Nova Law Review

Volume 25, *Issue* 3 2001 *Article* 7

”Please Let Me Be Heard:” The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution

Bernard P. Perlmutter* Carolyn S. Salisbury†

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> The remarks and suggestions made by foster care graduates contained a recurrent theme—the importance of consultation with the young people themselves. They felt like pawns—subject to the many powers of others. They felt disregarded, that it did not matter what they wanted or had to say, because too often they were never asked. Whether it was a decision about a foster home, about

* Director and Associate Director, respectively, University of Miami School of Law, Children & Youth Law Clinic, and counsel for petitioner in *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000).

changes in placement, about visiting arrangements with kin, or about their goals in life, they felt they should have been heard.[1]

I. INTRODUCTION: THE STORY OF MICHAEL AND HIS STRUGGLE TO BE HEARD

"Michael" is a teenage foster child who was committed by the Florida Department of Children & Families ("DCF") to a psychiatric institution after a five-minute hearing at which he was not present, in which he had no opportunity to participate, and at which no evidence was presented. The commitment order signed by the juvenile court judge required Michael to be transported under armed police escort to the institution. While at this institution, Michael was forcibly administered psychotropic drugs, placed in four-point leather restraints, and punished by being placed in seclusion, prohibited from speaking to other patients, or telephoning his family.

Michael was one of nine children born in Miami to a poor, single mother. At the age of six, Michael and his siblings were removed from his mother's custody and placed in foster care due to allegations of abuse and neglect. During his many years in state custody, Michael was placed by DCF in several different settings, including foster homes, group homes, hospitals, and his mother's home. While in foster care, he sometimes ran to his mother's home.

During his long period in foster care, Michael was also hospitalized on several occasions for crisis stabilization and evaluations. Two doctors who evaluated Michael during one of these hospital stays disagreed as to the type of placement that was appropriate for him. One, a psychiatrist, recommended "'a residential placement emphasizing self-responsibility, self-identity, and independent living skills . . . .'"[2] Another, a psychologist, recommended that a foster placement in which the foster mother would be most "'accessible and available'" to this adolescent child would be most therapeutic.[3] Michael's court-appointed attorney asked the court to appoint another psychologist to perform an independent examination. The independent psychologist recommended that Michael be given "individual therapy, psychotropic medications, and that he be placed in therapeutic foster care."[4]

Later, his case was reviewed by a DCF multi-disciplinary case review committee charged under Florida law with determining children's eligibility

1. TRUDY FESTINGER, NO ONE EVER ASKED US: A POSTSCRIPT TO FOSTER CARE 296 (1983).
2. M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).
3. *Id.* at 93.
4. *Id.* at 94.

for residential treatment.[5] The committee considered another assessment, one prepared by a psychologist hired by DCF. This assessment opined that Michael "'did not appear to be at risk for suicidal attempts or self-injurious behaviors but he is at risk for running away and the dangers associated with this.'"[6] The psychologist, however, recommended Michael's placement in a "'supportive, but locked residential environment wherein [Michael] will be able to develop relationships with others and can participate in family therapy . . . .'"[7] Without interviewing Michael, or hearing from Michael's court-appointed lawyer, the committee adopted this psychologist's recommendation.[8]

DCF then appeared in court and asked Michael's presiding juvenile court judge to order than he be placed in a locked residential environment.[9] Michael's attorney asked the judge, prior to ordering this placement, to allow an evidentiary hearing under the Baker Act[10] to take place in order to sort out the conflicting evidence and allow Michael to present evidence that residential placement was not necessary.[11] The dependency judge refused to conduct such a hearing, found that a locked residential placement was "appropriate," and set an evidentiary hearing six weeks later, over the protests of Michael's attorney.[12]

While in the locked program, Michael was interviewed by a newspaper reporter. The reporter described him in the following manner:

> Michael has been confined to Lock Towns for more than a year. He turned 16 inside the pink walls and behind locked metal doors. He is not allowed out, except to go to court or see a doctor. When he does leave, Lock Towns' staff puts his legs in shackles to prevent him from running away . . . . He is on several powerful drugs, and he says he has been mistreated and harshly punished. "It feels like I'm in jail," Michael said. To an untrained eye, Michael does not appear to be disturbed. He answers questions thoughtfully though with few words. He likes the Dallas Cowboys and Denver Broncos and has a teen-ager's awkward shyness. As he sits in his case-

5. *See* FLA. ADMIN. CODE ANN. r. 65E-10.018 (2001).
6. *M.W.*, 756 So. 2d at 94.
7. *Id.*
8. *Id.*
9. *Id.* at 95.
10. FLA. STAT. § 394.451–.4789 (2000). The Act is also known as The Florida Mental Health Act. *See* § 394.467.
11. *M.W.*, 756 So. 2d at 95.
12. *Id.*

> worker's office, he fidgets with her computer. He downs two orange sodas and a large bag of potato chips.[13]

Michael's story is not an isolated, or even unusual, one. In *No One Ever Asked Us: A Postscript to Foster Care*,[14] the author reported on an extensive study on the views of former foster care youth.[15] One of the most "unsettling and confusing" aspects of a foster child's is the experience of moving from one foster home to another, or from a foster home to a psychiatric hospital, or from a foster home to a temporary shelter.[16] The youths surveyed in the study had no opportunity to be heard before such changes in placement occurred.[17] Foster children felt bounced around like a "ping-pong ball," to use their words.[18] "'There has to be a greater understanding that one is moving people, not furniture' and 'Children are not objects . . . like merchandise' were common refrains."[19] No change in placement is more traumatic to a foster child than the removal from a foster home and an alternative commitment to a locked psychiatric institution.

The commitment of foster children to long-term, locked psychiatric institutions is a matter of great importance affecting the privacy and liberty rights of many foster children in the state's custody. This article will address the right of a foster child to procedural due process prior to commitment to a psychiatric institution. First, the article will provide an overview of the Supreme Court of Florida's holding in *M.W. v. Davis*[20] and the context of the decision. Second, the article will review the relevant Florida statutes that govern the psychiatric commitment of a foster child in state custody. Third, the article will address the foster child's right to privacy under the Florida Constitution when the state seeks to commit the child to a psychiatric institution. Fourth, the article will discuss what procedural safeguards should be set forth in the new rule of court that resulted from the *M.W.* decision. Finally, the article will review the therapeutic jurisprudence considerations that were implicated by the *M.W.* decision, which support greater

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13. Sally Kestin, *At 16, He's Behind Locked Doors, State as Parent Denies Rights to Foster Kids*, SUN-SENTINEL (Ft. Lauderdale), Nov. 7, 1999, at A25.

14. FESTINGER, *supra* note 1.

15. *Id.* at 275.

16. *Id.*

17. *Id.*

18. *Id.* at 281.

19. *Id.* at 275. "Placement in foster care undermines the children's interpersonal trust, sense of mastery, and control over events within the environment." Wendy Glockner Kates, et al., *Whose Child Is This? Assessment and Treatment of Children in Foster Care*, 61 AM. J. ORTHOPSYCHIATRY 584, 585 (Oct. 1991).

20. 756 So. 2d 90 (Fla. 2000).

procedural due process for children in state custody who face psychiatric commitment.

II. *M.W. v. DAVIS*

A. *Procedural History of the Litigation*

The *M.W.* decision was the culmination of a two-year battle waged on behalf of Michael, a seventeen-year-old who spent ten years in the foster care system. Michael experienced multiple placements during that time after which he was ordered into the residential treatment program at Lock Towns Adolescent Care Program, a locked psychiatric facility on the grounds of South Florida State Hospital,[21] after a five-minute hearing in the juvenile court.

Michael and his counsel, members of the University of Miami Children & Youth Law Clinic,[22] appeared at the hearing, but were denied the opportunity to present evidence that he did not meet the criteria under the Baker Act to be involuntarily placed in such a restrictive setting.[23] The trial court set an evidentiary hearing more than six weeks after his placement.[24] Shortly after his placement in Lock Towns, the Clinic filed a petition for habeas corpus in the Fourth District Court of Appeal, arguing that the commitment was illegal because the trial court failed to provide a pre-placement adversarial hearing with findings by clear and convincing evidence that involuntary commitment was required and that no less restrictive treatment alternative was available.[25] The district court initially agreed, and granted the writ, holding that Michael's commitment by DCF violated his rights to an adversarial hearing under sections 39.407(4) and 394.467 of the *Florida Statutes*.[26]

On DCF's motion for rehearing, rehearing en banc and certification, the district court withdrew its earlier opinion and denied the child's petition for habeas corpus relief, holding that no further hearing on Michael's commitment was required.[27] The court of appeal denied further rehearing requested

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21. *Id.* at 95 n.12.

22. Counsel was appointed by the dependency court as an attorney ad litem. *Id.* at 92 n.3.

23. *Id.* at 95.

24. *Id.*

25. *Id.*

26. M.W. v. Davis, 23 Fla. L. Weekly D2419 (4th Dist. Ct. App., Oct. 27, 1998), *withdrawn on reh'g*, 722 So. 2d 966 (Fla. 4th Dist. Ct. App. 1999).

27. *M.W.*, 722 So. 2d at 969.

by Michael, but certified to the Supreme Court of Florida as a matter of great public importance the following question:

> IS A HEARING WHICH COMPLIES WITH THE REQUIREMENTS OF SECTIONS 39.407(4) AND 394.467(1), *FLORIDA STATUTES*, NECESSARY WHEN A COURT ORDERS THAT A CHILD BE PLACED IN A RESIDENTIAL FACILITY FOR MENTAL HEALTH TREATMENT, WHERE THE CHILD HAS BEEN COMMITTED TO THE LEGAL CUSTODY OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES AND THE DEPARTMENT IS SEEKING RESIDENTIAL TREATMENT?[28]

The Supreme Court of Florida held that neither the statutory framework in chapter 39, nor the United States Constitution, requires an evidentiary hearing that complies with section 394.467(1), before the juvenile court orders a child in the legal custody of DCF to be placed in a residential facility for mental health treatment.[29] However, the court stated that "[a]n order approving the placement of a fifteen-year-old dependent child in a locked residential facility against the wishes of that child deprives that child of liberty and requires clear-cut procedures to be followed by the dependency court judge."[30] The court directed the Juvenile Court Rules Committee to develop a rule that above all that affords the child "a meaningful opportunity to be heard" before the court orders the child's placement against his will in a psychiatric institution.[31]

The court instructed the Juvenile Court Rules Committee to prepare a proposed rule that will set forth the procedures to be followed by the dependency court that "give[s] due regard to both the rights of the child and the child's best interests."[32]

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28. M.W. v. Davis, 729 So. 2d 481 (Fla. 4th Dist. Ct. App. 1999). The certified question prompted the filing of several amicus briefs in the Supreme Court of Florida in the case of *M.W. v. Davis*, 756 So. 2d 90, 91 (Fla. 2000), including one filed jointly by the ACLU Foundation of Florida, the Children First Project at Nova Southeastern University Shepard Broad Law Center, the Advocacy Center for Persons With Disabilities, the National Association of Counsel for Children, and others by the Legal Aid Society of Palm Beach County's Juvenile Advocacy Project and the Guardian Ad Litem Program for the Eleventh Judicial Circuit, reflecting the importance of this litigation to children's, civil rights, and disability rights advocates throughout the state and nation.

29. *M.W.*, 756 So. 2d at 92.

30. *Id.* at 107.

31. *Id.* at 109.

32. *Id.*

B. M.W. *in Context: Residential Treatment of "Troublesome" Youth*

The *M.W.* litigation was brought against a backdrop of growing skepticism about the effectiveness, necessity, and cost benefit value of residential treatment of emotionally disturbed or behaviorally disordered children and adolescents in state care. In recent years, advocates for children and mental patients have voiced and documented their concerns about the overuse and misuse of private mental hospitals to institutionalize "trouble-some youth" diagnosed with relatively mild adolescent disorders such as "conduct disorder," "oppositional defiant disorder," and "adolescent adjustment reaction."[33] Many of these youths "do not appear to suffer from anything more serious than normal developmental changes" associated with adolescence.[34] According to Ira M. Schwartz, Dean of the School of Social Work at the University of Pennsylvania, who has criticized the mental hospitalization of "oppositional" adolescents, "[t]hese names sound as though they have diagnostic precision . . . but they don't."[35] In fact, they include a wide variety of typical teenage behaviors: running away, aggression, opposition to parental values and rules, engaging in excessive sexual activity, or serious antisocial behavior.[36]

Increasingly, in recent years, child welfare, juvenile justice, and mental health policy experts have come to regard residential treatment as an ineffective, unnecessary, and expensive solution to these problems, which can usually be treated through less restrictive, community-based interven-tions such as therapeutic foster care and family builder programs.[37] In Florida,

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33. *See, e.g.*, Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 788–91 (1988) (noting that "fewer than one-third of juveniles admitted for in-patient psychiatric treatment were diagnosed with severe or acute disorders such as psychotic, serious depressive, or organic disorders as necessary for such admissions").

34. *Id.* at 789.

35. Nina Darnton, *Committed Youth: Why Are So Many Teens Being Locked Up in Private Mental Hospitals?*, NEWSWEEK, July 31, 1989, at 66, 68; *see also* IRA M. SCHWARTZ, *Rethinking the Best Interests of the Child, in* JUSTICE FOR JUVENILES 131–48 (Lexington Books 1989) (characterizing unnecessary hospitalization as "being abused at better prices").

36. Darnton, *supra* note 35, at 68.

37. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH (2001), *available at* http://www.surgeongeneral gov/cmh/childreport.htm (last visited Sept. 8, 2001) (noting the positive evidence favoring home and community based care for severely emotionally disturbed children in contrast to traditional forms of institutional care which can have deleterious consequences); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999), *available at* http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec7.html (last visited Sept. 8, 2001) (recommending alternatives to institutionalization for the mentally

this skepticism was fueled by revelations over the years that many children locked up in long-term treatment facilities are often mistreated, overmedicated, abused, and held longer than therapeutically warranted. Newspapers throughout Florida for the past decade have published chilling accounts of children being asphyxiated by "basket hold" physical restraints administered by staff in psychiatric hospitals to de-escalate aggressive behavior, children with mild emotional disturbances shackled and overmedicated in facilities for the acutely disturbed, and children confined in psychiatric wards months and years after being discharged because DCF has nowhere else to put them.[38]

Nationally, a review of data from several states has indicated that at least forty percent of children and youth committed to psychiatric institutions are inappropriately placed.[39] Also, studies of the psychiatric commit-

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ill, including outpatient treatment, community-based interventions, therapeutic foster and group home care, and family support programs); GARY B. MELTON, ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS (1998) (recommending that states support family-based alternatives to inpatient hospitalization of minors, including respite care, as a means of preserving families and ensuring alternatives to inpatient psychiatric treatment); FLA. COMM'N ON MENTAL HEALTH & SUBSTANCE ABUSE, REPORT OF CHILDREN'S WORKGROUP (2000), *available at* http://cmhsa.fmhi.usf.edu/finalreport/children.pdf (last visited Sept. 8, 2001) (noting that the shortage of therapeutic foster placements for children with mental health problems creates a situation where adolescents remain unnecessarily in residential placements because of the absence of appropriate placements in less restrictive programs); NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AGENDA FOR CHILDREN & FAMILIES (1991) (observing that traditional psychotherapy is often unavailable to children in low-income families, and that even if it is available, it is typically isolated from other health, education, and social services that these children and their families need).

38. *See, e.g.*, Steve Patterson, *Troubled Kids Left in Center Too Long*, FLA. TIMES-UNION, Mar. 12, 2000, at A1; William Cooper, Jr., *Alternative to "Basket Hold" Restraint Demanded State's Limited Options Leave Children in Limbo*, PALM BEACH POST, Dec. 6, 1998, at 1C; William Cooper, Jr., *Mentally Ill Teen's Homicide Haunts Her Father, Workers Who Restrained Her Placed on Leave*, PALM BEACH POST, Nov. 26, 1998, at 1B; Candy Hatcher, *Meet Samantha: Her Only Family is the State*, PALM BEACH POST, June 12, 1994, at 1A; Karen Samples & Donna Pazdera, *Crisis Center to Adjust Plan Keeps Unruly Teens Out of Unit*, SUN-SENTINEL (Ft. Lauderdale), Feb. 8, 1993, at 5B; Mary Brooks, *Drug-Treatment Program is in Trouble with State Again*, ORLANDO SENTINEL, Dec. 11, 1991 at D3; Carol Gentry, *Child's Death Spurs Inquiry*, ST. PETERSBURG TIMES, Sept. 4, 1991, at 1B.

39. Weithorn, *supra* note 33, at 784 n.72 (quoting J. KNITZER, UNCLAIMED CHILDREN: THE FAILURE OF PUBLIC RESPONSIBILITY TO CHILDREN AND ADOLESCENTS IN NEED OF MENTAL HEALTH SERVICES 46 (1982) (reviewing agency reports from several states)). "'Inappropriateness' was judged on the basis of factors such as whether the children could have been served as outpatients or in day treatment, and whether the severity of the children's diagnoses warranted inpatient treatment." *Id.* Indeed, "'at least 40% of children and youth in state hospitals could have been treated in less restrictive settings, by the states' own admission.'"

ment of adolescents have shown that "[f]ewer than one-third of those children admitted for inpatient mental health treatment were diagnosed as having severe or acute mental disorders of the type typically associated with such admissions (such as psychotic, serious depressive, or organic disorders)."[40] Disturbingly, "the rising rates of psychiatric admission of children and adolescents reflect an increasing use of hospitalization to manage a population for whom such intervention is typically inappropriate: 'troublesome' youth who do not suffer from severe mental disorders."[41]

Many of the "troublesome" youth who are committed to psychiatric institutions are children who have been abused, abandoned, or neglected and placed in state foster care. Indeed:

> [A] very large proportion of children in mental hospitals and other residential treatment facilities are wards of the state .... The GAO [General Accounting Office] found that half of the youths institutionalized in 'health' facilities in the three states it examined (Florida, New Jersey, and Wisconsin) were referred by welfare authorities. [citing Residential care: Patterns of child placement in three states (report No. GAO/PEMD-85-2)] .... Once children are placed in state custody, a new set of problems emerge. Social service placements often are far from children's families and therefore, promote an institutional climate. Children find themselves amid a slow bureaucracy in which they are stuck in restrictive settings for long periods of time without effective recourse.[42]

Children who are committed to psychiatric institutions remain there indefinitely. In fact, once hospitalized, juvenile psychiatric patients remain in the institution approximately twice as long as do adults.[43] Additionally, foster children who are in state custody remain institutionalized longer than children who are in their parents' custody.[44] Indeed, as the United States Supreme Court has noted, "[t]he absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital....

MELTON, *supra* note 37, at 37 (emphasis in original) (citing J. KNITZER, UNCLAIMED CHILDREN: THE FAILURE OF PUBLIC RESPONSIBILITY TO CHILDREN AND ADOLESCENTS IN NEED OF MENTAL HEALTH SERVICES (1982)).

40. Weithorn, *supra* note 33, at 788.
41. *Id.* at 773–74.
42. MELTON, *supra* note 37, at 15–16 (citations omitted).
43. Weithorn, *supra* note 33, at 789.
44. MELTON, *supra* note 37, at 16.

For a child without natural parents, we must acknowledge the risk of being 'lost in the shuffle.'"[45]

Sound policy reasons should prevent a state child welfare agency from being equated with a parent for the purpose of institutionalizing a child. "'The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . .'"[46] A natural parent who makes treatment decisions is emotionally bonded with the child, observes the child on a regular basis, and knows the child's history. By contrast, as a foster child navigates the child's journey through state custody, the child interacts with a long series of state agents—social workers, shelter staff, foster parents, etc. Unlike a parent, a state agency granted temporary legal custody of a child does not form an emotional attachment with a child and does not achieve "the intimacy of daily association."[47]

In recent years, literally hundreds of foster children in Florida placed in residential treatment centers by the state have been "lost in the shuffle."[48]

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45. Parham v. J.R., 442 U.S. 584, 619 (1979) (holding that the child's Fourteenth Amendment liberty interests are not violated when a parent or the state commits a child to a psychiatric facility without a formal due process hearing, but requiring independent review of the child's condition after commitment to the facility as a necessary check against possible arbitrariness in the initial admission decision).

46. *In re* E.A.W., 658 So. 2d 961, 973 (1995) (Kogan, J., concurring in part, dissenting in part) (quoting Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977)).

47. As Gary B. Melton and his collaborators, in their examination of the legal framework and policy relating to the commitment of minors to residential treatment, observe:

> [T]he notion of identical interests between foster child and state guardian is nonsensical. With the turnover in state social workers, large caseloads, and, most importantly, lack of family ties, the contention that guardians can and will protect the interests of their wards in the same manner as watchful parents defies common sense . . . . Also, because state social workers are part of the very bureaucracy that is responsible for the administration or regulation of residential treatment facilities, they may have little discretion in monitoring the welfare of their wards placed within them . . . . At a minimum, state social workers are apt to have the appearance of a conflict of interest. Therefore, rejection of the myth of 'voluntary' placement of children is especially important when the admitting 'parent' is the state guardian.

MELTON, *supra* note 37, at 157–58.

48. According to DCF, approximately 800 children were admitted to residential treatment centers or therapeutic group homes during fiscal year 1997–1998 for the purpose of receiving treatment for emotional disturbance. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, CS/SB 682 (2000). The agency also reported that during fiscal year 1998–1999, there were 411 residential placements of children and 877 other placements in therapeutic group homes funded through the DCF children's mental health budget. *Id.*

The South Florida Sun-Sentinel in a series of articles examining Florida's practice of warehousing these children in private residential treatment programs reported:

> In Florida, some children have been sent to locked treatment centers simply because the state has no place else to put them .... Once confined, some children have spent years in treatment centers because of the state's perennial lack of foster homes. The average length of stay in a treatment centers statewide is nine months. But in some parts of the state, it is much higher: sixteen months in Gainesville for instance, and two years in Tampa.[49]

Erroneous placement in a residential treatment facility can have an extremely harmful and traumatic impact on a child:

> A recent review of psychological research concluded that certain degrees of freedom of movement, association, and communication are critical to the psychological well-being of children and adolescents. Mental hospitalization may entail substantial periods of isolation, particularly in the case of recalcitrant children and adolescents, and may be characterized by involuntary administration of heavy doses of psychotropic medication (that is, medication used to alter psychological functioning), invasions of privacy, and social pressure to conform behavior to certain norms. ...
>
> Certain aspects of mental hospitalization can be extremely frightening for some children. Children who are not seriously emotionally disturbed may be greatly upset by exposure to children who are. In addition to the possible assault on one's psychological well-being, an involuntary hospitalization may be harmful to one's physical health ....[50]

Moreover, children erroneously committed to mental hospitals often experience behavioral deterioration because "[t]he psychiatric hospital can also be a place to learn some previously unconsidered behaviors, such as suicide attempts."[51]

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49. Sally Kestin, *No Place Else to Go Florida Has Never Measured the Effectiveness of Treatment Centers for Troubled Children*, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 1A.

50. Weithorn, *supra* note 33, at 797 (footnotes omitted) (citing MELTON, ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS (1998)).

51. Gerald P. Koocher, M.D., *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 723 (1992). Moreover, "[t]he stigma of a history of [psychiatric] institutional placement also is well-known. The effects on youth who are on the

Furthermore, many children are abused in psychiatric institutions. The abusive treatment to which Florida's foster children have often been subjected in psychiatric facilities throughout this state has long been documented.[52] One instance of children being abused in psychiatric institutions was brought to light by Broward County Court Judge Ginger Lerner-Wren and substantiated by the DCF Inspector General.[53]

In March of 1999, during a visit to the Brown Schools of Florida, a thirty-bed residential facility for emotionally disturbed children in Sunrise, Florida, Judge Lerner-Wren witnessed a staff member twisting the arm of a fourteen-year-old pregnant patient in the program.[54] Alarmed by what she had witnessed and by other accounts of abuses and overmedication of children in the program, Judge Lerner-Wren scheduled hearings for all children at the Brown Schools under her jurisdiction, citing "'significant safety concerns'" about their treatment.[55] The heightened judicial scrutiny of the children in the facility, and resulting media coverage, prompted the Secretary of DCF, Kathleen Kearney, to send in teams of experts from Tallahassee program offices to investigate allegations of improper restraint in the facility.[56]

DCF's Inspector General launched a separate investigation of the program. Its August 1999 report found that the majority of the children could be treated on an outpatient basis in less restrictive, non-residential settings, with quality case management, wrap-around treatment and support.[57] Over half of the children in the program had been improperly admitted. At least one quarter did not have a diagnosed major mental illness. The report was

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verge of applying for jobs, seeking insurance, and so forth may be especially pernicious." MELTON, *supra* note 37, at 47 (citations omitted).

52. *See generally* newspaper articles, *supra* note 38.

53. *See* Shana Gruskin, *State: Restraints Overused on Youths, Brown Schools Monitoring Flawed*, SUN-SENTINEL (Ft. Lauderdale), Aug. 17, 1999, at 4B.

54. *See* Sally Kestin, *State Team to Review Youth Center Restraints, Brown Schools Monitoring Flawed*, SUN-SENTINEL (Ft. Lauderdale), Mar. 25, 1999, at 1A.

55. *Id.*

56. *Id.* Concerns about the injuries and even deaths suffered by children in psychiatric hospitals because of the excessive use of force by hospital staff while physically restraining them are by no means confined to Florida. *See, e.g.*, Blint & Poitras, *Boy, 11, Crushed During Restraint: Aides at Psychiatric Facility Put on Leave During Probe*, HARTFORD COURANT, Mar. 24, 1998, at A1.

57. *See* OFFICE OF INSPECTOR GENERAL, INTERNAL AUDIT, MANAGEMENT REVIEW OF THE BROWN SCHOOLS OF FLORIDA, INC. (covering July 1, 1998 through April 1, 1999) (finding violations of DCF administrative protocols for the placement of emotionally disturbed children in residential treatment; no multi-disciplinary eligibility assessments for many children admitted to the facility; improper uses of chemical and physical restraints; and incomplete abuse and neglect incident reports); *see also* Gruskin, *supra* note 53, at 4B.

especially critical of the "serious shortage of this level non-residential intensive, individualized mental health treatment" programs for DCF children in Broward.[58]

The lack of available placements for emotionally disturbed children in Broward County, and the "abusive practice" of housing these children at "assessment centers," without providing them necessary mental health treatment or medical services, was the subject of a separate round of news articles in Broward and court hearings before Judge Lerner-Wren.[59]

C. *Sun-Sentinel Series: "Throwaway Kids"*

The most disturbing revelations about conditions in children's psychiatric facilities in Florida came to light in November of 1999, when the South Florida Sun-Sentinel published a seventeen-part investigative series on the state's practice of locking up children in costly psychiatric institutions where many did not belong, where many languished months and years after completing treatment, and where care and treatment provided to children confined in these institutions was often of dubious value.[60] The series graphically documented the treatment (or maltreatment) provided to the more than 500 children "too troubled for foster care . . . grow[ing] up in institutions," costing taxpayers up to $109,500 a year per child, often subjected to physical and sexual abuse, overmedication, and the improper use of physical restraints, resulting in serious injuries and even death.[61]

The series reported the children were sent to these residential treatment centers which operate with lax or no oversight or regulation from government agencies such as DCF and the Agency for Health Care Administra-

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58. OFFICE OF INSPECTOR GENERAL, *supra* note 57, at 4.

59. *See* Dep't of Children & Family Servs. v. I.C., 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999) (affirming juvenile court order for in camera production of records of emotionally disturbed children housed at DCF "assessment center" pending their placement by DCF in appropriate therapeutic settings); *see also* Shana Gruskin, *Judges' Role in DCF Clarified: Appeals Court Ruling Pleases Both Sides*, SUN-SENTINEL (Ft. Lauderdale), Sept. 2 1999, at 1B. The chronic shortages of suitable therapeutic placements for children in the legal custody of the Department of Children and Families has been the subject of a long-pending statewide class action lawsuit against state officials in Florida. Third Amended Complaint for Declaratory and Injunctive Relief, M.E. v. Bush, No. 90-1008-Civ-Moore (S.D. Fla. 1997).

60. *See* Sally Kestin, *Throwaway Kids*, SUN-SENTINEL (Ft. Lauderdale), Nov. 6–9, 1999, *available at* http://www.sun-sentinel.com/news/specials/throwawaykids.

61. *See* Sally Kestin, *Too Troubled for Foster Care, Kids Grow Up in Institutions*, SUN-SENTINEL (Ft. Lauderdale), Nov. 6, 1999, at 1A.

tion.[62] It cited reports by the state showing that at least one quarter of the children placed in these programs did not belong there, but were confined in these facilities because the state had nowhere else to place them.[63] It chronicled cases of parents relinquishing custody of children to the foster care system in order to access needed, but costly, mental health treatment, and then unable to reclaim custody of their children from that very system after becoming frustrated with the abuses suffered by their children in that residential care.[64] The effectiveness of treatment, utilizing rigid and often punitive behavior modification techniques and other controls, also was called into question.[65] Additionally, the series reported that numerous children had been subjected to overuse of physical restraints, seclusion, illegal communication restrictions, and overmedication with psychotropic drugs, and that many of the children had also been victims of emotional, physical, and sexual abuse while locked up in the institutions.[66] Children were placed in the care of poorly trained, poorly educated staff who sometimes abused them.[67] The articles disclosed at least fifty-five cases of children abused or neglected by staff in these institutions over the preceding three years.[68]

Finally, spurred by the revelations in the Sun-Sentinel series, DCF responded to the serious concerns of these children and sent teams of inspectors to eight treatment centers.[69] DCF terminated its $1.4 million annual

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62. Sally Kestin, *Children's Centers Lack Oversight, Treatment Facilities Operate with Few Regulations and with Little Monitoring by State or Federal Governments*, SUN-SENTINEL (Ft. Lauderdale), Nov. 9, 1999 at 1A.

63. Kestin, *supra* note 49.

64. Sally Kestin, *Parents Helpless After State Assumes Custody*, SUN-SENTINEL (Ft. Lauderdale), Nov. 6, 1999, at 1A. This predicament has challenged parents of mentally ill children across the nation. For at least the past two decades, parents in many states, including Florida, have been confronted with the dilemma of giving up custody of children to the child welfare or juvenile justice system in order to obtain publicly funded treatment for their children's mental health problems. *See generally* BAZELON CENTER FOR MENTAL HEALTH LAW, RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN'S MENTAL HEALTH NEEDS (Mar. 2000).

65. Sally Kestin, *Treatment's Results Hard to Gauge Lacking Standards, the State is Unable to Judge the Effectiveness of Children's Therapy in Psychiatric Centers*, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 19A; Sally Kestin, *The Rules Are Strict, the Punishment Swift and Stiff, Experts Disagree on Whether Some Centers' Rigid Structure Benefits Children or Hurts Them*, SUN-SENTINEL (Ft. Lauderdale), Nov. 8, 1999, at 19A.

66. Sally Kestin, *Environment Sometimes Leads to Abuse Investigations Lack Depth, Children's Input*, SUN-SENTINEL (Ft. Lauderdale), Nov. 9, 1999, at 6A.

67. *Id.*

68. *Id.*

69. Sally Kestin, *State Goes After Youth Centers Crackdown Aimed at Halting Abuse, Neglect*, SUN-SENTINEL (Ft. Lauderdale), June 18, 2000, at 13A.

contract with Lock Towns, which housed Matthew for almost two years.[70] The agency found that staff used excessive force in restraining children and the staff gave powerful medications to control their behavior but did not monitor these children for side effects.[71] DCF also found Lock Towns did not provide youths with individual therapy and unlicensed, unqualified workers were conducting most group therapy sessions.[72] According to the chief of mental health services for DCF in Miami-Dade County, "[w]hat stopped me in my tracks was there was no therapist on staff [at Lock Towns] since February.... These are some of our sickest kids. That is just unacceptable."[73]

D. *The New Legislation*

In response to the Sun-Sentinel Throwaway Kids series' revelations about the many abuses of children in residential treatment centers, Democrat Senator Howard Forman, of Pembroke Pines, co-sponsored legislation in the 2000 session.[74] The legislation is designed to provide greater legal protection for children inappropriately admitted to or held in psychiatric facilities.[75]

Addressing the Sun-Sentinel's concerns about lax regulation of residential programs by state agencies, the new legislation requires children's residential treatment centers to be licensed and regulated by the Agency for Health Care Administration ("AHCA").[76] The legislation also directs DCF, in consultation with AHCA, to issue rules governing residential treatment centers for children and adolescents which specify licensure standards for a number of the problems identified in the series.[77] These include: admission, length of stay, program and staffing, discharge and discharge planning, treatment planning, seclusion, restraints, time-outs, rights of patients under

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* The children in the Lock Towns program were moved to different facilities throughout South Florida. *Id.* Fourteen were transferred to a facility on the grounds of South Florida State Hospital, operated by Citrus Health Network, in a building described by the DCF mental health chief as "much nicer." *Id.*

74. CS/SB 682 (Fla. 2000); HB 2347 (Fla. 2000).

75. Sally Kestin, *Bill Would Add Legal Protection for Kids*, SUN-SENTINEL (Ft. Lauderdale), Nov. 29, 1999, at 1B.

76. FLA. STAT. § 394.4785 (2000).

77. § 394.875(10).

section 394.459 of the *Florida Statutes*, use of psychotropic medications, and standards for the operation of such centers.[78]

The bill also amended portions of chapters 39 and 394 by requiring guardians ad litem to represent children and to have a suitability examination and assessment conducted by a "qualified evaluator" appointed by the Agency for Health Care Administration before being placed in residential treatment centers.[79]

The legislation, which took effect October 1, 2000, provides procedural safeguards for children, *after* their placement in the facilities by DCF, to ensure they are not institutionalized for lengthy periods of time without judicial oversight. It requires DCF to notify the court and the child's guardian, "[i]mmediately upon placing a child in a residential treatment program," that the child has been placed in a facility.[80] The residential treatment program must report monthly to DCF and the guardian on the child's progress and DCF must submit monthly status reports to the juvenile court.[81] The legislation further provides a court hearing shall take place no later than three months after the child's placement in the program, that includes a clinical review by a qualified evaluator addressing the need for continued residential placement.[82] Further, judicial reviews must be conducted every

78. *Id.* Proposed rule 65E-9 of the Florida Administrative Code Annotated, governing licensure of children's residential treatment centers, was published in 27 Fla. Admin. Weekly 8 (Feb. 23, 2001), but advocates have criticized the limited public notice and comment opportunities afforded by DCF, in violation of section 120.54(2)(c) of the *Florida Statutes*. Letter from Brent R. Taylor, Policy Director, Advocacy Center for Persons with Disabilities, to Jim Poindexter, Operations and Management Consultant, Department of Children and Families (Feb. 26, 2001).

79. *See* FLA. STAT. § 39.407(5), (5)(c) (2000). "Suitability for residential treatment" means that the qualified evaluator has found that: 1) the child appears to have an emotional disturbance serious enough to require residential treatment and is reasonably likely to benefit from treatment; 2) the child has been provided a clinically appropriate explanation of the nature and purpose of treatment; and 3) all less restrictive modalities of treatment have been considered, and a less restrictive alternative offering comparable benefits to the child is unavailable. § 39.407(5)(a)3.

These standards, which allocate to the "qualified evaluator" the principal role in determining a child's suitability for placement in a residential setting, appear to be derived from *Parham v. J.R.*, 442 U.S. 584, 609 (1979). In *Parham*, the Court noted that the questions of whether to have a child institutionalized for mental health care "are essentially medical in character," that provision of a "neutral [non-judicial] factfinder" adequately protects against erroneous admission, and that judicial review does not heighten the reliability and validity of the psychiatric diagnosis. *Id.* at 607.

80. FLA. STAT. § 39.407(5)(d) (2000).

81. § 39.407(5)(f)–(g).

82. § 39.407(5)(g)(2).

ninety days after the initial three-month review by the juvenile court.[83] Additionally, the court may order the child be placed in a less restrictive setting any time the court determines the child is not "suitable" for continued residential placement.[84]

The legislation is notably silent on whether pre-commitment adversarial hearings are required, although the statute permits DCF to involuntarily examine or place the child in a residential treatment setting pursuant to section 394.463 or section 394.467 of the Baker Act.[85] The statute, while mandating the appointment of a guardian ad litem, is also silent on whether appointed legal counsel for the child is required.[86] The pre-commitment hearing procedures and the requirements of appointed counsel are the subjects of a proposed rule of Juvenile Procedure, which the Supreme Court of Florida is currently considering in the aftermath of the *M.W.* decision.[87]

III. THE FLORIDA STATUTES

The statutes at issue in *M.W. v. Davis* were sections 39.407(4) and 394.467 of the 1998 *Florida Statutes*. At the time of Michael's commitment to the locked program, section 39.407(4) provided that, "if it is necessary to

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83. § 39.407(5)(h).

84. § 39.407(5)(g)(4).

85. § 39.407(5). The legislation's focus on the post-commitment procedures concerning a child's suitability for residential placement, rather than pre-commitment procedures, was due in part to the legislature's awareness that the pre-commitment procedures were the subject of the *M.W.* case, then pending before the Supreme Court of Florida. *See* SENATE STAFF, *supra* note 48. Ironically, the supreme court's decision in *M.W.* issued on May 4, 2000, the day before the Senate vote on SB 682, noted that "legislation is pending that would explicitly set forth certain procedures to be used before a child who has been adjudicated dependant may be placed in a residential psychiatric facility. The amendment of section 39.407 would be an important step in specifying what steps are required to be taken before a child may be placed in residential treatment." *M.W.*, 756 So. 2d at 107 n.34 (citations omitted). This stand-off between the legislature and the judiciary inevitably forced the original purpose of the law, namely to establish court hearings before the child's placement in order to avoid an erroneous commitment to a residential facility, to fall into the cracks.

86. *Cf.* FLA. STAT. § 39.4085(20) (2000) (establishing as a goal for children in shelter and foster care that "a guardian ad litem [should be] appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem [should be] appointed to represent their legal interests").

87. *See In re* Amendment to the Rules of Juvenile Procedure, Case No. SC00-2044, Placement of Child in Residential Mental Health Treatment Facility (noting that when originally filed, SB 682 required a court hearing before placement of a child in a residential treatment facility; but this provision was "affirmatively removed" by the legislature and replaced with the "extensive process" of evaluations, reports and reviews, due process safeguards similar to those in *Parham*).

place the child in a residential facility for such [mental health] services, the procedures and criteria established in s. 394.467 or chapter 393 shall be used . . . ."[88] This statute cross-referenced section 394.467, commonly known as the "Baker Act," which provides that before a person may be involuntarily placed for psychiatric treatment, there must be a finding by "clear and convincing evidence" that the person is mentally ill, cannot care for himself, or is likely to "inflict bodily harm," and that a less restrictive setting cannot provide the necessary treatment for the patient.[89]

Prior to *M.W.*, several Florida district courts of appeal had unanimously ruled a court could not commit a child in state custody through delinquency proceedings to a psychiatric institution without following the Baker Act's procedures.[90] In addition, in a case where the child's parent appeared to oppose the child's commitment, Florida's Second District Court of Appeal had ruled that the child could not be committed unless the requirements of the Baker Act were met.[91]

Moreover, in *L.W.*, the Fourth District held that the court could not order a dependent child in the DCF's legal custody to be placed in a thera-

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88. FLA. STAT. § 39.407(4) (2000).

89. Chapter 394 also specifically references the involuntary placement provisions of section 394.467 of the *Florida Statutes*. *See* FLA. STAT. § 394.490–.4985 ("Comprehensive Child and Adolescent Mental Health Services"). Section 394.492(6) of the *Florida Statutes* defines a child or adolescent who has a serious emotional disturbance or mental illness as including a child or adolescent who meets the criteria for involuntary placement under section 394.467(1). *See also* FLA. STAT. § 394.492(5) (defining "'a child or adolescent who has an emotional disturbance'" as not including "a child or adolescent who meets the criteria for involuntary placement under s. 394.467(1)").

90. *See* Dep't of Health & Rehab. Servs. v. A.E., 667 So. 2d 429, 429 (Fla. 2d Dist. Ct. App. 1996) (directing that proceedings to commit a child to a mental health facility be commenced under FLA. STAT. §§ 39.046, 394.467, and 393.11), T.L. v. State, 670 So. 2d 172, 174 (Fla. 4th Dist. Ct. App. 1996) (stating that "chapter 39 specifically cross-references chapter 394 in providing that if it is necessary to place a child in a residential facility for mental health services, the procedures and criteria established in chapter 394 shall be used"); Dep't of Health & Rehab. Servs. v. State, 655 So. 2d 227, 228 (Fla. 5th Dist. Ct. App. 1995) (declaring that it was error for the trial court to order the child committed to an interim long-term residential mental health placement without following the procedures of the Baker Act); *see also* State *ex rel* Smith v. Brummer, 426 So. 2d 532 (Fla. 1982) (indicating that while the Public Defender's Office was authorized to represent a child in a chapter 394 involuntary commitment proceeding, the Public Defender's Office could not file a class action on behalf of all children similarly situated).

91. *In re* L.A., 530 So. 2d 489, 490 (Fla. 1st Dist. Ct. App. 1988) (reversing the trial court's commitment of a child to a mental health hospital because the involuntary commitment criteria of section 394.467(1)(a)2.a. and 394.467(1)(b) were not met).

peutic facility without following the provisions in the Baker Act.[92] Ironically, in *L.W.*, it was DCF that objected to the order of placement and appealed the court's order, arguing that the Baker Act involuntary placement procedures apply to children in both shelter and foster care.[93] DCF objected to the court order not on the basis of any articulated interest in the child's well-being or needs, but on the basis of a "lack of financial funding."[94]

In Michael's case, a lack of resources, namely a sufficient array of therapeutic foster homes, was the guiding reason that DCF placed him in a locked psychiatric facility.[95] Unlike *L.W.*, in *M.W.*, the Fourth District was presented with a case where DCF placed a foster child in a psychiatric facility, but it was the child who objected. The Fourth District ruled that this was a "voluntary" placement that did not require the Baker Act, since the child was in the Department's legal custody and the Department placed him.

In reviewing the Fourth District's decision in *M.W.*, the Supreme Court of Florida did not hold that Michael's commitment was a "voluntary" placement. Instead, the court ruled that since section 39.407(4) of the *Florida Statutes* referenced children in the "physical custody" of DCF, it did not apply to children in DCF's legal custody.[96] Thus, the Supreme Court of Florida rejected the Fourth District's holdings in both *L.W.* and *M.W.* that the statute applied to children in both the agency's physical and legal custody. During the pendency of the *M.W.* litigation, the legislature replaced the term "physical custody" in section 39.407(4) with the phrase "out-of-home care."[97] Michael argued this amendment clarified the provision applied to *all* children who are in out of home care, including those children who are in the legal custody of DCF. However, the Supreme Court of Florida rejected this argument and ruled this statute did not apply to foster children in DCF legal custody.[98]

As noted above, during the 2000 session the legislature further amended section 39.407 of the *Florida Statutes* to require a "suitability examination and assessment" conducted by a "qualified evaluator" for any child that DCF

92. *In re* L.W., 615 So. 2d 834, 835 (Fla. 4th Dist. Ct. App. 1993) (reversing and remanding the trial court's commitment of a dependent child to residential treatment because the court failed to follow the provisions of sections 39.407(4) and 394.467(1)).

93. *Id.* at 836.

94. *Id.*

95. DCF, in its briefs to the Supreme Court of Florida in *M.W.*, acknowledged that its decision to institutionalize a child in a psychiatric facility involves not only "a best interest of the child calculus" but also "budgetary and availability constraints," an especially disturbing position to take in view of the needs of children for a continuum of care irrespective of the budgetary constraints.

96. M.W. v. Davis, 756 So. 2d 90, 109 (2000).

97. *See* H.B. 2347 (Fla. 2000).

98. *Id.* at 109.

seeks to place in a residential facility, in addition to other procedures. Although the court held that neither the statutory framework nor the Fourteenth Amendment requires an evidentiary hearing prior to the child's commitment, in directing the Juvenile Court Rules Committee to develop procedures for commitment that afford the child a "meaningful opportunity to be heard," the Committee had to consider both the Supreme Court of Florida's ruling in *M.W. v. Davis* and the recent amendment to section 39.407 of the 2000 *Florida Statutes*. Additionally, the privacy interests of the child, under the Florida Constitution is a consideration in the promulgation of the procedural rule, if the child is to have a truly "meaningful opportunity to be heard" prior to the loss of his liberty.[99]

IV. A MINOR'S RIGHT TO PRIVACY UNDER THE FLORIDA CONSTITUTION

In *M.W.*, the Supreme Court of Florida declined to address a child's right to privacy under the Florida Constitution, but such a right should be taken into account by the court in adopting a rule of court that governs a foster child's commitment to a residential facility. Florida's citizens chose in 1980 to include an explicit right to privacy in the state constitution guaranteeing that "every natural person has the right to be let alone and free from government intrusion into his private life."[100] As the Supreme Court of Florida has stated, minors are "persons" in the eyes of the law, and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights."[101]

In *In re T.W.*, the Supreme Court of Florida first established that minors have the right to privacy under the Florida Constitution and that this privacy right extends to medical procedures.[102] Additionally, the court has extended the right to choose or reject medical treatment, under the Constitution's guarantee of a right to privacy, to incompetent or incapacitated persons,

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99. *Id.*

100. FLA. CONST. art. I, § 23. "'Privacy' has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest." *In re* Guardianship of Browning, 568 So. 2d 4, 9–10 (Fla. 1990).

101. *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976)).

102. *Id.* (holding that the right to privacy under the Florida Constitution encompasses a minor's right to consent to an abortion without first obtaining parental consent or court authorization); *see also* Jones v. State, 640 So. 2d 1084 (Fla. 1994) (indicating that a minor's privacy right extends to other medical and surgical procedures besides abortion, and to the "conduct of others," including the state).

because "the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike."[103]

In *T.W.*, the court ruled that the child's right to privacy included her own decision as to whether to terminate her pregnancy.[104] Thus, the minor obtained the right to make the decision about whether to have a medical procedure that affects her body.[105] Michael and other foster youth have not sought the decision-making autonomy that the Supreme Court of Florida accorded to *T.W.* under the Florida Constitution's privacy clause. Indeed, foster children like Michael do not seek to make the decision as to whether they will be committed to a psychiatric institution. Rather, these children seek meaningful due process before their privacy is invaded by institutionalization at locked psychiatric facilities where their bodies are forcibly and involuntarily subjected to four-point restraints, seclusion, and psychotropic medications.

In *Winfield v. Division of Pari-Mutuel Wagering*,[106] the Supreme Court of Florida first established the appropriate test to be applied when the right to privacy is implicated:

> The right to privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.[107]

In reviewing the state's intrusion on a minor's fundamental right to privacy, the supreme court applied the *Winfield* test.[108] With regard to the first prong of the test, the court reiterated that the burden is on the state to prove that it has a compelling, not merely significant, state interest before the state can impinge on a minor's privacy right:

> We agree that the state's interests in protecting minors and in preserving family unity are worthy objectives. Unlike the fed-

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103. *In re* Guardianship of Browning, 568 So. 2d at 12 & n.9 (defining "incompetent" and "incapacitated" persons, to whom the right of privacy extends, as "those individuals unable to make medical decisions on their own behalf" and holding that the constitutional right to refuse medical treatment is not lost or diminished by virtue of mental incapacity or incompetence); *see also* J.F.K. Mem'l Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984).

104. *In re T.W.*, 551 So. 2d at 1189.

105. *Id.*

106. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985).

107. *Id.* at 547 (citations omitted).

108. *In re T.W.*, 551 So. 2d at 1193.

> eral Constitution, however, which allows intrusion based on a "significant" state interest, the Florida Constitution requires a "compelling" state interest in all cases where the right to privacy is implicated.[109]

The court acknowledged that, where minors are concerned, the State has worthy interests in protection of the immature minor and in preservation of the family unit. However, the court specifically held that "neither of these interests is sufficiently compelling under Florida law to override Florida's privacy amendment."[110] In the context of psychiatric treatment, although the state similarly has an interest in protecting foster children because they are minors, the Supreme Court of Florida has already established the state's interest in protecting minors is not sufficiently compelling to override the minor's constitutional right to privacy.

Even if the state had a compelling interest that outweighed the minor's privacy right, it cannot commit a minor in its custody to a long-term, locked psychiatric institution without providing the minor due process, because the state must accomplish its objective through use of the least intrusive means, which is the second prong of the *Winfield* test.[111] In reviewing the state's intrusion on a minor's right to privacy, and the means of furthering the state's interest, the Supreme Court of Florida has held that "[a]ny inquiry under this prong must consider procedural safeguards relative to the intrusion."[112]

In the *M.W.* litigation, DCF contended that it could commit a minor in its custody to a long-term, locked psychiatric institution, subject only to the judicial review provisions of chapter 39 of the *Florida Statutes*.[113] However,

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109. *Id.* at 1195 (quoting *Winfield*, 477 So. 2d at 547). The court in *T.W.* noted that an unemancipated minor could give consent to any medical procedure pertaining to her pregnancy or care for her unborn child, pursuant to section 743.065 of the *Florida Statutes*, regardless of its intrusiveness or potential danger. *Id.* However, the same unemancipated minor was prohibited from giving consent for an abortion under the challenged 1988 statute, section 390.001(4)(a) of the *Florida Statutes*. *Id.*

110. *In re T.W.*, 551 So. 2d at 1194.

111. *Winfield*, 477 So. 2d at 547.

112. *In re T.W.*, 551 So. 2d at 1195–96; *see also* Singletary v. Costello, 665 So. 2d 1099, 1105 (Fla. 4th Dist. Ct. App. 1996) (stating that when the right of privacy is involved, "the means to carry out such a compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual").

113. FLA. STAT. § 39.701 (2000). The court has continuing jurisdiction to periodically review the status of the dependent child, including the progress being made to place the child for adoption, the status of independent living services being provided to an adolescent child, the financial support given to the child by the child's natural parents, and the compliance of the parties with their tasks in the case plan, among other items. *Id.*; *see also In re* L.W., 615

these provisions are not sufficient to authorize the child's commitment to a psychiatric institution against the child's will, as they do not mandate notice to the child, an opportunity for the child to be heard, or the appointment of counsel if the child contests his commitment. Indeed, as the supreme court noted:

> Considering the statutory framework of Chapter 39 and the ongoing judicial review once a child is adjudicated dependent, it is reasonable to conclude that the Legislature would require different procedures to apply when the Department takes the extraordinary step of requesting the court to order residential mental health treatment for a child who is not yet in its temporary legal custody versus a child who has been adjudicated dependent and placed in the Department's legal custody.[114]

Thus, these provisions are constitutionally inadequate to withstand the test established by the Supreme Court of Florida when the fundamental rights implicated here are at stake because they contain no procedural safeguards.[115]

In formulating a procedural rule that provides a dependent child a "meaningful opportunity to be heard" prior to commitment, the court must provide safeguards that, at a minimum, assure the child notice, the appointment of counsel, a pre-placement hearing, the opportunity to be present at the hearing, and to present and rebut evidence.

In the *M.W.* decision, the Supreme Court of Florida noted that one of the purposes of chapter 39 is "[t]o provide judicial and other procedures to assure due process through which children . . . are assured fair hearings by a . . . respected court . . . and enforcement of their constitutional and other legal rights . . . ."[116] The court observed that although there are abundant procedures concerning other aspects of treatment and care for children in the dependency system, no statute or rule specifically set forth procedures that DCF and the court must follow to place a child in a residential facility for mental health treatment.[117] The court noted:

So. 2d 834 (Fla. 4th Dist. Ct. App. 1993) (purpose of judicial review is to assure that the state is making reasonable efforts to promote adoptive placement or return the child to the family unit).

114. M.W. v. Davis, 756 So. 2d 90, 105 (Fla. 2000).

115. *See Winfield*, 477 So. 2d at 544.

116. *M.W.*, 756 So. 2d at 106 (quoting FLA. STAT. § 39.001(1)(*l*) (2000)).

117. *Id.* at 106.

> [N]either Chapter 39 nor our own procedural rules adequately address whether an attorney for the child should be appointed before a commitment to a residential facility takes place, what type of hearing is required, what standard of proof should apply and whether the child should have the right to put on evidence before the court orders a placement in a residential psychiatric facility.[118]

Moreover, because the amendment to section 39.407 is insufficient to ensure what type of hearing is required, what standard of proof should apply and whether the child should have the right to put on evidence *before* the court orders a placement in a residential treatment facility, it is especially critical that the rule adopted by the court afford children with safeguards that protect the privacy interests under the Florida Constitution.

V. THE RULE OF JUVENILE PROCEDURE

Although the court in *M.W.* did not reach the constitutional question under Florida's right to privacy clause, it did hold that there must be procedural safeguards that give the child a meaningful opportunity to be heard. It urged the Juvenile Court Rules Committee to consider a proposed rule submitted by the Guardian ad Litem program *amicus*, to look at rules in other jurisdictions and in particular the New Jersey procedural rules addressing this issue.[119] In essence, then, in formulating an appropriate procedural

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118. *Id.* at 106–07 (internal footnotes omitted).

119. While New Jersey was the one state identified by the court, it should be noted that several other states' supreme courts have already considered the constitutional rights of minors facing psychiatric commitment and have granted minors due process protections, greater than those afforded to minors under the Fourteenth Amendment, consistent with their state constitutions. *See, e.g.*, Washington *ex rel.* T.B. v. CPC Fairfax Hosp., 918 P.2d 497 (Wash. 1996) (granting a fifteen-year-old mentally ill minor's petition for writ of habeas corpus on the ground that the involuntary incarceration of the minor in a mental hospital against her will violated Washington state law and the minor's constitutional right to liberty); *In re* N.N., 679 A.2d 1174 (N.J. 1996) (holding that even though the state has an interest in ensuring the mental health of its children, that interest is not sufficiently compelling to justify infringement upon a child's due process and liberty rights and ruling that a minor who is in need of intensive institutional psychiatric therapy may not be committed without a finding based on clear and convincing evidence that the minor without such care is a danger to others or self); *In re* P.F. v. Walsh, 648 P.2d 1067 (Colo. 1982) (holding that a minor has a substantial and protectable liberty interest in being free from the physical restraints attendant to commitment in a psychiatric hospital); *In re* Roger S., 569 P.2d 1286 (Cal. 1977) (holding that no interest of the state sufficiently outweighs the liberty interest of a mature minor (over age 14) to independently exercise his right to due process in a commitment to a mental hospital).

rule, the Supreme Court of Florida is considering the "procedural safeguards relative to the intrusion."[120]

There are four main procedural safeguards at issue: 1) the right to notice and to be heard; 2) the right to an attorney; 3) the right to a pre-placement court hearing; and 4) the right to present evidence and to have a burden of proof met.

The Juvenile Court Rules Committee drafted proposed Rule 8.350, Placement of Child Into Residential Treatment Center After Adjudication of Dependency, attempting to give consideration both to the court's directives in *M.W. v. Davis* and the recent amendments to section 39.407 of the *Florida Statutes*.[121] The proposed rule, approved by a vote of 18-7-0 (and by the Florida Bar Board of Governors, 8-3) unfortunately failed to mandate counsel, require a pre-placement hearing, define the standard of proof, or spell out what evidence, if any, the child could present at the hearing.[122] It also failed to consider amending rule 8.140(c), governing case plan modification, as directed by the court.[123]

The Committee's proposed rule required notification to the parties of the child's placement in a residential treatment center, including the written findings of the qualified evaluator, within seventy-two hours of placement; the appointment of a guardian ad litem and/or represention by counsel; the submission of a report by the guardian within fourteen days of placement, including a recommendation regarding placement and a statement of the child's wishes; discretionary appointment of counsel by the court upon notification of the child's placement; the setting of a "status hearing" requiring the presence of the guardian and/or attorney (but not the child) within five working days after placement; and a directive to the guardian and/or attorney to attempt to ascertain whether the child consents to placement.[124] The rule additionally set out procedures for an initial placement review, to be set upon motion of any party or if the guardian's report indicates the child objects to placement within the time requested by the moving party or within fourteen days of the filing of the motion or the GAL report.[125]

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120. *In re T.W.*, 551 So. 2d at 1195–96. In formulating juvenile court rules, the Supreme Court of Florida has stated, "[w]e have the authority to establish proper procedures for juvenile proceedings to implement constitutional rights." R.J.A. v. Foster, 603 So. 2d 1167, 1171 (Fla. 1992) (holding that juvenile rule of procedure regarding a time period took precedence over the legislative enactment).

121. The full text of the proposed rule is available at http://www.flcourts.org/sct/sctdocs/proposed.html (last visited May 30, 2001).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

Under the proposed rule, the placement hearing considers the following: based on an independent assessment of the child, the recommendation by DCF that residential treatment is in the child's best interest and that it is the least restrictive alternative available; the GAL's recommendation; the recommendation of the multidisciplinary case review committee, if any; written findings of the evaluation and suitability assessment prepared by a qualified evaluator.[126] Any party can present evidence concerning "suitability of placement" at this hearing. The court is required to order DCF to place the child in a less restrictive setting best suited to the child's needs if the court determines that the child is not suitable for continued placement.[127]

Finally, the proposed rule, tracking recently enacted section 39.407(5) of the *Florida Statutes*, requires an initial review hearing within three months of admission, and continuing review hearing every three months thereafter, until the child is placed in a less restrictive setting. The child must be present at all hearings except the initial five day status hearing.[128]

The two issues that generated the most discussion in both the plenary Committee and a Dependency Subcommittee were whether a pre-placement court hearing was required and whether the appointment of counsel should be mandated for every dependent child recommended for placement in a residential facility.[129] The disagreement over the appointment of counsel in turn prompted a sharply worded Minority Report, which resulted from close and conflicting votes on a draft of the proposed rule that read as follows: "Upon notification that a child has been placed into a residential treatment center, the court *shall* appoint an attorney to represent the child."[130]

The proposed rule also prompted the filing of eight separate comments critical of various aspects of the rule. The comments were filed by Univer-

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126. Proposed Rule 8.350, *available at* http://www.flcourts.org/sct/sctdocs/proposed.html (last visited May 30, 2001).

127. *Id.*

128. *Id.*

129. *Id.*

130. *See* Amendment to FLA. R. JUV. P. 8.100(a), 26 Fla. L. Weekly S171 (Fla. Mar. 15, 2001). The minority argued that a "'meaningful opportunity to be heard is the hallmark of procedural due process," which requires fairness to the litigant, and that for a child to have a meaningful opportunity to be heard in a commitment proceeding, the child must be represented by counsel. The minority stressed that the child as a separate party through his case must be given the opportunity, through his lawyer, to subpoena witnesses, present testimony and evidence, cross examine witnesses and present argument. The report also noted the irony and inconsistency of mandating the appointment of counsel for the lay guardian, while depriving the child himself of legal representation in this proceeding. *Id. See also* Dep't of Children & Family Servs. v. I.C., 742 So. 2d 401, 406 (Fla. 1999) (stating that "the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases").

sity of Miami Children & Youth Law Clinic; University of Miami Law Professor Susan Stefan and the Bazelon Center for Mental Health Law; the Advocacy Center for Persons with Disabilities; the Florida Public Defender Association; the Florida Bar Public Interest Law Section; the Children First Project at Nova Southeastern University; University of Miami Law Professor Bruce Winick and Broward County Judge Ginger Lerner-Wren; and attorney Karen Gievers, representing the Children's Advocacy Foundation, Inc. All of the comments argued that the rule should, at a minimum, provide for notice, counsel, and a meaningful opportunity to be heard before children can be involuntarily placed by DCF in residential treatment centers.[131]

The essential elements that the rule should contain, in order to comport with the privacy interests of the child at stake in this type of proceeding, and to afford the child a meaningful opportunity to be heard, are the following.

A. *The Right to Notice and to be Heard*

In *M.W.*, the Supreme Court of Florida held that the foster child facing commitment to a psychiatric institution must be provided "a meaningful opportunity to be heard."[132] The court recognized the importance of "whether a child believes that he or she is being listened to and that his or her opinion is respected and counts."[133] Indeed, former foster children were extremely troubled that they were not heard when critical decisions were being made about their lives. A recurrent theme in their comments was the importance of consulting with children and allowing them to share in, and contribute to, decisions that need to be made.[134]

The fundamental principles of due process require notice and the opportunity to be heard, but a child in foster care is typically provided neither. Chapter 39 provides for judicial review hearings at six month intervals for children in foster care.[135] With the recent statutory amendments, chapter 39 now provides for judicial review hearings at three month intervals for foster children placed in residential treatment centers.[136] However, chapter 39 does not include the child among those who must be noticed for a

131. *See generally* therapeutic jurisprudence arguments of Winick/Lerner-Wren and Stefan/Bazelon, as well as the high points of the other six comments.

132. M.W. v. Davis, 756 So. 2d 90, 109 (2000).

133. *Id.* at 108.

134. FESTINGER, *supra* note 1, at 281. "Some felt left, and others felt left out: 'They always had conferences and you weren't in on it and they don't tell you what they discussed about you . . . then they write a report and you don't know what they've said.' Some felt that general statements such as 'it's in your best interest' makes you feel like a client, not a person." *Id.*

135. FLA. STAT. § 39.701(1)(a) (2000).

136. § 39.407(5)(h).

judicial review hearing, and it does not provide the child with the right to be heard at a judicial review hearing.[137]

The *Florida Rules of Juvenile Procedure* provide that a child is a party to his dependency case,[138] and therefore the child is entitled to receive the same notice as any other party.[139] The *Florida Rules of Juvenile Procedure* further entitle the child to be heard at court hearings.[140] However in reality, most children are not provided with notice of their hearings and are not heard by the court.

For example, statistics compiled in the District XI (Miami-Dade County) Florida Foster Care Review's Annual Data Summary Reports demonstrate that there is a near absence of children's participation in their foster care review hearings. In a recent year, out of 1214 cases reviewed with children over the age of ten, involving a total of 1766 children, only 234 children participated in the review hearings of their cases.[141]

On a daily basis in Florida, judicial review hearings take place in dependency court, and every party is heard from, except the most important party—the child. In addition, routinely only *one* party is present for foster care review hearings and therefore only one party is heard from—the Department of Children & Families. Without hearing from the child or from anyone other than DCF, the court cannot know if it is being provided with inaccurate or incomplete information, as frequently occurs.

The experiences of various clients of the Children & Youth Law Clinic illustrate the need for the court to hear from them and to listen to them.[142] One client of the Clinic, upon reaching the age of majority, read her court file and discovered various reports and evaluations submitted to the court unbeknownst to her which contained inaccurate and prejudicial information. This information had resulted in her commitment to a locked psychiatric facility where she was subsequently abused. She described how she was taken to the facility by her DCF worker and a police officer, without being able to talk to a judge. It was not until she saw her court file and looked at

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137. *See* § 39.701(5)(a)–(f) (notice must be provided to such persons as the social service agency charged with the supervision, custody or guardianship of the child, the foster parents or legal custodian, the parents, the guardian ad litem, among others but not the child).

138. FLA. R. JUV. P. 8.210.

139. FLA. R. JUV. P. 8.225(c); 8.235(a).

140. FLA. R. JUV. P. 8.100(a).

141. DISTRICT XI FLORIDA FOSTER CARE REVIEW'S ANNUAL DATA SUMMARY REPORTS (1997–98). Additionally, out of 1681 total reviews heard, children only had an assigned guardian ad litem in 348 cases. *Id.*

142. *See generally* Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1 (1999) (discussing the importance of listening to the real foster care experts, the children severed by the system).

the numerous court orders in the file that she realized there had been regular court hearings and reviews of her case from which she had been systematically excluded. Unfortunately, this foster youth's experience is typical of the experiences of children in foster care who are committed to psychiatric facilities.

Numerous foster youth have described to the attorneys and interns in the Clinic & Youth Law Clinic their experiences and feelings when they have been locked up in psychiatric institutions, subjected to seclusion, four point restraints, the forced administration of potent psychotropic medications, and limitations imposed on family contact and visitation, without ever having been heard by the juvenile court. Even if a foster child is not noticed or heard in foster care review proceedings on a regular basis, as the child should, the child *must* be provided notice and an opportunity to be heard in a proceeding involving the child's commitment to a locked psychiatric facility where the child's liberty and privacy rights are at stake. No foster care hearing regarding the child's psychiatric commitment should proceed without providing the child notice and the opportunity to be heard directly by the court.

The juvenile court in a delinquency proceeding in all certainty would not proceed to adjudicate the child and thereby deprive him of liberty, without first ascertaining that the child was provided notice and the opportunity to be heard directly by the court. In *M.W.*, the Supreme Court of Florida stated: "[i]ronically, our rules provide more procedural protections in this situation for children in the custody of the state because they are delinquent than for those children who are in the custody of the state because they have been adjudicated dependent through no fault of their own."[143] A foster child facing commitment to a psychiatric institution is entitled to the same notice and opportunity to be heard as a delinquent child who faces the same commitment.

In fact, in rejecting a proposal that juvenile detention hearings in delinquency proceedings be conducted through audiovisual devices rather than the children's personal appearance in court, the Supreme Court of Florida stated:

> Florida's oft-repeated pledge that 'our children come first' cannot ring hollow in—of all places—our halls of justice. Not simply allowing, but mandating that children attend detention hearings conducted through an audio-visual device steers us towards a sterile environment of T.V. chamber justice, and away from a system where children are aptly treated as society's most precious resource. It is time that we understand that these youths are indi-

143. *See* M.W. v. Davis, 756 So. 2d 90, 108 n.36 (2000).

> viduals and require sufficient resources if we are to expect a brighter tomorrow. . . . Personalized attention and plans are necessary to properly address the multiple and complex problems facing today's children.[144]

A foster child has as much of a right to be heard directly by the juvenile court at a foster care hearing as does a delinquent child at a delinquency hearing.

Further, a foster child facing commitment to a locked psychiatric institution through a dependency proceeding suffers the same loss of liberty and privacy as a child facing the same psychiatric commitment in a delinquency proceeding. In Michael's case, he could not understand why children placed in the same locked psychiatric facility as he was placed had received a full hearing before the juvenile court prior to being committed to the facility, while he did not. Michael could understand that children do not have the same rights as adults, and therefore he did not receive the procedural due process given to the adults committed to South Florida State Hospital in the mental wards that were yards away from him. However, he could not understand why another child in state custody placed in a bed next to him, in the same locked facility, had received so much greater procedural due process from the juvenile court prior to being committed than he received.

B. *The Right to Counsel*

In addition to notice and the opportunity to be heard, a foster youth must be provided with an attorney if the youth seeks to contest his or her commitment. In *T.W.*, the Supreme Court of Florida held that "[i]n proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution."[145] Indeed:

> A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to

144. Amendment to FLA. R. JUV. P. 8.100(a), 25 Fla. L. Weekly S516 (Fla. Mar. 15, 2001) (internal citation omitted).

145. *In re* T.W., 551 So. 2d 1186, 1196 (Fla. 1989).

> navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.[146]

The Supreme Court of Florida has required the State to be represented by counsel in all dependency proceedings, including judicial review proceedings.[147] In *In re D.B.*, the supreme court held that counsel for the parent is mandatory in dependency proceedings where the parent-child relationship is in danger of being severed, but counsel for the child is discretionary.[148] In proceedings involving an infringement of the parent-child relationship, the parent's attorney can adequately protect both the parent's and the child's mutual constitutional right to family integrity. Thus, separate counsel for the child is not necessary to protect the child's right to family integrity. However, in a dependency proceeding involving the child's commitment to a psychiatric institution, it is the child's constitutional rights to liberty and privacy that are at stake and there is no other counsel to protect this right. Even if a minor is not ordinarily entitled to an attorney in dependency proceedings, the minor must be provided with counsel in a proceeding involving his commitment to a long-term, locked psychiatric institution, as this proceeding would wholly deprive him of his ability to exercise his fundamental right to privacy under the Florida Constitution.[149] Therefore, under these circumstances counsel for the child is mandatory.

Finally, contrary to the Majority in its attempt to justify a rule that mandated guardians but not counsel for children in these proceedings, an appointed guardian is no substitute for legal counsel. As correctly noted by the Minority Report, an attorney provides the child with important and irreplaceable protection of a child's constitutional interests that a guardian cannot provide:

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146. *Id.* (quoting Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983)).

147. Florida Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989).

148. *In re* D.B., 385 So. 2d 83, 91 (Fla. 1980).

149. Not only is the child a party to his or her dependency case under chapter 39 and the *Florida Rules of Juvenile Procedure*, but the child is a "patient" and as such is protected by the safeguards enumerated in chapter 394. Under section 394.875(10) of the *Florida Statutes*, children placed in residential treatment centers are accorded the rights of patients set forth in section 394.459. *See* § 394.875(10) (2000) Indeed, when placed in residential treatment, "[c]hildren's rights, as specified in Section 394.459, F.S., for patients, shall be safeguarded. Children shall be informed of their legal and civil rights, including the right to legal counsel and all other requirements of due process. Receipt of such information shall be documented by parent or guardian, and the child's signature." FLA. ADMIN. CODE ANN. r. 65E-10.021 (2001).

> The minority believes that this advocacy cannot be provided by the guardian ad litem or the guardian ad litem's attorney, as set forth in subdivision (a)(3) of the proposed rule. See § 39.820(1). Fla. Stat. (1998). The American Bar Association's Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (approved by the ABA House of Delegates, February 5, 1996), provide that a child's attorney is charged with providing "legal services for a child" and "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." In contrast, a lawyer who is appointed as a guardian ad litem is "appointed to protect the child's interests without being bound by the child's expressed preferences." Thus only an attorney for the child can properly advocate for the child and provide him or her with a "meaningful opportunity to be heard."[150]

C. *The Right to a Pre-Placement Court Hearing*

Procedural due process under the United States Constitution guarantees that the states shall give every person "fair notice" and "a real opportunity to be heard" in a "meaningful manner" and at "a meaningful time."[151] In *M.W.*, the Supreme Court of Florida stated: "we cannot eschew the necessity for a hearing *before* a dependent child is placed in residential treatment against his wishes simply because other statutorily mandated hearings are already required or because it would otherwise burden our dependency courts."[152] The Juvenile Court Rules Committee was under the belief that it could not mandate a pre-placement hearing for a child facing commitment to a long-term residential treatment facility because the recent amendment to chapter 39 did not require such a hearing. However, the Supreme Court of Florida can require that the child be provided a pre-placement court hearing.[153]

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150. *See* Minority Report; *see also* Jan C. Costello, *Representing Children in Mental Disability Proceedings*, 1 CENTER FOR CHILDREN & THE CTS. J. 101 (1999) (recommending that lawyers for children in civil commitment proceedings pursue the client's legal interests and avoid functioning as a guardian ad litem or therapist, and observing that "[b]y skillful and zealous representation they must seek to empower the child client").

151. Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 960 (Fla. 1991) (citation omitted).

152. M.W. v. Davis, 756 So. 2d 90, 109 (2000) (emphasis added).

153. In the *M.W.* decision, the Supreme Court of Florida noted that legislation was then pending that would clearly set forth the procedures to be used before a dependent child may be placed in a residential psychiatric facility. *M.W.*, 756 So. 2d at 107 n.34. However, the enacted legislation is silent as to a pre-placement hearing procedure, which makes the necessity for such a proceeding through the Juvenile Court Rules even more critical.

In addition to the child's rights under the Florida Constitution, the circuit court has both the constitutional authority[154] and the inherent power to protect children, which cannot be restricted by statute. The doctrine of inherent judicial power is necessary for the court to protect its independence and integrity and to make its lawful actions effective.[155] As the Supreme Court of Florida has stated, "[t]he invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights."[156] The court stressed that "where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements."[157]

The court's protection of children and their fundamental rights is perhaps the court's most important inherent power. This inherent power, which stems from the duty of chancery courts to protect the interests of minors, is well-established.[158] Indeed:

> Independent of statute or rule a court of chancery has inherent jurisdiction and right to control and protect infants . . . [Courts] must exert the utmost vigilance to see that the rights of so protected a class as that of infants are not infringed on or destroyed. The court itself is, in legal contemplation, the infant's guardian.[159]

Although the court is the infant's guardian:

> Courts lack the physical ability to efficiently carry out custodial functions at all stages of dependency proceedings . . . . In recognition of this fact the legislature gave the courts the prerogative to divest themselves of the actual physical care of children alleged or adjudicated to be dependent while still maintaining the exclusive original jurisdiction of the courts. All powers not expressly divested by the court are retained by it.[160]

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154. FLA. CONST. art. V, § 5(b).

155. *See, e.g.*, Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978).

156. *Id.* at 137.

157. *Id.*

158. Dep't of Health & Rehab. Servs. v. Hollis, 439 So. 2d 947 (Fla. 1st Dist. Ct. App. 1983). "'Chancery is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom.'" *Id.* at 949 (citing Cooper v. Cooper, 194 So. 2d 278, 281 (Fla. 2d Dist. Ct. App. 1967) (internal quotations omitted)).

159. *Id.* at 949 (citing Brown v. Ripley, 119 So. 2d 712, 717 (Fla. 1st Dist. Ct. App. 1960)).

160. Div. of Children & Family Servs. v. Florida, 319 So. 2d 72, 76 (Fla. 1st Dist. Ct. App. 1975).

"Indeed, it is not conceded that under our Constitution, vesting as it does the circuit courts with equity jurisdiction, this power could, under our Constitution as it stands, be taken away by statute."[161]

The Supreme Court of Florida holds that "[a] statute which attempts to restrict the inherent powers will be broadly interpreted as laying down reasonable guidelines within which the power operates rather than as a sole or actual source of the power."[162] Additionally, where the supreme court promulgates rules relating to the practice and procedure of the courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.[163]

In developing the new rule of court, as noted previously, the Committee did not respond to the court's directive to consider existing rule 8.410(c) that governs court approval of amendments to the child's case plan, but this is integral to the proposed rule. The dependency court adopts a case plan for each child in foster care, in which it orders the "type of placement," and "type of home or institution" where the child is to be placed and specifies the placement that is in the "least restrictive and most family-like setting available . . . in as close proximity as possible to the child's home."[164] This is not just a requirement of state statutory law,[165] and the existing juvenile rules of court,[166] but is also a requirement of federal law.[167] Moreover, this is part of the circuit court's constitutional and inherent power to protect children.

Once the court adopts the case plan, it becomes an order of the court. A statute cannot authorize DCF to unilaterally change the conditions of the child's placement, in contravention of the court's existing order. Michael's own case provides a stark example, as his court-ordered case plan placed him in a foster home, with the goal of reunification and regular family therapy with his mother. In contravention of the court-ordered case plan, DCF instead placed him in a locked psychiatric institution in another county

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161. *Cooper*, 194 So. 2d at 281.

162. *Rose*, 361 So. 2d at 139 n.14; *see, e.g.*, Smith v. Miller, 387 P.2d 738 (1963); State v. Webb, 21 N.E.2d 421 (1939); Bass v. County of Saline, 106 N.W.2d 860 (1960).

163. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991).

164. Although the court cannot name the specific foster home or facility where the child is to be placed, it is well-established that the court can name the type of placement. *See, e.g.*, *In re* L.W., 615 So. 2d 834 (Fla. 4th Dist. Ct. App. 1993); *In re* F.B., 319 So. 2d 77 (Fla. 1st Dist. Ct. App. 1975); *see also* Henry & Rilla White Found., Inc. v. Migdal, 720 So. 2d 568, 574 (Fla. 4th Dist. Ct. App. 1998) (indicating that "the department and the court have overlapping and concurrent power over matters relating to dependency and delinquency proceedings").

165. FLA. STAT. § 39.601 (2000).

166. FLA. R. JUV. P. 8.410, Form 8.967.

167. *See* 42 U.S.C. § 675–679a (2000).

far away from his mother. This required a court-ordered amendment to the case plan, after notice and an evidentiary hearing.[168]

A psychiatric institution where the child is subject to restrictive and potentially hazardous treatment modalities is a drastically different type of placement than a foster home. When the child's court-ordered case plan requires placement in a foster home, DCF may move the child from foster home to foster home without prior court approval. However, a change in the type of placement from foster home to psychiatric institution requires an amendment to the child's case plan, following notice and an evidentiary hearing.[169] The court's constitutional authority to protect children mandates a court hearing prior to the child's placement being changed to a locked psychiatric institution.[170]

Moreover, when a child is involuntarily committed to a psychiatric institution where the child is subject to physical and chemical restraint, as well as a documented risk of serious mental and physical injury and even death, the child's right to privacy under the Florida Constitution is clearly implicated. A residential treatment center for children and adolescents

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168. In the child's case plan, the court orders the "type of placement," and "type of home or institution" where the child is to be placed, and the child cannot be placed in contravention of a valid, existing court order. FLA. STAT. § 39.601 (2000). Additionally, while the amendment to section 39.407 of the *Florida Statutes* is silent on the necessity for a pre-placement hearing, chapter 39 continues to mandate that DCF, as temporary legal custodian, can only provide a child with ordinary psychiatric and psychological treatment, unless the court orders otherwise. § 39.01(70).

169. Where the child requires short-term hospitalization or treatment in a crisis facility, then there is no need for the court to conduct a pre-placement hearing. However, when the type of the child's long-term placement is changed from a foster home to a psychiatric institution in contravention of the court-ordered case plan, then a pre-placement hearing is required. Moreover, viewed from both the child's perspective and from the child's best interests, the child should not be subjected to the intrusiveness and harmful effects of this type of placement, nor should the child be bounced around like a "ping-pong ball," being sent to a residential treatment center in a different county, only to be discharged by the court days or weeks later.

170. Moreover, as the Supreme Court of Florida noted in *M.W.*, providing pre-placement hearings for children facing long-term commitment to residential centers should not be eschewed just because it would be burdensome to the dependency courts. *M.W.*, 756 So. 2d at 109. In fact, the courts would not be unduly burdened by having to conduct such hearings, as the number of foster care children in residential psychiatric settings represents a relatively small percentage of the total population. For example, in Miami-Dade County the number of foster care children placed in long-term psychiatric residential treatment facilities in 1999–2000 totaled only 94, representing only three percent of the children in foster care in the county. FOSTER CARE REVIEW, INC., ANNUAL RECAPITULATION REPORT (July 1999–July 2000).

utilizes "a variety of treatment modalities in a more restrictive setting,"[171] including the use of psychotropic drugs, restraints, and seclusion.[172] Under these circumstances, the "procedural safeguards relative to the intrusion"[173] should include a pre-placement court hearing.

D. *The Right to Present Evidence and the Burden of Proof Required*

In developing the rule, the court must also consider the question of the evidentiary standard to be met. In *M.W.*, the Fourth District ruled that because the juvenile court has an "ongoing relationship" with a dependent minor, the presentation of evidence is not necessary in court reviews involving the child's commitment to a psychiatric institution.[174] In the ideal system, a juvenile court judge does have an ongoing relationship with a child. In reality, though, just as the dependent child often has a constant turnover of social workers, so too does the child often have a number of juvenile court judges presiding over the case during the time the child may spend in the state foster care system. In addition, given the extraordinary number of cases in each juvenile judge's docket, even if there is one consistent judge presiding, it is difficult for a judge to recollect every child in his or her docket. As demonstrated in Michael's case, even though there had been several hearings before the court, the court stated at the start of the hearing in which the child was committed: "I don't remember this child, so tell me a little about the case."[175] No judge can possibly remember the details of the hundreds of cases in his or her docket. Without a meaningful hearing, the court cannot know if it is being provided with erroneous or incomplete information, as M.W. maintains occurred in his case, and has the potential to occur in every case where a minor is being institutionalized by the state. In a proceeding involving the child's commitment to a psychiatric institution, a perfunctory hearing before the juvenile court does not provide the child with

171. FLA. STAT. § 394.67(22) (2000).

172. *See* § 394.875(10); FLA. ADMIN. CODE ANN. r. 65-10.021(8) (discussing procedures for use on children of mechanical restraints, canvas jackets, and cuffs and requiring additional justification for other hazardous procedures or modalities that place the child at physical risk or which are potentially painful); *see also* Godwin v. State, 593 So. 2d 211, 216 (Fla. 1992) (Kogan, J., concurring in part and dissenting in part) ("we tend to forget exactly what civil commitment means: [t]he person is taken out of society, deprived of liberty . . . and involuntarily subjected to examination and treatment. There is very little difference between this procedure and incarceration for crime"); Tal-Mason v. State, 515 So. 2d 738, 740 (Fla. 1987) (equating a psychiatric institution to a jail because of the facilities for enforced confinement).

173. *In re* T.W., 551 So. 2d 1186, 1195–96 (Fla. 1989).

174. M.W. v. Davis, 756 So. 2d 90, 104 (Fla. 2000).

175. Record at 29, M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).

any meaningful protection. A child must be provided the opportunity to present and rebut evidence in a proceeding where the child's liberty and privacy is at stake.

Moreover, when constitutionally protected rights are being impinged upon by the state, the state has a burden of proof, which can be no less than clear and convincing evidence.[176] Indeed, the Supreme Court of Florida "has consistently held that the constitution requires substantial burdens of proof where state action may deprive individuals of basic rights."[177] In non-criminal contexts, the court has held that constitutionally protected individual rights may not be impinged with a showing of less than clear and convincing evidence.[178] Chapter 39 does not provide *any* evidentiary standard for the court to follow in judicial review proceedings, nor does it provide for the rules of evidence to be followed at the hearing. Even if the rules of evidence are not followed during judicial review hearings regarding the child's general status, the rules of evidence must be followed in proceedings involving the minor's commitment to a long-term, locked psychiatric institution, as the minor's constitutional rights are at stake.

As the supreme court has made clear, "[t]he seriousness of the deprivation of liberty and the consequences which follow in adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual's liberty is in jeopardy."[179] This is necessary because of the uncertainty and risk of erroneous psychiatric diagnosis may result in inappropriate commitment to a mental institution.[180]

Additionally, in the context of psychiatric commitment, the Supreme Court of Florida has required the trial court, by clear and convincing evidence, to "eliminate the possibility of successful treatment through some less restrictive alternative."[181] As one commentator has noted:

> The doctrine of the least restrictive alternative found in mental health law has its roots in basic constitutional doctrine. A state-imposed bur-

176. *See generally* Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 967 (Fla. 1991).

177. *Id.*

178. *Id.*

179. *In re* Beverly, 342 So. 2d 481, 489 (Fla. 1977).

180. *See In re* Roger S., 569 P.2d 1286 (Cal. 1977) (holding that neither the state nor the parent has an interest in committing a child to a state mental hospital if the child is not in need of treatment and if commitment is based on erroneous information and evaluation); *see also In re* Michael E., 538 P.2d 231 (Cal. 1975) (establishing criteria for admission of minors who are wards of the state where the state seeks to commit the minors to psychiatric institutions).

181. *In re* Beverly, 342 So. 2d at 490.

> den on a 'fundamental' right, such as certain liberty [or privacy] rights, is constitutional only if the burden is *necessary* to further a compelling government interest. Thus, if the government's interest can be promoted by a means that imposes a lesser burden on the right, the more burdensome means is constitutionally impermissible.[182]

VI. *PARHAM V. J.R.* AND THE NEW SOCIAL SCIENCE RESEARCH

In ruling that a dependent child must be provided a meaningful opportunity to be heard prior to commitment to a residential facility, the court rejected the arguments that Florida law and the U.S. Constitution afford the child this right. The lynchpin of its decision in *M.W.*, and the directive to the Juvenile Court Rules Committee was its observation that:

> While the child's best interests may in fact be paramount in the eyes, minds and hearts of every participant in the dependency proceeding, it is important that our procedures in dependency cases ensure that each child is treated with the dignity to which every participant in a dependency proceedings should be entitled. It is true that the dependency court, a citizen review panel, the Department and multiple psychiatrists and psychologists were involved in M.W.'s case and all were concerned with his best interests. However, of paramount concern is the question of whether M.W. perceived that anyone had his best interests at heart when he was placed against his wishes in a locked psychiatric facility without the opportunity to be heard.
>
> Indeed the issue presented by this case extends beyond the legal question of what process is due; rather, this case also presents the question of whether the child believes that he or she is being listened to and that his or her opinion is respected and counts.[183]

Over twenty years ago, in 1979, the United States Supreme Court decided *Parham v. J.R.*, in which the Court ruled that the Fourteenth Amendment to the United States Constitution does not bar parents or the

182. Weithorn, *supra* note 33, at 787 n.85. (citations omitted) (emphasis added).

183. M.W. v. Davis, 756 So.2d 90, 107–08 (Fla. 2000); *see* MELTON, *supra* note 37, at 146–47 (stating that children obtain psychological benefit from procedural protections prior to being placed in psychiatric treatment facilities).

state from committing children "voluntarily" to a mental hospital.[184] In its ruling, the Court relied upon an *amicus* brief submitted by the American Psychiatric Association and the social science research prevalent at the time.[185] Two decades later, the social science research now stands inapposite. In *Parham*, Justice Burger stated that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment."[186] However, this *dicta* by the Supreme Court is one of a number of outmoded "assumptions" that the Court relied upon in its ruling.

Indeed, the social science research now indicates that "at least in their reasoning about treatment decisions, adolescents are indistinguishable from adults."[187] In a leading research study, clinical psychologists:

> [P]resented hypothetical dilemmas about medical and psychological treatment decisions to nine, fourteen, eighteen, and twenty-one-year olds. The responses of the fourteen-year olds could not be differentiated from those of the adult groups, according to any of the major standards of competency: evidence of choice; reasonable outcome or choice; reasonable decision making process; understanding the facts.[188]

This empirical evidence indicates that:

> [t]here seems to be ample basis for reversal of current presumptions in favor of a view of adolescents as autonomous persons possessed of independent interests regarding liberty and privacy. Ac-

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184. Parham v. J.R., 442 U.S. 584 (1979). In filing his petition for habeas, Michael did not seek his release from Lock Towns under the Fourteenth Amendment to the United States Constitution, because he knew that such relief would be precluded by the Supreme Court's ruling in *Parham*. Michael predicated his relief entirely on the *Florida Statutes* and the Florida Constitution, consistent with the Supreme Court's discussion in *Parham* referencing the state's ability to provide more expansive rights for children than allowed by the Fourteenth Amendment and the need to provide greater judicial protection for wards of the state.

185. *Id.* at 606.

186. *Id.* at 603.

187. Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts:* Parham *as an Example*, 22 J. FAM. L. 633, 649 (1983–84) (citations omitted).

188. Gary B. Melton, *Toward Personhood for Adolescents: Autonomy and Privacy as Values on Public Policy*, 38 AM. PSYCHOL. 99 (Jan. 1983); *see also* Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075 (1996) (arguing that minors should be accorded due process in contested medical treatment cases to protect their rights to informed consent, bodily integrity, self-determination, and privacy).

> cordingly, psychologists should actively involve minors in decision making about treatment and research, and policy-makers should begin their analyses of issues involving adolescents with respect for their autonomy and privacy.[189]

In fact, both the American Psychiatric Association and the American Psychological Association now strongly support due process for adolescent minors facing psychiatric institutionalization, particularly when the minor is a ward of the state. Both associations have drafted or voted to endorse model commitment statutes or approved guidelines for minors facing commitment to psychiatric facilities that provide the youth substantial due process prior to commitment.[190]

In 1981, two years after *Parham*, the American Psychiatric Association approved a set of guidelines for the psychiatric hospitalization of minors. The guidelines, prepared by the Association's Task Force on the Commitment of Minors, guarantee children over the age of sixteen the right to contest an involuntary admission to a psychiatric facility, the right to an involuntary commitment hearing, and the right to counsel at the involuntary commitment hearing.[191] At the involuntary commitment hearing, the child through his appointed counsel has the right to cross examine witnesses favoring commitment and the right to present testimony and evidence in opposition to commitment and/or in favor of less structured alternatives.[192]

In addition to these protections, the party seeking to commit the child against his will has the burden of showing the court by clear and convincing evidence that: a) the child has a mental disorder; b) the child is in need of treatment or care available at the institution to which involuntary commitment is sought; and c) no less structured means are likely to be as effective in providing such treatment or care. If the court, after hearing the evidence presented, commits the child to a psychiatric program, the duration of the initial commitment cannot exceed forty-five days, with the next commitment for ninety days, and subsequent commitments of six months.

More recently, the American Psychological Association's Division of Child, Youth, and Family Services endorsed guidelines that provide similar due process to youth facing psychiatric commitment.[193] Both the guidelines by the American Psychological Association and the American Psychiatric

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189. Melton, *supra* note 188, at 99.

190. *See generally* Amer. Psychiatric Ass'n & Amer. Psycho. Ass'n Children's Model Mental Health Code.

191. *See generally* http://www.psych.org/index.cfm.

192. *Id.*

193. *See generally Guidelines for Psychological Evaluations in Child Protection Matters, available at* http://www.apa.org/practice/childprotection.html (last visited Sept. 16, 2001).

Association apply even where the parent is seeking the youth's commitment.[194]

VII. THERAPEUTIC JURISPRUDENCE

Commendably, the Supreme Court of Florida was able to see Michael's perspective and understand how he felt when he was committed to a psychiatric institution without the opportunity to be heard by the court.[195] Providing a minor due process in the context of mental health commitment enhances therapeutic and psychological benefits for the minor. A number of research studies have found that providing adversarial proceedings produces positive psychological benefits for children. Empirical research indicates that "having some control over the process (a form of control inherent in a truly adversarial system) is likely to enhance a child's sense of perceived justice . . . and perhaps decrease resistance to treatment if it ultimately is ordered." [196]

Indeed, significant clinical evidence exists showing a greater likelihood of the treatment succeeding when adolescents participate in the decision to begin treatment.[197] Contemporary research on civil commitment hearings conducted by social psychologists and therapeutic, jurisprudence scholars strongly favors procedures that "increase patients perceptions of fairness, participation, and dignity, thereby increasing the likelihood that they will accept the outcome of the hearing, will view that outcome as being in their best interests, and will participate in the treatment process in ways that will bring about better treatment results."[198]

A research study found considerable benefits resulting from allowing adolescents to have judicial hearings prior to their commitment if they objected to hospitalization.[199] The researchers reported hospital staff believed that giving adolescents a hearing if they objected to hospitalization was "helpful to children" for the following reasons:

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194. *See generally* http://www.psych.org/index.cfm; http://www.apa.org.

195. *See* M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).

196. *See* MELTON, *supra* note 37, at 139–41.

197. *See* Rochelle T. Bastien & Howard S. Adelman, *Noncompulsory Versus Legally Mandated Placement, Perceived Choice, and Response to Treatment Among Adolescents*, 52 J. CONSULTING & CLINICAL PSYCHOL., 171, 177 (1984).

198. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 60 (1999).

199. Alan Meisel & L.H. Roth, *The Child's Right to Object to Hospitalization: Some Empirical Data*, 4 J. OF PSYCHIATRY & L., 377–92 (1976).

1. The procedure gave the child the opportunity to tell how he felt. He had the opportunity to express his objection.
2. The procedure crystallized the issue of the need for treatment. It made the child (and the family) confront the issue of whether or not the child really needed or wanted to be hospitalized.
3. It made the child feel that he had been treated fairly; if he objected, he would have an impartial hearing.
4. The procedure afforded the child some measure of control over his own destiny.
5. This procedure was a step in the patient's involvement in planning for his own care.
6. The judge could only release the child if he did not need to be hospitalized.[200]

As one commentator noted: "[p]rocedural due process does not immunize persons against deprivations of life, liberty, or property; it simply insists on a degree of fairness and humanity. . . . To that degree the *capacity* of children has nothing to do with their right to be treated fairly, decently, and humanely by their government. They are entitled to such treatment not because they are competent but because they are persons.[201] Indeed, "the 'competency' of the claimant bears little or no relationship to the issue of entitlement, primarily where the liberties involved are aimed not at maximizing free choice but at civilizing the process and instruments of state compulsion."[202]

VIII. CONCLUSION

The Children & Youth Law Clinic's perspective as counsel for foster youth has given it a unique ability to see these proceedings from the eyes of the child. Many clients have expressed feeling "like pieces of furniture" when placed in psychiatric facilities without being seen or heard by the court. They have described feeling "shut up" and "shut out" when deprived

200. *Id.* at 384–85; *see also In re* Gault, 387 U.S. 1, 27 (1967) (observing that that the appearance as well as the actuality of fairness, impartiality and orderliness—in short the essentials of due process—may be a more impressive and therapeutic attitude so far as the juvenile is concerned).

201. *See* Leon Letwin, *After* Goss v. Lopez*: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 642 (1977).

202. *Id.*

of the chance to speak to the judge to contest their placement or to correct inaccurate information in the court record. Thus, it is important to view the issue through the eyes of the child who faces commitment.

As one former foster youth has written: "[f]oster care begins with the terror of suddenly losing family, friends, toys, clothes, siblings, relatives, neighborhood, and home. A child faces strange surroundings, strange people, the indignity of a medical strip search, and questions that aren't nice."[203] When a foster child is placed in a residential psychiatric facility, the child experiences the same feelings of loss, indignity, and dislocation. It is therefore essential that foster children be provided with meaningful due process procedures and protection by the juvenile court prior to, as well as during, their placement in psychiatric facilities.

Indeed:

> The decisions in foster care often involve many, and sometimes conflicting, interests. The viewpoints of the children are, therefore, not sufficient alone but need to be seen as a necessary part of the considerations that determine the recommendations that are made. Such a practice can be beneficial in the long run since it is almost axiomatic that those who participate in making decisions are more concerned about making things work out . . . . Surely a field that stresses the self-determination of clients needs to take steps to avoid drowning out the voices of children.[204]

Ultimately, it is hoped that the Supreme Court of Florida's willingness to consider the feelings and perceptions of Michael and the psychological benefits of affording the child a hearing, and most important, Michael's valiant struggle to have his voice heard, will inform the court's consideration of a rule of procedure that provides dependent children a truly meaningful opportunity to be heard by affording them the right to notice, counsel, a pre-placement hearing, and the right to present and rebut evidence of the need for commitment in a psychiatric facility before the state can commit them to these facilities.

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203. Jessica Watson Crosby, *Why Foster Care Can Never Be Reformed*, FOSTER CARE YOUTH UNITED, 32 (May/June 1997).

204. Festinger, *supra* note 1, at 296-97.