet his needs swiftly coalesce into the activities of family life. This is the identity he develops of himself and it furnishes the perspective he has of the world around him and his place within it.

In *Rumph v. V. D.*, 667 So. 2d 998 (Fla. 3d DCA 1996), the appellate court declined to order that a perfectly happy and loved little girl be uprooted from her foster home and temporarily sent off to "completely qualified" relatives and their extended family in another state, but who were strangers to the child. *Id.* at 999 (Schwartz, C.J., specially concurring).

> "In the absence also of a clear and binding statutory or common law basis for choice–as would be the case, for example, if one of the contestants were the child's natural parent -one is left with a single unquestioned fact and the logical consequences which flow from it: the child is a well-adjusted, happy youngster living in the custody of a person who loves her and treats her well and is loved in return. Experience, common sense and therefore the law teach–without the need for expert testimony–both that stability is better than disruption for the psychic health of everyone, and particularly small children, and that it is unwise to risk a known good in a certain present for the

necessarily unknown possibilities of an uncertain future."

Id. at 999-1000 (citations omitted).

More than 20 years ago, in *Agudo v. Agudo*, 411 So. 2d 249, 250 (Fla. 3d DCA), *rev. denied*, 418 So. 2d 1278 (1982), the court took note of extensive expert testimony that it is a well-accepted and uncontroverted proposition that a child between the age of six months and three years establishes an attachment, or bonding, to a primary caretaker; that the bonding is essential to the wholesome emotional development of the child, and that to deprive a child of the primary caretaker during this period has a destructive effect on the child's intellectual, physical and psycho-social development.

> This outlook is a reflection of research in the field of child psychology:
>
> "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world.
>
> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones. . . .
>
> Change of the caretaking person for infants and toddlers further affects the course of their emotional development.
>
> Their attachments, at these ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful. When continuity of such relationships is interrupted more than once, as happens due to multiple placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings."

Best Interests, at 32-33.

Evolution of Florida Law Away from Post-Disposition Relative Priorities

> "It is presumptively in the best interests of a child to remain
> in the home where he or she has spent the majority of his or her life."

DCF v. J. C., 847 S. 2d 487, 491 (Fla. 3d DCA 2002), *reh. en banc denied*. (hereafter referred to as "J.C."). This is the opposite of what many in the child welfare system have long viewed and described to others as conventional wisdom. Because this is still occasionally challenged, it may

be useful to review the legal evolution.

Background:

For a space of five years during the 1970s, the legislature promoted a relative priority in all dependency cases. That ended in 1978.

The first reported decision addressing a child dependency custody dispute between a biological grandparent and either foster parents or a child welfare agency was *Van Meter v. Murphy*, 287 So. 2d 740 (Fla. 1st DCA 1973). Following several hearings in which the parents were found to be unfit and both sets of grandparents sought custody, the trial judge ruled that the two children should temporarily be placed in foster care. By the time the case reached the appellate court, the legislature had enacted section 39.10(5), *Fla.Stat.* (1973), which provided:

> (5) In all cases where one or both of the parents of a child is unable or unfit to be awarded custody and where the child have a close relative who is fit, ready, able and willing to be awarded such custody, the court shall award the custody of the child to such close relative and not to any foster home or agency of the state.

The court reversed, citing the statute, and *Pittman v. Pittman*, 14 So. 2d 671 (Fla. 1943), where the Supreme Court had declined to award a child to a divorced father for boarding with an aunt, a stranger to the child, rather than with the child's grandparents with whom the five-year-old had lived for the last four years.

The 1973 statute led the same district court to a similar outcome a year later in *In the Interest of R. J. C.*, 300 So. 2d 54 (Fla. 1st DCA 1974). In that case, the child from birth had lived with the mother and grandmother in Iowa for almost a year when the mother and infant left, eventually surfacing in Pensacola, where both mother and purported father placed the child with the Children's Home Society for the purpose of adoption. The appellate court decided that the parents had no right to do so and that the child should be given to the grandmother under the statute. *Id.* at 58-59.[2]

Section 39.10(5), *Fla. Stat.* (1973), had a short-run. It was repealed in its entirety during the 1978 session of the legislature, and did not re-emerge elsewhere.[3] Instead, the legislature that year assigned to the dependency court itself the decision as to what temporary placement would be in the best interest of the child. It is therefore clear that by 1978, Florida law no longer gave any across-the board edge to relatives over non-relatives in disputes over temporary custody in

[2] See also, *Delafield v. Vreeland*, 334 So. 2d 292 (Fla. 1st DCA 1976). In *Hedspeth v. Albritton*, 356 So. 2d 34 (Fla. 1st DCA 1978), the child had been placed by court order with the grandmother in 1973 and her babysitters sought a change of custody to them in 1977. Both couples were fit, but the statute tilted the decision toward the grandparents, together with the fact that the grandparents were also raising two siblings. *Id.* at 35-36.

[3] See, Ch. 78-414, at 1343-44, and "Historical Note," section 39.10, *Fla. Stat. Annot.*

dependency cases. As that basic, case-sensitive approach evolved over the years, the legislature has fine-tuned the chapter to make clear that relatives should be considered as the favored placement option at the initial shelter hearing. There is no clear statutory preference following the initial shelter hearing. While relatives must always be fairly considered, following the shelter hearing, the law gradually shifts its focus, particularly following disposition, from single-mindedly attempting to pair the child with relatives to the dominant importance of maintaining the child in as few placements as possible, at least through the point at which the child achieves permanency, either through reunification or adoption.

A comparison of the sequential shelter, adjudicatory, dispositional, post-dispositional and adoption statutes is illuminating.

Currently, Section 39.402(17), *Fla. Stat.*, provides that

> At the shelter hearing, the court shall inquire of the parent whether the parent has relatives who might be considered as a placement for the child. The parent shall provide to the court and all parties identification and location information regarding the relatives. The court shall advise the parent that the parent has a continuing duty to inform the department of any relative who should be considered for placement of the child.

Section 39.402(8)(b), *Fla. Stat.*, states that "[t]he court shall require the parents or legal custodians present at the hearing to provide to the court on the record the names, addresses, and relationships of all parents, prospective parents, and next of kin of the child, so far as are known."

At the adjudicatory stage, section 39.507(7)(c), *Fla. Stat.*, provides that

> If the courts 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. 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. The parent or parents shall provide to the court and all parties identification and location information of the relatives.

Section 39.521(3)(c)-(d), *Fla. Stat.*, states:

> When any child is adjudicated by a court to be dependent, the court shall determine the appropriate placement for the child as follows: . . .
>
> (c) If no fit parent is willing or available to assume care and custody of the child, place the child in the temporary legal custody of an adult relative, the adoptive parent of the child's sibling, or another adult approved by the court who is willing to care for the child, under the protective supervision of the department. The department must supervise this placement until the child reaches permanency status in this home, and in no case for a

> period of less than 6 months. Permanency in a relative placement shall be by adoption, long-term custody, or guardianship.
>
> (d) If the child cannot be safely placed in a nonlicensed placement [such as a relative], the court shall commit the child to the temporary legal custody of the department. Such commitment invests in the department all rights and responsibilities of a legal custodian. The department shall not return any child to the physical care and custody of the person from whom the child was removed, except for court-approved visitation periods, without the approval of the court. Any order for visitation or other contact must conform to the provisions of s. 39.0139. The term of such commitment continues until terminated by the court or until the child reaches the age of 18. After the child is committed to the temporary legal custody of the department, all further proceedings under this section are governed by this chapter.

It is fair to say that the statute pre-disposition could be clearer. However, following disposition, the legislature has clearly and explicitly directed how the court must address a situation in which the disposition placed the child in foster care, but an approved relative later appears seeking custody:

> If the court does not commit the child to the temporary legal custody of an adult relative, legal custodian, or other adult approved by the court, the disposition order shall include the reasons for such a decision and shall include a determination as to whether diligent efforts were made by the department to locate an adult relative, legal custodian, or other adult willing to care for the child in order to present that placement option to the court instead of placement with the department.
>
> If no suitable relative is found and the child is placed with the department or a legal custodian or other adult approved by the court, both the department and the court shall consider transferring temporary legal custody to an adult relative approved by the court at a later date, but neither the department nor the court is obligated to so place the child if it is in the child's best interest to remain in the current placement.

Section 39.521(1)(d)(8)(a)-(b), *Fla. Stat.* (emphasis added).

Prior to June 7, 2006, the legislature had implicitly made DCF's performance of an earlier diligent search for relatives a condition precedent to allowing the child's best interest to guide post-disposition decision-making. See, e.g., *C. C. v. DCF*, 732 So. 2d 1125, 1126 (Fla. 4th DCA 1999). The legislature broke that linkage in 2006. Ch. 2006-86, s. 13, Laws of Florida (June 7, 2006). Accordingly, there is no relative preference following disposition irrespective of whether DCF performed a diligent search for relatives at an earlier stage of the case, because changing child custody is not how DCF's mistakes are rectified. This statutory revision underscores the increasing priority assigned by the legislature to maintaining stable placements.

Following disposition, section 39.522, *Fla. Stat.*, entitled, "Postdisposition change of custody," provides in pertinent part that: "[t]he standard for changing custody of the child shall be the best interest of the child. When applying this standard, the Court shall consider the

continuity of the child's placement in the same out-of-home residence as a factor when determining the best interests of the child."

Continuity has thus been singled-out by the legislature as the one factor to which a court must pay particular attention. An example of this outlook can be seen in a decision holding that a grandmother enjoyed no placement preference and that changing the child's placement was not in the child's best interest, reversing the trial court's order which had changed the child's placement from his foster home to his biological grandmother. *Guardian Ad Litem Program v. R. A.*, 995 So. 2d 1083 (Fla. 5th DCA 2008).

The importance of protecting the stability of out-of-home placements has also been recognized as relevant to whether the court and DCF may opt for a relative placement over the often more difficult work of terminating parental rights in order to actually free the child for adoption. The legislature has declared that when a child has lived with a foster family for six months, termination of parental rights to free the child for adoption is proper without regard to a potential relative placement. Section 39.810(1), *Fla. Stat.* ("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 a placement with a relative, may not be considered as a ground to deny the termination of parental rights."). An argument may be made that the legislature would not have passed that law if the legislature intended for children in placements of at least six-month duration to be diverted into relative placements just as timely termination of parental rights cases are being filed. Diverting children at that stage may be viewed as subverting the legislature's promotion of the stability of the child's temporary placement while he is being freed for permanent placement through adoption.

Special Procedural Rights of Foster Parents in Adoption Disputes

The existence of a foster care agreement does not stop foster parents from adopting. *I. B. v. DCF*, 876 So. 2d 581, 587 n. 3 (Fla. 5th DCA 2004).

Historically, Florida child welfare agencies have asserted ultimate authority to select who may retain custody or adopt a foster child. For a variety of reasons, that reality began to change in the mid-1990s, giving juvenile courts and foster parents a larger say in the decision-making process.

The dissatisfaction, prior to the seismic shift that occurred in 2004, with a lack of checks and balances is illustrated by the following examples:

J. R. v. R. M., 679 So. 2d 64 (Fla. 4th DCA 1996) (DCF opposes foster parent adoption, preferring another couple)

"Foster family wins adoption battle," *Palm Beach Post*, Jan. 7, 1997

"Foster Care 'Saint' Loses State License," *Palm Beach Post,* Nov. 10, 1997

"Agency Returning Foster Kids," *Palm Beach Post*, Jan. 7, 1998

S. F. v. DCF, 727 So. 2d 943 (Fla. 4th DCA Oct. 7, 1998)	"Finally, Shaq goes home," *Palm Beach Post*, July 14, 1999; "State Admits Error In Trying to Prevent Interracial Adoption," *Miami Herald*, July 14, 1999
DCF v. In the Interest of M. A. P., 788 So. 2d 982 (Fla. 3d DCA 2001) (denying request for review of order restraining removal of child from foster parents); *Guardian Ad Litem Program for the Eleventh Jud. Cir., M. K and E. K. v. DCF*, Case No. 01-0022403, Div. of Adm, Hearings (July 5, 2001 settlement stip.) (DCF opposes foster parents, prefers different home)	"Law Hailed as Giving Stability to Foster Kids; State Must Ask Court Before Child is Moved," *Orlando Sentinel,* July 2, 2004 (noting that same foster parents ultimately prevailed)
J. C. (DCF opposes custodian adoption prefers different home)	"Legal Cadre Gives James a Real Mom," *Miami Herald*, July 24, 2003; "Pro bono lawyers labor for love: Two years, seven attorneys, hundreds of hours later, boy gets to keep his mom," *Florida Bar News*, Aug. 15, 2003
"Baby Taken After 16 Months," *Miami Herald*, Oct. 15, 2003	"Child Taken from Family in Key Largo is Returned, *Miami Herald*, October 18, 2003

These disputes were litigated before (a) the legislature in 2004 authorized courts to waive DCF's consent when unreasonably withheld, *Fla. Stat.* § 39.812(5), and (b) the Florida Supreme Court shortly thereafter held in *B. Y. v. DCF*, 887 So. 2d 1253 (Fla. 2004) ("*B.Y.*") that juvenile courts had possessed authority prior to 2004 to overrule DCF's refusal to furnish adoptive consent.

The key statutes are:

> (4) The court shall retain jurisdiction over any child placed in the custody of the department until the child is adopted. After custody of a child for subsequent adoption has been given to the department, the court has jurisdiction for the purpose of reviewing the status of the child and the progress being made toward permanent adoptive placement. As part of this continuing jurisdiction, for good cause shown by the guardian ad litem for the child, the court may review the appropriateness of the adoptive placement of the child. When a licensed foster parent or court-ordered custodian has applied to adopt a child who has resided with the foster parent or custodian for at least 6 months and who has previously been permanently committed to the legal custody of the department and the department does not grant the application to adopt, the department may not, in the absence of a prior court order authorizing it to do so, remove the child from the foster home or custodian, except when**:**

(a) There is probable cause to believe that the child is at imminent risk of abuse or neglect;

(b) Thirty days have expired following written notice to the foster parent or custodian of the denial of the application to adopt, within which period no formal challenge of the department's decision has been filed; or

(c) The foster parent or custodian agrees to the child's removal.

(5) The petition for adoption must be filed in the division of the circuit court which entered the judgment terminating parental rights, unless a motion for change of venue is granted pursuant to s. 47.122. A copy of the consent executed by the department must be attached to the petition, unless waived pursuant to s. 63.062(7) . . . . Section 39.812(4), (5), *Fla. Stat.* (emphasis added).

Section 63.062(7), *Fla. Stat.*, in turn provides:

(7) If parental rights to the minor have previously been terminated, the adoption entity with which the minor has been placed for subsequent adoption may provide consent to the adoption. In such case, no other consent is required. The consent of the department shall be waived upon a determination by the court that such consent is being unreasonably withheld and if the petitioner has filed with the court a favorable preliminary adoptive home study as required under s. 63.092. (emphasis added)

See also, Rule 8.535(d), Fla. R. Juv. P. ("Withholding Consent to Adopt"). Once parental rights are terminated as to a child in DCF legal custody, there are various legal strategies that may be considered.

(a) the dependency court may:

(i) as in *J. C.*, for good cause shown by the Guardian Ad Litem Program, review the appropriateness of the adoptive placement proposed by DCF. *Fla. Stat.* § 39.812(4); and

(ii) as in *J. C.*, – and subsequently under section 39.812(4), *Fla. Stat.* (2004) *should* – restrain unilateral and opposed disruption of a 6-month or longer placement, and

(b) the adoption court may:

(i) waive DCF's consent if unreasonably withheld. *Fla. Stat.* §§ 39.812 (5), 63.062(7) ("The consent of the department shall be waived upon a determination that such consent is being unreasonably withheld . . ."); *B. Y.*;

(ii) disapprove an inappropriate placement for the individual adoptee, Compare, *R. H. v. DCF*, 988 So. 2d 673 (Fla. 4th DCA 2008) (affirming adoption by foster parents over relatives, and expressing a view of how the 2004 legislation should be applied);

(iii) deny an adoption not in the child's best interest. *Fla. Stat.* §63.142(4) (2008).

As should be self-evident, this convoluted state of the law is a reflection of the tug and pull between the executive and judicial branches of state government, as well as the outlook of courts in particular controversies.

In addition to the above judicial approaches, DCF must afford a right (under the Administrative Procedures Act, ch. 120) of administrative review to adoptive applicants whose applications have been denied. This includes not only a blanket denial as to the opportunity to adopt *any* child, but as to a choice made by DCF as between two applications as to a particular child in DCF legal custody. *DCF v. I. B.*, 891 So. 2d 1168 (Fla. 1st DCA 2005) (requiring that DCF comply with the Administrative Procedures Act in choosing between competing adoptive applicants).

> DCF internal rules provide that it does not entrust its decision in a problematic case to a single social worker. A committee hears from witnesses, deliberates, issues a recommendation to a senior administrator, whose decision is subject to a de novo trial before an administrative law judge, whose recommendation is then reviewed by the DCF Secretary, who considers any exceptions before entering a final administrative order, appealable to the district court. Fla. Admin. Code § 65C-16.00 (8)-(9) ("Evaluation of Applicants") (2003).

In the Matter of the Adoption of John Doe, 16 Fla. L. Weekly Supp. 75, 2008 WL 5070056, at *30 n. 31 (Fla. 16th Jud. Cir. Aug. 29, 2008).

Until the administrative appeal mechanism has run its course, or been waived, DCF is not lawfully authorized to issue a final administrative order furnishing its adoptive consent to either of the contestants.[4] Unfortunately, DCF and private community-based care officials are frequently unaware of this limitation on their authority.

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[4] "Until proceedings are had satisfying section 120.57 or an opportunity for them is offered and waived, there can be no agency action affecting the substantial interests of a person." *Florida League of Cities, Inc. v. Admin. Comm.,* 586 So.2d 397, 413 (Fla. 1st DCA 1991). See also, *Wilson v. Pest Control Comm. of Florida*, 199 So. 2d 777, 780 (Fla. 4th DCA 1967) ("It is obvious the intention of the legislature...was to guarantee to any party affected by agency action a hearing before any of the party's rights, privileges, or immunities were affected, not afterwards.")

The right to administratively appeal DCF's initial choice includes, when the factual basis of DCF's choice is materially in dispute, a right to a full-blown ("de novo") trial before an administrative decision-maker, a right of access to the relevant internal DCF records and a right to depose witnesses. Thus, while the foster parent is not a party in juvenile court, he is obviously a party in the administrative dispute he has himself initiated. Information gained through the administrative process may be useful in later litigation, if ultimately necessary under section 39.812(5), *Fla. Stat.*, which authorizes the juvenile/adoption court to waive DCF's (final administrative) consent when determined to have been unreasonably withheld.

In addition to offering an additional venue for attempting to change DCF's internal decision of who will receive consent, timely filing an administrative challenge may increase the persuasiveness of an argument to the juvenile judge that a foster child should not be removed from the foster home due to the non-final selection by local officials of a different home. In other words, while the administrative decision-maker does not himself possess authority to stay or change the movement of a child (who remains under the juvenile court's exclusive jurisdiction) based on the pendency of an administrative appeal, the fact that an administrative appeal is pending may be of significance to the juvenile judge in deciding whether, as a matter of discretion, to maintain the status quo pending resolution of who will adopt.

There are other potential limitations on DCF's authority to choose who will adopt a foster child. For example, federal civil rights laws (e.g., 42 U.S.C. 1996b (Interethnic Adoption Act of 1996)[5]; Title II of the Americans with Disabilities Act and implementing regulations) have previously been used in successful efforts to overrule decisions influenced by consideration of race (euphemistically referred to perhaps as "culture") or physical disability of existing family members in the adoptive household.

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[5] (1) Prohibited Conduct

> A person or government that is involved in adoption or foster care placements may not--
> (A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child involved; or
> (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

(2) Enforcement

> Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.].

42 U.S.C. § 1996b.

For example, in one highly unusual situation, where DCF appointed a high-level committee to evaluate whether the Secretary should uphold a local decision to remove a foster child from a pre-adoptive foster home, a lawsuit was filed by the ultimately successful foster parents under Florida's Government in the Sunshine Law to enjoin DCF from relying upon the result of the committee's secret deliberations.

DCF rules since 2003 no longer accord either relatives or foster parents (or anyone else) a lawful preference in selecting an adoptive home for a foster child.[6] Unfortunately, local decision-making by DCF, community-based care organizations and their contract agencies does not always reflect an understanding or acceptance of this fact. Here is what the principal rule actually provides:

> 65C-16.002. Adoptive Family Selection.
>
> (1) The Department facilitates the adoption of children with special needs. Persons seeking to adopt non-special needs children will be referred to private agencies. Birth parents seeking adoption planning for their non-special needs children will be referred to private adoption agencies. Any non-special needs children in the care of the department for whom adoption is the goal, will be referred to private adoption agencies for placement planning, unless there is a plan for adoption by the current custodian.
>
> **(2)** General Policy. A person or government involved in adoption may not deny to any individual the opportunity to become an adoptive parent on the basis of race, color or national origin of the individual or the child. A person or government may not delay or deny the placement of a child for adoption on the basis of race, color or national origin of the adoptive parent or the child.
>
> **(3)** It is the policy of the state and of the department that adoption placements must be made consistent with the best interest of the child. The role of good judgment in assessing

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[6] Prior to 2003, grandparents did enjoy a qualified priority to adopt their grandchildren when otherwise in the child's best interest. Compare, *Davis v. Dixon*, 545 So. 2d 318 (Fla. 3d DCA), *rev. denied*, 551 So. 2d 460 (1989) (order allowing great aunt instead of grandparent to adopt reversed for new hearing) with *Dillon v. Robb*, 597 So. 2d 891 (Fla. 5th DCA) (affirming denial of grandparent adoption as not in child's best interest), *cause dism'd*, 605 So. 2d 1263 (1992). In 2003, the legislature revised section 63.0425 to repeal the priority and replace it with a requirement that a grandparent must be given notice of the filing of a predicate chapter 63 petition for termination of parental rights pending adoption only:

> If a child has lived with a grandparent for at least 6 months within the 24-month period immediately preceding the filing of a petition for termination of parental rights pending adoption, the adoption entity shall provide notice to that grandparent of the hearing on the petition for termination of parental rights pending adoption. *Fla. Stat.* §63.0425(1).

the best interest of the child cannot be replaced by rote policy decrees. The exercise of that judgment must be shaped by the following considerations:

(a) Grandparent priority. Grandparents with whom a child has lived for at least six months must be notified that their grandchild is being considered for adoption as specified in Section 63.0425, F.S. Such grandparents must be afforded the opportunity to have a home study completed and to petition for adoption, and the court is required to give first priority to that petition.(emphasis added)[7]

(b) Other relative priority. Other relatives may wish to be considered as an adoption placement for the child. If such a relative is identified and requests consideration for adoption placement, the application of the relative must be evaluated to determine suitability through an adoptive home study.

(c) Current custodian priority. The current custodian of the child may wish to adopt. If the custodian applies to adopt the child, the application must be evaluated to determine suitability through an adoptive home study. The home study must assess the length of time the child has lived in a stable, satisfactory environment and the depth of the relationship existing between the child and the custodian. There are some situations in which adoption by the current custodian may not be in the best interest of the child. Examples of these situations include:

1. The current custodians want to adopt a child but not his or her siblings and it is in the best interest of the sibling group to be placed together.

2. The current custodian has returned other adopted children to the department, or has arranged for some other out-of-home informal long-term placement for a previously adopted child.

(d) Non-custodian with whom child has a relationship. Persons known to the child, but who do not have custody of the child, may wish to be considered for adoption. If such persons apply to adopt the child, the application must be evaluated to determine suitability through an adoptive home study. In addition, the depth of the relationship existing between the child and the non-custodial applicant must be examined.

(e) Family new to the child. Many families who pursue adoption do not have a specific child in mind when they apply. These families must be provided information about the children available for adoption through the department, and must be helped, through

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[7] A strong argument may be made that this portion of the 2003 Rule is invalid since the grandparent priority statute *was repealed by the legislature in 2003*. *DCF v. I. B.*, 891 So. 2d 1168, 1173 (Fla. 1st DCA 2005)("[T]he authority to adopt an administrative rule must be based on the explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority.") quoting *S. W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000). DCF's "interpretation of its regulatory authority is clearly at odds with statutory language to the contrary." *Cleveland v. DCF*, 868 So. 2d 1227, 1231 (Fla. 1st DCA 2004).

training, preparation, and the home study process, to determine if special needs adoption is appropriate for their family.

(4) Siblings.
(a) When considering adoption placement of a sibling group, consideration must include the fact that a sibling relationship is the longest lasting relationship for a child and placing siblings together, whenever possible, preserves the family unit.

(b) In situations where consideration is being given to separating siblings, the adoption unit must staff the case as a team. The team must consider the emotional ties existing between and among the siblings and the degree of harm which each child is likely to experience as a result of separation. The positives and negatives of keeping the children together must be thoroughly explored, and at least one member of the team must be assigned the role of defending the position of placing the children together. In particularly difficult cases, professionals who have expertise in this area can be consulted.

(c) The decision to separate siblings must be approved in writing and documented in the statewide automated system by the community based care or sub-contractor staff charged with this responsibility. The community based care or sub-contractor staff will prepare a memorandum directed to a designated community based care or sub-contractor staff describing efforts made to keep the siblings together and an assessment of the short term and long range effects of separation on the children. The memorandum must also include a description of the plan for future contact between the children if separation is approved. The plan must be one to which each adoptive parent and caretaker can commit.

(d) If after placement as a sibling group, one child does not adjust to the family, a decision must be made regarding what is best for all of the children. The adoption staff must review this situation as a team, and choose the plan that will be least detrimental to the children. The decision must be documented in the children's records, including the statewide automated system. This documentation must also include the plan for future contact if the decision is to pursue separate placements.

(e) Sometimes the department may take into custody a child who is a sibling to previously adopted children. The department or community based care or sub-contractor staff shall advise the adoptive parents of this occurrence. If this child becomes available for adoption, the adoptive parents of the previously placed sibling shall be given an opportunity to apply to adopt this child. The application of these adoptive parents will be given the same consideration as an application for adoption by a relative, as described above.

(5) Occasionally a child whose parent's parental rights have been terminated, for whom there is a plan for foster parent adoption, has relatives who indicate an interest in adopting after the termination process is completed. The following factors must be considered in making a decision that represents the best interest of the child in this situation.

(a) Attachment. Consideration must be given to the quality and length of the attachment to the foster parent. The age of the child at placement and the current age must be

considered in assessing attachment. The ease with which the child attached to the current family and any indications of attachment difficulty in the child's history must be evaluated. The number of moves the child has experienced will be an important factor in determining the likelihood that the child will form a healthy attachment to the relative.

(b) Kinship. Children who have a shared history with extended family and cultural values and traditions are more likely to be passed on to the child when there is opportunity to grow up in the care of family members. Consideration must be given to the quality of the relationship with the relative. Some children will already know and trust the relative seeking to adopt. If not, the willingness of the relative to participate in pre-placement activities to promote the development of a relationship must be considered.

(c) Permanence. The capacity of the relative and the foster parent to meet the child's need for permanence must be evaluated. The ability of the prospective parent to understand the needs of adoptive children in different developmental stages and their awareness of the inherent challenges of parenting an adopted child must be carefully considered.

(6) In any adoptive placement of a Native American child, the federal "Indian Child Welfare Act" governs the order of placement preference. While the Indian Child Welfare Act gives a placement preference, it allows each tribe to establish a different order of preference by resolution, and that order must be followed. The Act lists the placement preference for adoption of an Indian child in the following order:
(a) A member of the child's extended family;

(b) Other members of the Indian child's tribe; or

(c) Other Indian families.

(7) Study of the Child. Completing the study of the child is an important part of the preparation needed to find an adoptive family. Before preparing the study of the child, the appropriate case manager or adoption counselor must be thoroughly familiar with the content of the child's entire record. The child study must include current and projected or future needs of the child based on all available information regarding the child and the birth family's medical and social history. The child study is also critical documentation of the child's special needs for subsidy purposes. Rather than repeat information from an evaluation or Comprehensive Behavior Health Assessment in a child study, these documents may be attached and referenced in the child study. All available social and medical history information must be provided to the adoptive parents prior to or at the time of the adoption placement. The study of the child, with identifying information removed, will be a part of the written background information provided to the adopting family. A study of the child will include:
(a) Developmental History. A developmental history must be obtained from the birth parents whenever possible. When the child has been in care for a period of time, developmental history obtained from birth parents must be supplemented by direct study and observation by the case manager or adoption counselor, foster parents, pediatrician, and if indicated, psychologist, teacher and other consultants. The developmental history must include:

1. Birth and health history;

2. Early development;

3. Child's characteristic way of responding to people;

4. Deviations from the normal range of development; and

5. Child's prior experiences, including continuity of care, separations, and information regarding other known significant relationships the child has had prior to and since entering foster care.

(b) Medical History. A medical examination must be completed by a qualified physician, preferably a pediatrician, to determine the child's state of health and significant health factors which may interfere with normal development. The medical history must take into consideration the following:

1. Circumstances of birth and possible birth trauma;

2. Congenital conditions which may have been corrected or need additional correction or treatment;

3. Physical handicaps that may interfere with normal activity and achievement;

4. Significant illnesses and health of the child, parents and other family members; and

5. Immunization record of the child.

(c) Family History. Family history will be obtained from birth parents when possible and will include any significant information about both parents and any siblings. Material about the child's birth family, which will be shared with the adoptive family and later with the child, must be carefully and accurately recorded. This information should include:

1. Age of both parents;

2. Race, national origin or ethnicity;

3. Religion;

4. Physical characteristics;

5. Educational achievements and occupations;

6. Health, medical history and possible hereditary problems;

7. Personality traits, special interests and abilities;

8. Child's past and present relationship with family members and the significance of these relationships; and

9. Actual or potential impact of past abuse, neglect or abandonment.

(d) Psychological and Psychiatric Evaluations. Psychological or psychiatric evaluations of children known or suspected of having mental health problems must be obtained prior to the adoption placement. Any child who will be placed for adoption with medical subsidy for treatment of a psychological or psychiatric condition must have had such an evaluation within the 12 month period preceding the adoption placement.

(e) Heredity. There are no hereditary factors that rule out adoptive planning for a child. Genetic and medical professionals will assist in deciding which hereditary conditions entail significant risk because they limit life expectancy or adversely affect normal development. With the recognition that there are adoptive parents who are willing to accept children with special needs, such conditions must be carefully evaluated. An unfavorable diagnosis does not rule out adoption for the child when there are families willing to assume the risks.

(f) Pre-placement Physical Examination. Prior to placement every child must be given a complete physical examination. This will be completed when a specific family is being considered for a child and they express interest in proceeding after having received specific information about the child. Should placement with an identified family not occur after the physical has been completed, another examination will not be necessary if the child is placed with a subsequent family within six months of the date of the physical. No child will be placed without a physical which has been conducted within six months of placement. If the adoptive family prefers, the examination may be completed by the family's pediatrician at their expense, and a copy provided for the child's case record. It is important that this examination be thorough and provide the potential adoptive family and the case manager and adoption counselor with a clear understanding of the child's physical condition.

(8) The information discussed in paragraphs (a) through (f) must be shared in writing with the adoptive parents. The identity of the birth family must be protected when providing this written material to the family. Fla. Admin. C. 65C-16.002.

Open Adoption

All adoptions in Florida start from the same premise:

It terminates all legal relationships between the adopted person and the adopted person's relatives, including the birth parents, except a birth parent who is a petitioner or who is married to a petitioner, so that the adopted person thereafter is a stranger to his or her relatives for all purposes . . . .

Section 63.172(1)(b), *Fla. Stat.* Once the final judgment is entered, the adoptive petitioners become the child's parents. *See* section 63.172(1)(c), *Fla. Stat.* As an exception to the closed nature of adoptions, the legislature authorizes approval of *agreements* that (a) arise from

termination of parental rights under chapter 39 (e.g. foster children), and (b) are in the child's best interest. Adoptions in the United States have historically been closed. "[T]raditional adoptions in most states involve statutorily imposed anonymity of the parties, secrecy, and sealed records. The rational given for such secrecy is smooth integration of the adopted child into the adoptive family." Tammy M. Somogye, Comment, *Opening Minds to Open Adoption*, 45 U. Kan. L. Rev. 619, 620 (1997) (footnotes omitted). Florida has ordinarily followed this approach. *See, e.g.,* § 63.162(1), Fla. Stat. (2006) (confidentiality of hearings and files). Conversely, "[o]pen adoption is a rather new issue in the area of family law and children's rights which has generated a great deal of controversy. . . . In general terms, an open adoption occurs when the adopted child and one or more family members of the biological family maintain contact after adoption has occurred." Laurie A. Ames, Note, *Open Adoptions: Truth and Consequences*, 16 Law & Psychology Rev. 137, 137 (1992).

In 2001, the legislature enacted a progressive law affirmatively authorizing a juvenile judge to approve and retain jurisdiction to enforce open adoption agreements freely entered-into between the adopting parents(s) and specified adult biological relatives, so long as the agreement was determined by the judge to be in the adoptee's best interest. One psychological barrier leading birth parents not to voluntarily surrender parental rights is their insistence that the child be allowed to maintain contact with either themselves or extended biological family members. The availability of an open adoption agreement, when structured on a case-by-case basis to be protective of the child's best interest, can help transform a zero-sum exercise into as close to a win-win situation as possible. Negotiating this type of consensual solution can help satisfy the birth parent that his concerns are being addressed, help encourage him to sense that he is being fully respected, and assuage feelings of letting his children down by voluntarily surrendering parental rights.

When the outcome of a termination of parental rights case cannot be predicted with reasonable certainty, an open adoption, if carefully structured to address the peculiarities of the given case, may help maximize control over risk, by ensuring that parental rights are terminated, while imposing, as a trade-off, tolerable restrictions on post-adoptive contact. Although negotiating such agreements can be frustrating, time-consuming, and ultimately lead nowhere if agreement is either not reached or disapproved by the court, it offers an alternative to the risks of litigation reliant upon the imperfect record of months if not years of prior and typically underfunded social work performed by the government, over which neither the child nor the foster parents will have had any control.

In 2010, DCF convened an Open Adoption Work Group to develop new statewide policies designed to promote DCF's use and acceptance of open adoption agreements in appropriate situations. It is anticipated that at some time in the future DCF will publish proposed rules. However, the existing statute provides:

> 63.0427 Agreements for continued communication or contact between adopted child and siblings, parents, and other relatives.—
>
> (1) A child whose parents have had their parental rights terminated and whose custody has been awarded to the department pursuant to s. 39.811, and who is the subject of a petition for adoption under this chapter, shall have the right to have the court consider the

appropriateness of postadoption communication or contact, including, but not limited to, visits, written correspondence, or telephone calls, with his or her siblings or, upon agreement of the adoptive parents, with the parents who have had their parental rights terminated or other specified biological relatives. The court shall consider the following in making such determination:

(a) Any orders of the court pursuant to s. 39.811(7).

(b) Recommendations of the department, the foster parents if other than the adoptive parents, and the guardian ad litem.

(c) Statements of the prospective adoptive parents.

(d) Any other information deemed relevant and material by the court.

If the court determines that the child's best interests will be served by postadoption communication or contact, the court shall so order, stating the nature and frequency of the communication or contact. This order shall be made a part of the final adoption order, but the continuing validity of the adoption may not be contingent upon such postadoption communication or contact and the ability of the adoptive parents and child to change residence within or outside the State of Florida may not be impaired by such communication or contact.

(2) Notwithstanding s. 63.162, the adoptive parent may, at any time, petition for review of a communication or contact order entered pursuant to subsection (1), if the adoptive parent believes that the best interests of the adopted child are being compromised, and the court may order the communication or contact to be terminated or modified, as the court deems to be in the best interests of the adopted child; however, the court may not increase contact between the adopted child and siblings, birth parents, or other relatives without the consent of the adoptive parent or parents. As part of the review process, the court may order the parties to engage in mediation. The department shall not be required to be a party to such review.

In Florida, attempting to resolve termination of parental rights cases through child-friendly and court-approved open adoption agreements requires thinking outside the box. One of the procedural complications involved in structuring an open adoption is the frequent unwillingness of DCF and CBC personnel to accept a voluntary surrender of parental rights that is in any way conditional on the court's acceptance of the open adoption agreement, or in which a commitment from DCF is necessary as to whom its adoption consent will then be given. Strictly speaking, there is no reason why a conditional consent may not be accepted if otherwise appropriate for a given case. Compare, *C. G. v. Guardian Ad Litem Program*, 920 So. 2d 854 (Fla. 4th DCA 2006) (noting significance of the fact that the surrender and consent in that particular case was not conditional). Nonetheless, one possible approach for attempting to work around that potential impasse if it arises is reflected in the open adoption handout which provides that: "It is understood and agreed that to the extent of any inconsistency between Composite Exhibit "A" [the unconditional surrender] and this Stipulation, the terms contained in this Agreement shall prevail."

Consideration of Age

Under applicable law, age is a relevant consideration that may or may not be a pivotal factor depending upon the particular circumstances of a given case. Consistent with modern

attachment theory, Florida courts have discounted age as a decisive factor when the older petitioner has already been raising the child and wishes to continue doing so. In *In re Adoption of Brown*, 85 So. 2d 617 (Fla. 1956), the child was placed with the grandparents two hours after he was born, and they were raising him. When they sought to adopt him two years later, the grandmother was 53 years old, the grandfather was 57 years old, and the appellate court held that their age, though "undoubtedly a factor to be considered," should not stand in their way. In *In the Matter of Duke*, 93 So. 2d 909 (Fla. 1957), the father had turned over his daughter to the petitioning couple, aged 48 and 63, when she was one year old. For the next year and a half, they "had fed, nourished and restored it [sic] to normal health and they had become attached to it." *Id*. at 910. The appellate court held that they were not too old to continue doing so.

In *In re Adoption of a Minor*, 184 So. 2d 657 (Fla. 4th DCA 1966), the paternal grandmother, then 68, sought to adopt her 13-year old granddaughter whom she had been raising since shortly after she was born (the opinion states the parents placed their daughter with the grandmother in 1953). The appellate court spoke at length as to how advanced age should be analyzed in such situations:

> While no special emphasis was given to the matter of how the adoption would affect the child's welfare, our opinion is that it will be best served, despite petitioner's age, by approving the adoption. The child desires the adoption. The grandmother is the only parent she has ever known. It would afford her security to have the relationship cemented by law so that it could not be later challenged. It would not destroy or interfere with any ties or relationship existing with her natural parents as none, in fact, exists. It is also to be remembered that the grandmother has largely finished the undertaking of raising the child as thirteen years have elapsed and only a few years remain with which to be concerned before her emancipation.
>
> Advanced age, standing alone, will not serve as an automatic disqualification of an adoption petitioner. It is an important point to be weighed along with all other material evidence bearing on the issue. In some cases it may operate to tip the scale. In others it will be a matter of no moment. On account of the vagaries of life, health and temperament that specially confront persons up in their years, it may be tritely said that as a person's years increase his suitability and prospects as an adoption parent decrease. Thus, we appreciate the chancellor's hesitancy in stamping approval upon the proposition presented. I[t] requires a case containing unusual or remarkable circumstances for a court to approve and legally establish a person of sixty-eight years as an adoptive parent. This is such a case.

Id. at 658 (emphasis added). Compare, *Ross v. HRS*, 347 So. 2d 753 (Fla. 3d DCA 1977) (HRS opposes adoption citing 55-year old petitioner's marital status, economic condition and age); *Morrison v. Smith*, 257 So. 2d 623, 625 (Fla. 4th DCA 1972) (Cross, J., dissenting) (HRS cites fact that adoptive petitioners are in their fifties as one reason not to support their adoption of the child despite the fact that prospects for a subsequent adoption of the child were dim).

A decision from outside Florida, *Cain v. Adams*, 195 N. W. 2d 489 (Nebr. 1972), offers added guidance. In that case, the child was three years old and the contestants for custody

included a 53-year old grandmother and a 25-year old aunt. Both homes were "people of high moral character, and possess the requisite love and desire for the care of [the child]." *Id*. at 490. Both were "financially able to furnish proper food and clothing and the other environmental requirements for the raising, training, and care of [the child]." *Id*. The Nebraska Supreme Court, in affirming the trial court's ruling in favor of the aunt, explained why it approved of the trial court's consideration of the disparity in ages:

> In weighing the evidence in this case it is quite obvious that the district court, in exercising its discretion, considered the age of the parties and the effect of age on the ability to raise a child of tender years such as [the child] is. The [grandmother] is 53 years of age and plans to retire at the age of 65 years. Undoubtedly the trial court took into consideration the generation gap between the grandmother and [the child] and was responsive to the principle that child rearing is a difficult problem in a modern age and such problems are accentuated by an age difference between the child and a custodial grandmother, such as we have here.
>
> When [the child] is 15 years of age and a teenager, his grandmother will be 65 years of age. On the other hand, the [aunt and her husband], are now just beginning their own family, and are obviously much better equipped over the next 20 years to raise a small child. We feel that one of the considerations impelling the lower court's decision was that when a child grows up with younger people, as here, in a family with other children, it [sic] has a better opportunity for a more normal and wholesome development than with people separated from it [sic] in age by about 50 years. *Id*. at 490.

ADOPTION SUBSIDY AND RELATED MATTERS

In addition to the federal adoption tax credit, numerous financial supports are potentially available to persons adopting special needs children from DCF. Rule 65C-16.013, Fla. Admin. Code ("Determination of Maintenance Subsidy Payments"). Who is a special needs child?

> (a) "Special needs child" means:
> 1. A child whose permanent custody has been awarded to the department or to a licensed child-placing agency;
> 2. A child who has established significant emotional ties with his or her foster parents or is not likely to be adopted because he or she is:
> a. Eight years of age or older;
> b. Developmentally disabled;
> c. Physically or emotionally handicapped;
> d. Of black or racially mixed parentage; or
> e. A member of a sibling group of any age, provided two or more members of a sibling group remain together for purposes of adoption; and
> 3. Except when the child is being adopted by the child's foster parents or relative caregivers, a child for whom a reasonable but unsuccessful effort has been made to place the child without providing a maintenance subsidy. (Fla. Stat. §409.166)

The available package includes a $1000 per child non-recurring adoption expense subsidy

earmarked for legal expenses in finalizing the adoption, Medicaid eligibility until the child turns 18, a monthly maintenance subsidy that is ordinarily between 80% - 100% of the foster care board rate, and in-state public college tuition. Fla. Stat. §1009.25. An "Adoption Assistance Agreement" sets forth what the government is agreeing to pay and it must be signed prior to the adoption being finalized. Otherwise, the adoptive family has the burden in a post-adoption administrative fair hearing (that the family must initiate and litigate at its expense) to demonstrate why DCF should belatedly agree to furnish a subsidy. When DCF denies a request for a higher subsidy, that denial should be in writing and accompanied by a written notice to the family that they have a right to administratively appeal the denial. As a practical matter, such required notice is rarely, if ever, furnished. Though perhaps increasingly less common, there may be a "take it or leave it" attitude, and at times an implicit threat that the child may go to someone else if the adoptive parents do not toe the line. So long as it is in the best interest of the child, the government is entitled to prefer an otherwise appropriate adoption placement that is willing to waive an adoption subsidy, with the exception of existing foster parents to whom the child is already attached.

Provider agencies may furnish prospective adoptive parents a written or verbal list of one or more attorneys available to handle finalizations. It goes without saying that the attorney retained by the adopting parents owes a duty of loyalty and competence to the adoptive parents. However, there may be an expectation on the part of the adopting parents that all of the required legal work ought to be funded exclusively out of the $1000 in legal expenses to be reimbursed by the CBC. Consequently, an attorney may understand his or her role is to simply complete a barebones adoption, rather than also if necessary, challenging a proposed subsidy being offered by the CBC as too low, encouraging commencement and handling of administrative proceedings prior to the adoption finalization to attempt to secure certain benefits, preparing for and accompanying the clients to meetings with the Adoption Applicant Review Committee, etc. Most prospective adoptive parents don't know what they don't know, and therefore do not know what it may be in their interest to ask that their chosen attorney do on their behalf, whether the attorney will agree that is part of the engagement, whether he or she feels comfortable doing so, and if so, if and how he or she will be compensated for doing so. Many adoptive parents have few resources available to pay attorneys themselves. Bear in mind, however, that every $100 increase approved for a one year old adoptee over the basic monthly maintenance subsidy ultimately equals $20,400 until the child turns 18 ($100 x 12 months x 17 years). Making sure a dependent child with serious physical, psychological or developmental problems receives an appropriate subsidy from DCF in the sound exercise of its discretion may be one of the most important things any child advocate does for that child.

If following the adoption, the child's condition deteriorates, the government has the discretion, if asked, to raise the monthly maintenance subsidy. DCF does not pay retroactive subsidy increases prior to the date of the request (i.e., not automatically back to the date of the adoption). Disputes over subsidies are subject to administrative appeal before a DCF hearing officer, and then, in theory, an appeal may be taken to a district court of appeal. As a general rule, there are no prevailing party attorney's fees awarded.

Another issue that is increasingly arising since a legislative revision in 2004, in which our firm played a major role, is whether DCF must pay adoption subsidies when the child is adopted based on a judicial determination that DCF's adoptive consent has been unreasonably withheld, rather than based upon DCF's adoptive consent. The applicable statutory provision, section 409.166, *Fla. Stat.*, does not condition subsidy eligibility upon DCF adoptive consent. Therefore, the fact that the adoptive parent was compelled to successfully overcome DCF's resistance in court, cannot force the adoptive parents to choose between adopting and foregoing a subsidy. Precedent for this was previously established by the Juvenile Court in Miami in the course of gay adoption litigation handled by our firm. It is important before finalizing the adoption that the adoptive parents document DCF's commitment, however reluctantly, to paying the subsidy under those circumstances through pre-adoption litigation and pre-adoption execution by DCF of an Adoption Assistance Agreement. It may be reasonable to agree that in fairness the subsidy payments will nonetheless be conditioned upon any timely appeal from the final judgment of adoption being defeated.

Another issue that is also increasingly arising is whether subsidy eligibility exists when the child is adopted through the intervention procedure, *Fla. Stat.* § 63.082(6), based on the filing of a private petition to terminate parental rights supported by the consent of the birth parents who have found themselves on the wrong end of a DCF dependency/termination of parental rights petition. These adoptions are not based on DCF consent. Although this is a complex area of law (especially in multi-state situations), our experience has been that DCF has funded adoption subsidies in these type of cases so long as the child was adopted out of DCF's or an adoption agency's legal custody and certain other preconditions are met.

Other Programs

Persons adopting from DCF should be aware of certain other programs that it may well be in the child's best interest to activate:

Post-Adoption Support. The community-based care providers are required to consider offering assistance to adoptive parents who have adopted from DCF, and who are encountering adoption-related difficulty. For example, there may be times when the child requires certain assistance that Medicaid and the adoptive parents' private insurance will not cover. The CBC's have the discretion to fund that assistance. Accurate and detailed documentation as well as approval in advance is essential. If denied in advance, the denial may be formally litigated through a fair hearing. The regulation is worded as follows:

> 65C-16.014 Post Adoption Services.
>
> (1) After finalization, the adoptive family may require temporary case management support, information and referral assistance and related services. The need for medical assistance must be established prior to the adoption placement, although the service might not actually be needed until a later date. When this need is not established prior to the placement and the adoptive parents feel they have been wrongly denied services on behalf of an adopted child, they have the right to request a fair hearing. If, through the

> fair hearing process, a service is approved, the effective date of the service will be the date the family officially requested the service. Retroactive payment dating back to the date of placement will not be approved.
>
> (2) A service must be terminated when the condition for which it was granted no longer exists or on the child's 18th birthday, whichever occurs first. Children needing residential mental health services will be referred to the district's Alcohol, Drug Abuse and Mental Health Program Office, children's program for services.
>
> (3) The cost for a service will not be paid when those costs can be or are covered by the adopting family's medical insurance, Children's Medical Services, Children's Mental Health Services, Medicaid, Agency for Persons with Disabilities or local school districts.
>
> (4) The adoptive parents must obtain the approval of the community based care provider or sub-contractor agency prior to planning for the use of a service. The adoptive parents must submit a copy of the bill for the service to the community based care provider or sub-contractor agency to initiate reimbursement. The bill must be clearly legible and must specify the name of the child, the service rendered and the date of the service, in addition to the charge for the service.

DCF has asserted the position that post-adoption support does not include durable medical equipment that is medically necessary for the child, even assuming no one else (including Medicaid, APD or AHCA) will pay for it.

The Home and Community-Based Medicaid Waiver Program for the Developmentally-Disabled

In 1981, Congress created the Home and Community-Based Waiver Program in order that individuals who otherwise would be cared for in a nursing home or ICF/DD receive services in their own homes and in home-like settings. . . .

> The Home and Community-Based Waiver provides for an individual support plan designed to meet the individual's needs for health and rehabilitative services in a home or in a small home-like setting. Indeed the program contemplates personal privacy and basic freedom to make choices, including choices about when to go to bed and arise. Participants may, to the extent they are able, plan menus, grocery shop and cook. Ideally, the individuals live in residential neighborhoods and have the opportunity to participate in community activities.

Cramer v. Chiles, 33 F. Supp. 2d 1342 (S. D. Fla. 1999).

This program is administered by the Florida Agency for Persons with Disabilities ("APD"), which, as an example of the legislatively-directed fragmentation of service delivery in Florida, in most respects is entirely separate from DCF and the CBCs. Typically, a determination is made whether a developmentally-disabled foster child meets the criteria for eligibility to be placed "on the Waiver." However, the child, even if eligible, is presumptively not placed on the

Waiver, but on a waitlist, joining thousands of other Floridians. Only eligible persons deemed in "crisis" go to the front of the line, and very few Floridians are approved for "crisis status" each month. As a result, there was historically a disincentive for the disabled child's caregivers to adopt (or for the biological family to gain the confidence that they would receive the support they need to welcome reunification), and thereby assume complete and permanent financial responsibility for the child.

In 2010, DCF and APD agreed as a result of the filing of administrative litigation by our firm and others, that children who needed only to be placed on the Waiver in order to be adopted or reunified with their families would be deemed as "in crisis" for immediate movement from the waitlist to the Waiver. If this opportunity is not exercised prior to the eligible child's adoption, that child will often face remaining on the wait-list for years to come. It is therefore essential that prospective adoptive parents at least consider whether they want this conclusively addressed before finalizing the adoption. It may well be worth the wait.

Eligibility and Crisis decisions are also subject to administrative appeal, which can be enormously time-consuming. In serious cases of APD foot-dragging, attorney's fees may be awarded against APD. At times, a fiercely independent CBC provider, a Guardian Ad Litem Program attorney or a law school clinic may, if persuaded and possessing the resources to do so, be willing to take the lead in prosecuting an administrative appeal against DCF's sister agency. The renowned advocacy organization, Disability Rights Florida (formerly known as the Advocacy Center for Persons with Disabilities), may in its discretion also provide invaluable assistance. In South Florida, Legal Services of Greater Miami and the University Of Miami School of Law's Children and Youth Law Clinic have also done outstanding work in this area of law.

Early and Periodic Screening, Diagnosis and Treatment" program ("EPSDT")

This often-overlooked but extremely potent Medicaid program is a cooperative federal/state program that provides health care services to specified categories of individuals meeting income and other criteria. EPSDT lists specific items and categories of services that must be provided to eligible persons. Such services include screening and treatment of children and youth under 21. EPSDT describes the screening, vision, dental, hearing and treatment services that must be provided, and requires that such services include "such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services whether or not such services are covered under the State plan." Those categories of services which can be covered under the federal Medicaid statute are enumerated at 42 U.S.C. § 1396d(a). These listed services include "home health services," including "medical supplies, equipment and appliances suitable for use in the home." EPSDT is administered by Florida's Agency for Health Care Administration ("AHCA"). Its decisions are also subject to administrative appeal.