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2002 SURVEY OF FLORIDA JUVENILE LAW

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I. INTRODUCTION

Children are entitled to counsel, including a lawyer free of charge in a delinquency case, because the Supreme Court so held thirty-five years ago in *In re Gault*.[1] The Florida trial courts seem to have trouble properly explaining to a child about the right to counsel and determining whether the waiver is knowing, intelligent, and voluntary. This year, the intermediate appellate courts ruled in a number of cases on relatively blatant violations of the juvenile's right to counsel. The Supreme Court of Florida weighed-in in the area, albeit on a procedural matter. The court held that, while a motion to withdraw a plea is generally required prior to appellate review, since the child had no lawyer, a direct appeal would lie.[2] Issues of the right to counsel also arose in dependency and termination of parental rights cases where, by statute, Florida requires counsel for parents. The intermediate appellate courts ruled that a parent is entitled to proper notice of a proceeding, as well as notice to the attorney for the parent, that failure to appear may result in termination of parental rights.[3] However, the court is bound by the context of the statute, which addresses when there must be parental appearance and when counsel may withdraw at the appellate level.[4] The proper standard for withdrawal differs, and is dependent upon which district court of appeal is speak-

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1. 387 U.S. 1 (1967).
2. State v. B.P., 810 So. 2d 918, 919 (Fla. 2002).
3. FLA. STAT. § 39.801(3)(d) (2002).
4. *Id.*

ing.[5] Finally, in both the dependency and termination area, a number of appellate court opinions deal with the question of prospective neglect, including how to evaluate whether the neglect of one child can constitute grounds for neglect of the other, under the 1991 United States Supreme Court opinion in *Padgett v. Department of Health & Rehabilitative Services*.[6]

II. JUVENILE DELINQUENCY

A. *Adjudicatory Issues*

The 1967 United States Supreme Court ruling in *In re Gault* requires the provision of counsel to children in delinquency cases, and if the child is indigent an attorney paid for by the state.[7] As reported in virtually every juvenile survey article written by the author since 1989, the Florida trial courts continue to fail to comply with *Gault's* provision of counsel requirement.[8] In *V.S.J. v. State*,[9] the failure of the court to properly advise a child of the right to counsel and waiver was again before the appellate court.[10] As has happened so often in Florida, the trial judge addressed the juveniles appearing before it en masse and advised the youngsters as a group of their rights.[11] Reversing and remanding for the failure to comply with proper advice of the right to counsel and failure to obtain a knowing and intelligent waiver of counsel at every stage of the proceedings, the appellate court in *V.S.J.* said, "[w]e recognize that this method [referring to the en masse explanation] offers some convenience, but it also reduces the probability that every accused will be adequately and effectively advised of his or her constitutional rights."[12] The trial courts ought to dispose of this regular violation of children's constitutional rights and provide the proper admonition and evaluation of voluntary relinquishment on an individual basis.

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5. *Id.*
6. 577 So. 2d 565 (Fla. 1991).
7. 387 U.S. at 41.
8. Michael J. Dale, *Juvenile Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 903, 903–04 (2002) [hereinafter Dale I]. Under Florida law, children do not have the right to counsel in dependency or termination of parental rights cases. *See also* Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 783 (2001).
9. 793 So. 2d 104 (Fla. 2d Dist. Ct. App. 2001).
10. *Id.* at 105.
11. *Id.* (citing G.E.F. v. State, 782 So. 2d 951 (Fla. 2d Dist. Ct. App. 2001)); *see also* Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 94 (2000) (discussing this precise issue) [hereinafter Dale II].
12. *Id.* at 105–06.

In *M.Q. v. State*,[13] the Fifth District Court of Appeal also reversed for failure to properly offer counsel and failure to adequately inquire as to the waiver of counsel.[14] The appellate court decision could not be any more direct. "One proceeding even involved an en masse group advisement of rights by the trial [court]. For this reason we write again on the duties and responsibilities of trial judges with regard to offering legal representation in juvenile proceedings."[15] The court, thereafter, cited to the entire rule of juvenile procedure governing the duties and responsibilities of the trial court to notify children about their right to counsel.[16] The court went on to cite other examples of failure to comply with the rules, including the following colloquy in the opinion:

> JUDGE: Would it be your desire that you need to have an attorney, or would you like to represent yourself on that one?
>
> M.Q.: I'll represent myself.
>
> JUDGE: Would you like to enter a plea of guilty or not guilty?
>
> M.Q.: Guilty.[17]

The court ruled that this inquiry was insufficient and then, using italics, said the following: "The requirement is one of *detailed inquiry*, because it is 'extremely doubtful that any child of limited experience can possibly comprehend the importance of counsel.'"[18]

The admonition about right to counsel under the *Florida Rules of Juvenile Procedure* is also multifaceted, requiring the court to tell the child a number of things and then inquire as to whether the child knowingly and intelligently enters the plea and waiver of counsel based upon the understanding of a variety of admonitions. In *J.M.B. v. State*,[19] the court failed to inform the child of the possible dispositions available to the court and failed

13. 818 So. 2d 615 (Fla. 5th Dist. Ct. App. 2002).
14. *Id.*
15. *Id.* at 616–17; *see V.S.J.*, 793 So. 2d at 104 (rejecting this process).
16. *M.Q.*, 818 So. 2d at 617 (citing FLA. R. JUV. P. 8.165).
17. *Id.* at 618.
18. *Id.* (citing State v. T.G., 800 So. 2d 204 (Fla. 2001); P.L.S. v. State, 745 So. 2d 555, 557 (Fla. 4th Dist. Ct. App. 1999) (quoting G.L.D. v. State, 442 So. 2d 401, 404 (Fla. 2d Dist. Ct. App. 1983))).
19. 800 So. 2d 317 (Fla. 2d Dist. Ct. App. 2001).

to advise the child that he was entitled to be represented by counsel at every stage of the proceedings.[20] The appellate court found that the inquiry was incomplete, and thus, there was no effective waiver of counsel in accordance with section 8.165 of the *Florida Rules of Juvenile Procedure*, which is fundamental error requiring reversal.[21]

Not only is the court's inquiry multifaceted, it must also be thorough. In *T.M v. State*,[22] the court compared and contrasted the inquiry at the adjudicatory stage before one judge and the inquiry at the dispositional stage before a second judge, and then recited the full section of the relevant Florida Rule of Juvenile Procedure in the text before concluding that the judge did not conduct a thorough inquiry.[23] The inquiry made by the trial judge, essentially, was whether the child understood that he had a right to counsel, that a public defender would be appointed to represent the child if he so desired, and the child's age.[24] The appeals court found this was reversible error.[25]

While the trial courts repeatedly fail to properly advise children of their right to counsel, the question of how procedurally to challenge such failure ultimately came before the Supreme Court of Florida recently in *State v. T.G.*[26] The question in *T.G.* was whether a juvenile was required to preserve the error, in the context of failure to advise of the right to counsel, with a motion to withdraw a plea prior to seeking appellate review of the plea.[27] On the adult side, in *Robinson v. State*[28] the court held that the adult statute limited a defendant's right of appeal from a guilty plea to matters occurring contemporaneously with the plea.[29] Thus, defendants were required to attack the validity of the guilty plea in the trial court before challenging the plea on direct appeal.[30] The court in *T.G.* held that *Robinson* applies to juvenile delinquency proceedings, reading the amended juvenile statute so that juveniles pleading guilty or *nolo contendere* may directly appeal an involuntary plea only if it is preserved through a motion to withdraw the plea in the trial court.[31]

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20. *Id.* at 318 (citing FLA. R. JUV. P. 8.080(b)(1), (2)).
21. *Id.* (citing M.A.F. v. State, 742 So. 2d 534 (Fla. 2d Dist. Ct. App. 1999)).
22. 811 So. 2d 837 (Fla. 4th Dist. Ct. App. 2002).
23. *Id.* at 839.
24. *Id.* at 838–39 (citing FLA. R. JUV. P. 8.165).
25. *Id.* at 839.
26. 800 So. 2d 204 (Fla. 2001).
27. *Id.* at 206.
28. 373 So. 2d 898 (Fla. 1979).
29. *Id.* at 900.
30. *Id.*
31. 800 So. 2d at 206.

However, the Supreme Court of Florida noted that there is an exception in the situation where the juvenile enters into a guilty plea without the benefit of counsel, and the juvenile has not knowingly and intelligently waived the right to counsel.[32] While *Robinson* applies to a juvenile who is represented by counsel and claims that his or her plea is involuntary due to an inadequate plea colloquy requiring the juvenile to file a motion to withdraw the plea, the same is not true where the juvenile entered the plea without the benefit of counsel and did not knowingly or intelligently waive the right to counsel.[33] This is fundamental error, according to the court in *T.G.*, because of the "unique concern for juveniles who enter pleas without the benefit of counsel."[34] Thus, the court established what it described as a "narrowly drawn and extremely limited exception to *Robinson*" for juveniles who enter uncounseled pleas where the trial court fails to comply with the requirements of the Rules of Juvenile Procedure.[35] Because there was a failure to make a thorough inquiry into the child's comprehension of the offer and the capacity to make a knowing and intelligent choice, and because there was not even any offer made at the dispositional stage, the Supreme Court of Florida reversed and remanded.[36]

Florida's speedy trial rule in juvenile delinquency matters requires that the State commence trial within ninety days.[37] Application of the speedy trial rule, in a variety of contexts, has been repeatedly before the state appellate courts.[38] In *R.F. v. State*,[39] the question was whether the speedy trial time had run, measured from the time the child was taken into custody, one of the two tests for the running of the time period.[40] The State took the position that the child was not taken into custody when he was issued an "arrest/notice to appear" document at the police station.[41] However, the appellate court disagreed.[42] Relying upon section 985.03(55) of the *Florida Stat-*

32. *Id.* at 212; *see also* State v. B.P., 810 So. 2d 918 (Fla. 2002) (following *T.G. v. State* in context of waiver of counsel at plea hearing where child was shown a video that explained the right to counsel and a public defender was consulted but never appointed).

33. *T.G.*, 800 So. 2d at 212.

34. *Id.* at 213.

35. *Id.* (citing FLA. R. JUV. P. 8.165).

36. *Id.* at 213.

37. FLA. R. JUV. P. 8.090(a).

38. Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 834–35 (1999) [hereinafter Dale III]; Dale II, *supra* note 11, at 96.

39. 798 So. 2d 17 (Fla. 4th Dist. Ct. App. 2001).

40. *Id.*; *see* FLA. R. JUV. P. 8.090(a)(1).

41. *R.F.*, 798 So. 2d at 17–18.

42. *Id.* at 20.

utes,[43] the court determined that the documents in evidence showed that the child was arrested when he received the notice.[44] The child went to the police station in response to the police officer's request that he appear there to be arrested or processed, was issued a notice to appear, and was in fact formally processed and charged.[45] Thereafter, he was released to his mother.[46] The court concluded that the speedy trial rule applied because the evidence showed that the official took the child into custody and elected to release the child to the mother.[47]

In 1985 the United States Supreme Court decided *New Jersey v. T.L.O.,*[48] in which the Court established the test for the legality of school searches. A large body of both state and federal opinions have followed from the *T.L.O.* opinion.[49] In *T.L.O.*, the Court held that the Fourth Amendment protection against unreasonable searches and seizures applies in the school setting, but the balance between a child's right of privacy and the government's need for effective control of the school setting required a lesser standard, which the Court articulated as "reasonable" suspicion.[50] One example of the limitation on a child's privacy involves the school locker.[51] In Florida, by statute, the principal of a public school, or other school official designated by the principal, has authority to search the student's locker if that individual has reasonable suspicion of prohibited or illegal substance in that locker.[52] In *M.E.J. v. State,*[53] the court held that when a student was found in a school parking lot smelling of marijuana twenty minutes after school had begun and the student acknowledged smoking marijuana, it was reasonable for school officials to check the locker where a knife, rather than marijuana, was found.[54] The child's adjudication as delinquent for possession of a weapon on school property was thus affirmed.[55]

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43. *Id.* at 19. "'Taking into custody' means the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law." FLA. STAT. § 985.03(55) (1999).

44. *R.F.*, 798 So. 2d at 20.

45. *Id.* at 19.

46. *Id.* at 19.

47. *Id.* at 20.

48. 469 U.S. 325 (1985).

49. *See* 2 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 10.07[1], at 10–46 (2003).

50. *T.L.O.*, 469 U.S. at 341.

51. FLA. STAT. § 232.256 (2001).

52. § 232.256(2).

53. 805 So. 2d 1093 (Fla. 2d Dist. Ct. App. 2002).

54. *Id.* at 1094.

55. *Id.*

Illegal secure detention, in violation of the risk assessment instrument under Florida law, also occurs where the child is detained based upon non-attendance at school, as previously ordered by the court.[56] In *R.G. v. State*, no risk assessment was made out.[57] The statute is clear that such a requirement is obligatory.[58] Had the trial court sought to detain the child based upon indirect criminal contempt, an order to show cause, a hearing within twenty-four hours, and notice would have been necessary.[59] None occurred, and the appellate court reversed.[60]

Finally, and perhaps most significantly, is the following statement from the appellate court in *R.G.*:

> this is the sixth emergency habeas corpus petition filed against this same judge since March 26, 2002. In each case, the Attorney General's Office has conceded error. We would think that the message to this trial court judge should be clear that he, too, must follow the law. We trust that after this opinion, the trial court judge will modify his conduct accordingly.[61]

B. *Dispositional Issues*

Florida provides that a child also may be confined in secure detention following commitment and pending placement.[62] The question before the Second District Court of Appeal in *J.W. v. Leitner*[63] was whether a child must "meet [the] statutory 'detention criteria' to qualify for placement in secure detention" when the commitment is to a high-risk residential program.[64] The court held that the risk assessment evaluation scheme in the Florida statute, applying to detention criteria, is no different for children awaiting placement in a high-risk residential facility than it is for children awaiting placement in other facilities.[65] Furthermore, the court rejected the State's argument that it could rely upon representations of the Department of

56. R.G. v. State, 817 So. 2d 1019, 1020 (Fla. 3d Dist. Ct. App. 2002). *See generally* FLA. STAT. § 985.213 (2002).
57. *R.G.*, 817 So. 2d at 1020.
58. § 985.213(2)(a).
59. *R.G.*, 817 So. 2d at 1020.
60. *Id.*
61. *Id.*
62. *See generally* § 985.215(10).
63. 801 So. 2d 295 (Fla. 2d Dist. Ct. App. 2001).
64. *Id.* at 296.
65. *Id.* at 297.

Juvenile Justice that the child's lifestyle supported detention, in order to meet detention requirements.[66]

In a case of first impression, the First District Court of Appeal, in *L.S. v. State*,[67] agreed with other jurisdictions that have "upheld the constitutionality of similar DNA data base statutes."[68] In *L.S.*, a juvenile pled nolo contendere to a burglary charge, in exchange for an agreement by the State to drop a different charge.[69] Thereafter, the State requested that the child be compelled to give a blood sample or DNA testing as provided for by Florida law.[70] The district court of appeal rejected all of the child's constitutional arguments, finding the statute constitutional as against the Fourth, Fifth, and Eighth Amendment claims as well as a Florida Constitutional right of privacy challenge.[71]

Among the dispositional alternatives, restitution is available in Florida in delinquency cases.[72] Under Florida law, jurisdiction ends when the child turns nineteen.[73] In *Cesaire v. State,* the question was whether the court could consider an order to show cause for contempt after the child turned nineteen and when the child failed to make restitution.[74] The court held that the juvenile court did not retain jurisdiction to enforce the restitution order beyond the child's nineteenth birthday, although the state statute provides for such authority.[75] Thus, the court had no jurisdiction to enter a new order requiring the payment of restitution.[76] Moreover, a subsequent order to show cause for failure to appear and subsequent contempt was likewise void because the underlining restitutional order was void for lack of jurisdiction.[77]

Until recently, Florida used the term "community control" to mean probation.[78] That term has now been changed, as of 1998, to probation.[79] Under certain circumstances, a child who is on probation status and who is alleged to have violated that status by committing another delinquent act may be

66. *Id.*
67. 805 So. 2d 1004 (Fla. 1st Dist. Ct. App. 2001).
68. *Id.* at 1007.
69. *Id.* at 1005.
70. *Id.* at 1006; *see* FLA. STAT. § 943.325(1) (2002).
71. *L.S.*, 805 So. 2d at 1008.
72. *See generally* G.J.V. v. State, 637 So. 2d 78, 79 (Fla. 2d Dist. Ct. App. 1994); Cesaire v. State, 811 So. 2d 816 (Fla. 4th Dist. Ct. App. 2002).
73. FLA. STAT. § 985.201(4)(a) (2002).
74. *Cesaire*, 811 So. 2d at 817.
75. *Id.* at 818; *see also* § 985.201(4)(c).
76. *Cesaire*, 811 So. 2d at 818.
77. *Id.*
78. Dale II, *supra* note 11, at 96.
79. *See* § 985.215(2)(a); Dale II, *supra* note 11, at 96.

held in secure detention.[80] The question before the court in *D.H. v. Esteves*, was how to define probation when the statute refers specifically to "probation program."[81] The court held that the term probation was more extensive and did not just involve "program[s]," thus, ruling that secure detention was appropriate.[82]

Florida's juvenile delinquency dispositional statute allows a court to order placement at a restrictiveness level that differs from the Department of Juvenile Justice's recommendation.[83] However, when the court disagrees with the recommendation it must state so on the record and its rationale must be supported by a preponderance of the evidence.[84] In *K.N.M. v. State,*[85] a significant factor in the trial court's decision not to accept the recommendation of the Department of Juvenile Justice was the court's belief in the juvenile's lack of remorse and unwillingness to admit guilt.[86] On appeal, the court reconfirmed the proposition that it is improper for a trial court to aggravate a sentence when a defendant fails to exhibit remorse.[87] The appellate court held that in a dispositional hearing, the juvenile has a constitutional right to avoid aggravation of a sentence on those grounds.[88]

Three decades ago, in two cases, *Morrissey v. Brewer*[89] and *Gagnon v. Scarpelli*,[90] the United States Supreme Court applied due process protections to parole revocation in the adult context, finding that a parolee had a liberty interest in his parole. In those cases the court set up due process procedures including: 1) written notice; 2) disclosure of evidence; 3) an opportunity to be heard in person and present witnesses; 4) the ability to confront and cross-examine witnesses; 5) a hearing before a neutral and detached hearing officer; and 6) a written statement of the decision.[91] While the Court in the second case, *Gagnon*, did not provide that there was an absolute right to counsel, it said that the issue should be decided on a case-by-case basis.[92] In *M.T.*

80. D.H. v. Esteves, 790 So. 2d 1275, 1276 (Fla. 4th Dist. Ct. App. 2001). *See generally* § 985.215(2)(a).
81. *Id.*
82. *D.H.*, 790 So. 2d at 1276.
83. § 985.23(3)(e).
84. *See* A.C.N. v. State, 727 So. 2d 368, 370 (Fla. 1st Dist. Ct. App. 1999).
85. 793 So. 2d 1195, 1197 (Fla. 5th Dist. Ct. App. 2001).
86. *Id.* at 1196.
87. *Id.* at 1198.
88. *Id.* (citing A.S. v. State, 667 So. 2d 994, 996 (Fla. 3d Dist. Ct. App. 1996); R.A.B. v. State, 399 So. 2d 16 (Fla. 3d Dist. Ct. App. 1981)).
89. 408 U.S. 471 (1972).
90. 411 U.S. 778 (1973).
91. *Id.* at 782; *Morrisey*, 408 U.S. at 489.
92. *Gagnon*, 411 U.S. at 790.

v. State,[93] the trial court had revoked a child's parole after a hearing, finding that an affidavit of violation was unnecessary since the child was on a suspended commitment and that the effect of the revocation would be to remove him from community control to commitment, which had been previously imposed on the child, but suspended.[94] The appellate court held, relying upon *Gagnon*, that due process protections apply to a proceeding alleging a violation of community control for juveniles.[95] The court held further that the child did not receive proper notice of the violation that served as the basis of the revocation, and thus, it reversed.[96]

Florida, like other states, provides for parole revocation hearings, until recently, referred to as community control violation hearings.[97] In *J.S. v. State*,[98] the appellate court found that the trial court violated the child's due process rights by failing to give the juvenile adequate time to prepare for a violation hearing.[99] The facts are worth reciting. When the case was called, the community control officer advised the court that she was ready to proceed, and at that point the court appointed an assistant public defender to represent the child.[100] The lawyer received a notice of violation of court order ten minutes before, said she was not prepared to proceed, objected to the proceeding that day, and asked for a hearing.[101] The lawyer explained that she had not had an opportunity to speak with her client, nor to investigate.[102] The court offered her five minutes more and the attorney objected.[103] The proceeding went forward and community control was revoked.[104] The appellate court reversed, describing the court's violation of the constitutional rights in polite terms as "palpable abuse of [judicial] discretion."[105]

The question of whether Florida's Sexual Predators Act[106] applies to juveniles has been before the court on several occasions, most recently in *T.R.B. v. State*.[107] In that case, a child pleaded *nolo contendere* to the charge of sexual battery on a child under twelve, was adjudicated as delinquent and

93. 805 So. 2d 898 (Fla. 2d Dist. Ct. App. 2001).
94. *Id.* at 899.
95. *Id.*
96. *Id.*
97. *See* Dale II, *supra* note 11, at 96.
98. 796 So. 2d 1256 (Fla. 4th Dist. Ct. App. 2001).
99. *Id.*
100. *Id.*
101. *Id.* at 1256–57.
102. *Id.* at 1257.
103. *J.S.*, 796 So. 2d at 1257.
104. *Id.*
105. *Id.*
106. FLA. STAT. § 775.21 (2002).
107. 796 So. 2d 640 (Fla. 1st Dist. Ct. App. 2001).

was then declared a sexual predator, pursuant to the adult statute.[108] The appellate court reversed, holding that adjudication of delinquency is not a conviction for purposes of the sexual predator statute, and that there was no legislative intent to give the juvenile court authority to declare the child a sexual predator.[109] The ruling conflicts with a Second District Court of Appeal decision in *Payne v. State*.[110]

C. *Appellate Issues*

Two courts have recently been faced with the question of how to procedurally handle appeals challenging sentences beyond the statutory maximum, where the proper appellate procedure was not followed. Section 985.234(1) of the *Florida Statutes* requires all juvenile appeals to proceed pursuant to the *Florida Rules of Appellate Procedure*. The appellate rules provide that an appeal may not be taken unless prejudicial evidence is preserved.[111] In *J.C.R. v. State*[112] and *A.M. ex rel D.M. v. State*,[113] the Fourth and Fifth District Courts of Appeal, respectively, held that when a juvenile is sentenced beyond the statutory maximum for a particular crime, a fundamental error occurs that may be corrected without regard to preservation of issues.[114]

III. DEPENDENCY PROCEEDINGS

In 1997 the Florida Legislature amended chapter 39 to provide that indigent parents must be appointed counsel in dependency proceedings.[115] In *In re M.C.*,[116] a mother appealed from an order denying a motion to reopen a dependency case concerning her child.[117] The Department of Children and Family Services (appellee) failed to afford due process to the mother by properly notifying her and her attorney of a motion to terminate the dependency proceeding because the child had been in the custody of a maternal aunt for an extended period of time.[118] The court order relieved the Department of

108. *Id.* at 641.
109. *Id.* (citing J.M. v. State, 783 So. 2d 1204 (Fla. 1st Dist. Ct. App. 2001)).
110. 753 So. 2d 129 (Fla. 2d Dist. Ct. App. 2000), *rev. denied*, 773 So. 2d 56 (Fla. 2000); Dale I, *supra* note 8, at 909–10.
111. *See* FLA. STAT. § 90.104 (2002).
112. 785 So. 2d 550 (Fla. 4th Dist. Ct. App. 2001).
113. 790 So. 2d 1233 (Fla. 5th Dist. Ct. App. 2001).
114. *See id.* at 1235; *J.C.R.*, 785 So. 2d at 551.
115. *See* Dale III, *supra* note 38, at 828.
116. 796 So. 2d 566 (Fla. 2d Dist. Ct. App. 2001).
117. *Id.* at 567.
118. *Id.*

any further supervision of the child and placed the child in the care and custody of the maternal aunt.[119] The mother wrote the court, seeking to have the child and siblings returned to her.[120] Apparently, without her knowledge, the Department ordered to terminate the mother's supervision.[121] Subsequently, the court appointed a new lawyer to represent the mother, and counsel filed a motion to reopen the dependency case.[122] The Department filed a new motion to terminate supervision, despite the longstanding existence of a case plan aimed at reunification.[123] The court, inexplicably, terminated supervision based upon the length of time that the child had been in the care of the maternal aunt.[124] The appellate court reversed, finding a violation of due process in that the earlier case plan goal was reunification and that there had been no finding that reunification would be detrimental to the child's well-being.[125]

Mental abuse, as defined in chapter 39 governing dependency proceedings, has not been the topic of significant appellate review. That changed, however, with the recent opinion in *G.C. v. Department of Children & Families*.[126] Abuse is defined as "any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."[127] The question in *G.C.* was how to evaluate the test for willful mental abuse.[128] The case arose from a sexual abuse claim against a father toward two daughters.[129] The trial court found that after the alleged sexual abuse occurred, the mother, in an attempt to gain the return of the father to the family unit, allowed a private investigator to interview the children, and thus, the children were subjected to willful mental abuse.[130] The appellate court reversed, holding that the mother may have used poor judgment in telling the children the truth about the consequences of their actions and that she was following the advice of the lawyer when she allowed the investigator

119. *Id.*
120. *Id.*
121. *M.C.*, 796 So. 2d at 568.
122. *Id.* at 567.
123. *Id.*
124. *Id.* at 568.
125. *Id.*
126. 791 So. 2d 17 (Fla. 5th Dist. Ct. App. 2001).
127. FLA. STAT. § 39.01(2) (2002).
128. *G.C.*, 791 So. 2d at 20.
129. *Id.* at 18.
130. *Id.* at 19.

into the home to talk to them, but that neither was sufficient to establish mental abuse as defined by the law.[131]

The Florida courts are often asked to determine whether a child is subject to prospective neglect or abuse. Under the *Florida Statutes*, such prospective abuse or neglect is tested by evaluating whether the child is subjected to "substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodian."[132] In a dependency proceeding, the state must prove the allegation by a preponderance of the evidence.[133] Florida appellate courts have held that the trial court is not obligated to wait until the child is abused and neglected before adjudicating the child dependent.[134] In *C.W. v. Department of Children & Families,*[135] the father had a twenty-two year alcohol problem and there had been domestic violence between the parents, thus, placing the children at risk.[136] The appellate court explained that the father had stopped drinking and began attending Alcoholics Anonymous two months before the petition was filed and nearly a year before the hearing.[137] Moreover, the mother had obtained an injunction against the father for domestic violence four months before the dependency petition was filed, and there had been no subsequent acts of domestic violence.[138] There was no evidence that the father would repeat the cycle of alcohol abuse and domestic violence, and the children appeared to be well adjusted.[139] And finally, because there was no competent substantial evidence of prospective abuse or neglect in the record, the court reversed.[140]

The *Florida Statutes* do not define how imminent the prospective neglect must be. It is clear, however, that there need not be actual prior abuse, abandonment, or neglect before the court finds dependency, just so long as the imminent risk requirement is met.[141] In *E.M.A. v. Department of Children & Families,*[142] the court relied on an earlier ruling that where a nexus is shown between a parent's mental disorder and a significant risk of danger to

131. *Id.* at 21.
132. § 39.01(14)(f).
133. Richmond v. Dep't of Health & Rehabilitative Servs., 658 So. 2d 176, 177 (Fla. 5th Dist. Ct. App. 1995).
134. *See* Palmer v. Dep't of Health & Rehabilitative Servs., 547 So. 2d 981, 983–84 (Fla. 5th Dist. Ct. App. 1989).
135. 789 So. 2d 497 (Fla. 5th Dist. Ct. App. 2001).
136. *Id.*
137. *Id.*
138. *Id.* at 497–98.
139. *Id.* at 498.
140. *C.W.*, 789 So. 2d at 499.
141. *See* Denson v. Dep't of Health & Rehabilitative Servs., 661 So. 2d 934, 935 (Fla. 5th Dist. Ct. App. 1995); *Richmond*, 658 So. 2d at 177.
142. 795 So. 2d 183 (Fla. 1st Dist. Ct. App. 2001).

the child, the court need not wait for the abuse or neglect to occur.[143] In the case at bar, there was a clear nexus between the father's mental disorder and the inevitable prospect of another manic episode that would place the children in danger.[144] The court added that the legislature, in writing the relevant provision of chapter 39, did not require the injury to occur before a finding of neglect or abuse, where the exact timing of the next manic episode could not be predicted, but that it would happen very soon.[145] The same issue arose in *B.D. v. Department of Children & Families*,[146] where the court gave inconsistent verbal and written findings on the issue of whether the parent's mental illness was clearly connected to child-rearing capacity.[147] Relying on its ruling in *E.M.A.*, the First District reversed and remanded for further findings, clearly stating whether the Department met its burden to satisfy one of the dependency grounds.[148]

The issue of whether alleged abuse of one child constituted grounds for dependency of another child was before the court in *K.C. v. Department of Children & Families*.[149] A father appealed from a dependency adjudication as to one child, based upon alleged physical abuse by the father of the girlfriend's other child.[150] The trial court relied upon its memory of the testimony in the prior proceeding, where the father was not a party, and where testimony was not admitted into evidence in the instant proceeding to find dependency.[151] The appellate court held, first, that there was no establishment of a nexus between the father's alleged abuse of the first child and the potential abuse of the second child;[152] citing the Supreme Court of Florida 2000 opinion of *In re M.F.*,[153] where the court reversed based upon the fact that the trial court solely based its determination of dependency of one child upon the dependency adjudication of the other. More significantly, the court held that there was no competent evidence before the court in *K.C.*,[154] because the trial court relied upon its memory of prior testimony, where the

143. *Id.* at 187.
144. *Id.* at 186.
145. *Id.* at 188.
146. 797 So. 2d 1261 (Fla. 1st Dist. Ct. App. 2001).
147. *Id.* at 1265 (citing E.M.A. v. Dep't of Children & Families, 795 So. 2d 183, 186 (Fla. 1st Dist. Ct. App. 2001); Richmond v. Dep't of Health & Rehabilitative Servs., 658 So. 2d 176, 177–78 (Fla. 5th Dist. Ct. App. 1995)).
148. *Id.* at 1265.
149. 800 So. 2d 676 (Fla. 5th Dist. Ct. App. 2001).
150. *Id.* at 677.
151. *Id.*
152. *Id.*
153. 770 So. 2d 1189 (Fla. 2000); Dale I, *supra* note 8, at 913–14.
154. *K.C.*, 800 So. 2d at 677.

father had no opportunity to challenge the testimony or cross-examine witnesses.[155]

After a dependency adjudication under Florida law the Department of Children and Family Services shall develop a case plan for each child who is to receive services.[156] The case plan is to include a permanency goal for the child including the type of placement.[157] In *F.M. v. Department of Children & Families*,[158] a mother appealed from an order of dependency and disposition approving a case plan that had a permanency goal of maintaining and strengthening the placement with the child's father who had taken custody of the child.[159] The appellate court affirmed the trial court's ruling finding that reunification under the Florida statute is not the only possible role of a case plan.[160]

Once a child is declared dependent and in foster care, the child is in the legal care of the Department of Children and Family Services. The question in *Department of Children & Family Services v. G.M.*[161] was whether a court order was necessary to allow a child to have surgery, specifically removal of a cyst under the chin.[162] Chapter 39 provides that DCF may give the child ordinary medical care and may consent to medical treatment.[163] But neither term makes reference to surgery and the terms are not defined. However, section 743 of the *Florida Statutes* does deal with persons who may consent to medical care of a minor that does not include surgery.[164] Thus, the appellate court held that routine medical examination may be authorized but a surgery, inherently invasive by nature, is not ordinary and thus a court order is necessary.[165]

The issue of how informal dependency matters may be was before the Fifth District Court of Appeal in *Department of Children & Families v. H.W.W.*[166] In that case the judge called an informal meeting in chambers to explore options for obtaining financial assistance for the children in a de-

155. *Id.* at 678 (citing Petersen v. Dep't of Children & Families, 732 So. 2d 374 (Fla. 5th Dist. Ct. App. 1999), *rev. denied*, 740 So. 2d 527 (Fla. 1999)).
156. § 39.601.
157. § 39.601(3)(a).
158. 807 So. 2d 200 (Fla. 4th Dist. Ct. App. 2002).
159. *Id.*
160. *Id.* at 201–02 (citing § 39.601(5)).
161. 816 So. 2d 830 (Fla. 5th Dist. Ct. App. 2002).
162. *Id.* at 831.
163. *See* § 39.407(1), (13).
164. *See* FLA. STAT. § 743.0645(1)(b) (2002).
165. *G.M.*, 816 So. 2d at 832.
166. 816 So. 2d 1249 (Fla. 5th Dist. Ct. App. 2002).

pendency proceeding.[167] The parents of the children, although parties, were not informed of the meeting, which resulted in an order finding that the childrens's grandparent would be a "relative caregiver" under Florida law entitled to receive financial assistance.[168] The appellate court reversed, stating:

> We are unaware of how prevalent is this practice of a judge convening "meetings" rather than conducting hearings in juvenile cases. Such a practice does appear to be fraught with potential for problems, however. Certainly, if one of these "meetings" appears to be moving in the direction of court action, it is incumbent on the court to either adjourn the meeting and convene a hearing in accordance with the rules, or to create a record establishing that those procedures have been waived.[169]

Two cases decided this year affirmed the principle that speedy trial rules do not apply to dependency cases as they do in delinquency cases. In *M.T. v. Department of Children & Family Services*[170] and *J.W. v. Department of Children & Families*,[171] the courts held that there is no equivalent to Rule 8.090 of the *Florida Rules of Juvenile Procedure*, which governs speedy trials in delinquency cases. There are time frames referenced in chapter 39, but they are viewed by the courts as only directory and not mandatory or jurisdictional.[172]

IV. TERMINATION OF PARENTAL RIGHTS

As described previously in this review, Florida law provides nine distinct grounds for termination of parental rights.[173] Included among them is the situation where a parent fails to comply with a case plan for a period of twelve months, which constitutes evidence of continuing abuse, neglect, or abandonment.[174] This section of the statute applies only when a parent is provided with a case plan with the goal of reunification but not when the goal is termination. It was this problem that arose in *In re Z.J.S.*[175] The Department did not offer the parent a case plan with the goal of reunification.[176]

167. *Id.* at 1250.
168. *Id.* (citing FLA. STAT. § 39.5085 (2000)).
169. *Id.* at 1251.
170. 816 So. 2d 227 (Fla. 5th Dist. Ct. App. 2002).
171. 812 So. 2d 599 (Fla. 5th Dist. Ct. App. 2002).
172. *M.T.*, 816 So. 2d at 229.
173. FLA. STAT. § 39.806(1) (2002).
174. § 39.806(1)(e).
175. 787 So. 2d 875 (Fla. 2d Dist. Ct. App. 2001).
176. *Id.* at 878.

In that situation the Department must establish another ground for termination of parental rights. Thus, the court reversed.[177]

An interesting second issue in *In re Z.J.S.* dealt with the father's effort to have his child placed with relatives as an alternative remedy.[178] The appeals court recognized that on remand the trial court should revisit the issue of whether the child could be placed within relatives' care.[179] Significant is the concurrence of Judge Northcutt recognizing that parents have fundamental rights to care, custody, and management of their child, which he argued requires the court to grant deference to the father's plan.[180] In Judge Northcutt's view, the constitution requires respect for a parent's private placement decision "just as it does for the myriad other choices a parent must make in the raising of a child."[181]

Failure to comply with a case plan was also before the appellate court in *In re G.R.*[182] The Department of Children and Families alleged in its petition to terminate that the mother was in material breach and did not remain drug free.[183] The appeals court relied upon the Supreme Court of Florida decision in *Padgett v. Department of Health & Rehabilitative Services*[184] to rule that while the state has a paramount interest in protecting children from harm, the parents have a fundamental right to the care of their children which may only be compromised using the least restrictive means to protect the children from serious harm.[185] Here the court found that the state acted prematurely because the mother was making rehabilitative efforts and there was no evidence of severe neglect of the children.[186] Thus, as the court stated "there is no compelling need to rush to judgment under these facts."[187]

A separate ground for termination of parental rights in Florida involves one incident where the parent engaging in egregious conduct or failing to

177. *Id.* at 879.
178. *Id.* at 877.
179. *Id.* at 879.
180. *Z.J.S.*, 787 So. 2d at 879 (Northcutt, J., concurring) (citing Santosky v. Kramer, 455 U.S. 745 (1982)).

> Many parents who are unable to tend their children elect to place them with relatives or friends to ensure that the children receive proper care. Surely, such decisions are within the ambit of fundamental parenting rights, and the state has no authority to interfere with them in the absence of the exceptional circumstances specified in Chapter 39, Florida Statutes.

Id.
181. *Id.* at 880.
182. 793 So. 2d 988 (Fla. 2d Dist. Ct. App. 2001).
183. *Id.* at 989.
184. 577 So. 2d 565 (Fla. 1991).
185. *G.R.*, 793 So. 2d at 989.
186. *Id.*
187. *Id.*

prevent egregious conduct which threatens the life or safety of the child.[188] A single act may be enough to terminate parental rights. However, that single act must be of significant intensity, magnitude, or severity as to endanger the life of the child.[189] The Second District Court of Appeal in *In re D.W.*[190] evaluated whether in a particular factual situation one act was enough. The court recognized that termination of parental rights must be the least restrictive methodology for protecting the child from serious harm.[191] However, under the facts of the case the Department did not demonstrate that termination was the only option to protect the child.[192] Under the facts of the case, the mother had never been given a chance to demonstrate that she could safely maintain a relationship with the child.[193] Thus, the court reversed.[194]

As noted earlier in the section of this survey discussing dependency proceedings, prospective neglect based upon parental abuse of one child then can be used as evidence of a basis for termination of the parental rights to another child.[195] That issue arose in *A.C. v. Department of Children & Families*,[196] where the question was, *inter alia*, whether the mother's act of inflicting burns on a daughter should constitute grounds to terminate the parental rights over a son.[197] The court found that there was no evidence submitted by the Department that the single act of abuse of the prior child created a substantial risk of injury to this child and that the termination of parental rights was in the child's best interest as the case law in Florida provides.[198] Under Florida law a single act of abuse does not itself constitute proof of imminent risk of abuse and neglect of that child or of another unless the behavior is beyond the parent's control and is likely to continue and place the child at risk. Furthermore, the termination must be the least restrictive means to protect the child.[199]

To some degree in both prospective neglect adjudications and in termination of parental rights cases, the court does have to make some prediction about future behavior of the parent. When a prediction becomes speculation,

188. § 39.806(1)(f).
189. § 39.806(1)(f)(2).
190. 793 So. 2d 39 (Fla. 2d Dist. Ct. App. 2001).
191. *Id.* at 40 (citing *Padgett*, 577 So. 2d at 571).
192. *Id.*
193. *Id.*
194. *Id.* at 41.
195. Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991).
196. 798 So. 2d. 32 (Fla. 4th Dist. Ct. App. 2001).
197. *Id.* at 33.
198. *Id.* at 36.
199. *Id.*; D.H. v. Dep't of Children & Families, 769 So. 2d 424, 427 (Fla. 4th Dist. Ct. App. 2000).

the adjudication cannot stand. *In re C.W.W.*[200] was a termination of parental rights case involving a two-month old child of a mother with significant substance abuse problems.[201] The Department never offered the mother a case plan with the goal of reunification but rather commenced the termination proceeding *inter alia* on the grounds of future harm to the child irrespective of the provision of services.[202] The appellate court held that the Department did not establish that the continuing involvement of the mother with the child would threaten the child's life, safety, or health irrespective of services being provided.[203] The court explained that the Department could cite no case in which parental rights were terminated solely on the basis of the birth of a drug-dependent child.[204] The court's conclusion that the mother would fail in any attempt to comply with a case plan with a goal of reunification was speculation, and not a valid basis for terminating parental rights.[205] And finally, the court added that the Department had failed to establish that termination was the least restrictive means of preventing harm to the child, an additional standard required under Florida law.[206] The court therefore remanded.[207]

Abuse and neglect resulting in termination of parental rights can also be proven based upon past conduct with regard to other children. In *C.W. v. Department of Children & Families*,[208] the appellate court reviewed the facts and concluded that termination of parental rights to siblings because of abuse and neglect may serve as grounds for terminating parental rights, citing *Padgett v. Department of Health & Rehabilitative Services*.[209] Significantly, there was a dissent demonstrating the difficulty with application of *Padgett*.[210] Judge Ervin, dissenting, argued that there must be a causal connection between the past conduct and the present.[211]

A problematic interpretation of prospective neglect based upon parental abuse of one child used as the basis for termination of parental rights to a

200. 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001).
201. *Id.* at 1022.
202. *Id.*
203. *Id.* at 1023.
204. *Id.* at 1024.
205. *C.W.W.*, 788 So. 2d at 1023.
206. *Id.* at 1025.
207. *Id.*
208. 814 So. 2d 488 (Fla. 1st Dist. Ct. App. 2002).
209. *Id.* at 492; Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991).
210. *C.W.*, 814 So. 2d at 495 (Ervin, J., dissenting).
211. *Id.* at 496.

second child is *A.B. v. Department of Children & Families*.[212] In that case, the court seemed to opine that, based upon *Padgett*,[213] a parent whose parental rights have been terminated as to one child may avoid termination as to another child "if he or she comes forward with evidence that the circumstances or pattern of conduct that led to termination of parental rights to the other child cannot serve as a predictor of his or her conduct with the child at issue."[214] This rationale seems to suggest that the parent must demonstrate that his or her conduct changed after the State proved the termination as to the other child. It does not appear that this is what *Padgett* held.

Another and equally important issue was before the court in *A.C. v. Department of Children & Families*,[215] involving the question of the effect of a parent's invocation of the Fifth Amendment privilege against self-incrimination in the termination of parental rights case because of an ongoing criminal proceeding.[216] In both *A.C.* and in an earlier opinion in *C.J. v. Department of Children & Families*[217] the courts held that the trial court is obligated to exercise discretion when balancing the interests of the child in permanent placement at the earliest possible time with affording fairness to the parents. The criminal case can take a substantial period of time and thus, while a termination of parental rights proceeding may be continued, that continuance must be balanced against the circumstances of the child.[218]

Problems a child encounters after being removed from the home relating to separation from the parents do not constitute grounds for termination of parental rights. Two courts have so held. In *In re F.M.H.B.*,[219] the fact that a child was having great difficulty adjusting to foster care and school after separation from the parents was not a basis for termination of parental rights.[220] Similarly, in 1999 the court held in *In re K.C.C.*[221] that a youngster's need for counseling because of anxiety as a result of separation from the parents did not support termination of parental rights.[222]

Included among the grounds for termination of parental rights in Florida is voluntary relinquishment of parental rights.[223] However, even in the con-

212. 816 So. 2d 684, 686 (Fla. 5th Dist. Ct. App. 2002).
213. 577 So. 2d at 565.
214. *A.B.*, 816 So. 2d at 686.
215. 798 So. 2d 32 (Fla. 4th Dist. Ct. App. 2001).
216. *Id.* at 35.
217. 756 So. 2d 1108 (Fla. 3d Dist. Ct App. 2000).
218. *A.C.*, 798 So. 2d at 35.
219. 803 So. 2d 837 (Fla. 2d Dist. Ct. App. 2001).
220. *Id.* at 839.
221. 750 So. 2d 38 (Fla. 2d Dist. Ct. App. 1999).
222. *Id.* at 41.
223. *See* § 39.806(1)(a); § 39.808(4).

text of voluntary relinquishment certain procedural due process rights apply. In *L.O. v. Florida Department of Children & Family Services*,[224] a mother appealed from an order terminating her parental rights based upon a prior plea agreement in a criminal case in which she entered a guilty plea to neglect and violation of probation and also consented to termination of parental rights.[225] When the Department of Children and Family Services subsequently filed a termination of parental rights petition and the mother moved to withdraw her consent, the court entered an order terminating parental rights *nunc pro tunc*.[226] The appellate court reversed, holding that chapter 39 provides no short cuts in termination proceedings based on voluntary surrender of parental rights.[227] An adjudicatory hearing on a petition for voluntary termination must be held within twenty-one days after filing the petition.[228] The parent was not given an opportunity to deny any of the allegations of the petition nor to introduce testimony.[229] The court thus reversed.[230]

A second case interpreting voluntary relinquishment of parental rights is *T.C.B. v. Florida Department of Children & Families*.[231] In that case, when the Department sought to terminate parental rights, the mother, through counsel, made an offer of settlement or compromise providing that in return for the cancellation of the termination proceeding the mother would carry out her obligations under a case plan and if she defaulted, the Department would be entitled to receive executed surrenders for the children.[232] After that happened, the mother appealed a final order terminating her parental rights, challenging the settlement agreement.[233] The First District Court of Appeal reversed, finding that the contract was in fact void as against public policy and that it violated legislative intent.[234] Further, the appellate court held that in any circumstances an adjudicatory hearing must be held where the Department would establish the elements required for terminating parental rights by clear and convincing evidence.[235]

224. 807 So. 2d 810 (Fla. 4th Dist. Ct. App. 2002).
225. *Id.* at 811.
226. *Id.* at 812.
227. *Id.*
228. *Id.* at 813.
229. *L.O.*, 807 So. 2d at 813.
230. *Id.*
231. 816 So. 2d 194 (Fla. 1st Dist. Ct. App. 2002).
232. *Id.* at 196.
233. *Id.* at 195.
234. *Id.* at 196–97 (citing Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991); Santosky v. Kramer, 455 U.S. 745, 754 (1982); § 39.806(1)(a)).
235. *Id.* at 197.

In addition to defining separate grounds for termination of parental rights, Florida law provides that the court must also determine that termination of parental rights is in the manifest best interest of the child.[236] Florida law contains eleven factors the court shall consider in making this determination.[237] In *K.M. v. Department of Children & Families*[238] there was no evidence that the court considered the factors regarding the best interests of the child.[239] The appeals court reiterated what is clear under Florida law—that termination shall be based upon clear and convincing evidence after review of all statutory factors.[240]

In what one would have thought was an issue that never would have reached the appellate court, the Fifth District Court of Appeal in *E.J. v. Department of Children & Families*[241] held that a successor judge may not make a judgment based upon a reading of the court file and the transcript of a hearing held before his predecessor in the absence of a stipulation by the parties.[242]

As a practical matter which ought not require elucidation, a judgment terminating parental rights must be based upon evidence in the record. In *In re J.M.M.*[243] the court made findings reciting the court-appointed guardian ad litem's beliefs about the best interest of the child being served by termination of parental rights, that the child had formed a significant relationship with a parental substitute, and "that no bond or love existed between the parent and the child."[244] Unfortunately, there was no evidence as to the first two; as to the third, the evidence was to the contrary.[245] Thus, where the judgment was not based on record evidence, the court reversed.[246]

Under Florida law, failure to appear at an advisory hearing in a termination of parental rights case can result in a default and termination of parental rights.[247] In *In re W.C.*,[248] a parent had his attorney appear at the advisory hearing in a termination of parental rights case regarding two children of a father who resided in New Jersey. The court terminated parental rights based

236. § 39.810.
237. *Id.*
238. 795 So. 2d 1129 (Fla. 5th Dist. Ct. App. 2001).
239. *Id.* at 1130.
240. *Id.*
241. 795 So. 2d 1131 (Fla. 5th Dist. Ct. App. 2001).
242. *Id.*
243. 795 So. 2d 1034 (Fla. 2d Dist. Ct. App. 2001).
244. *Id.* at 1036.
245. *Id.*
246. *Id.* (citing *In re* C.W.W., 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001)).
247. *See* § 39.801(3)(d).
248. 797 So. 2d 1273 (Fla. 1st Dist. Ct. App. 2001).

upon the failure of the father to appear.[249] The Florida Legislature had changed the statute regarding personal appearances in amendments to the law in 1998 which precluded appearances through counsel at the advisory hearing as the method of appearance.[250] The appellate court in *W.C.* found that the clear intent of the legislature was that the parent personally appear because it provides the court with an opportunity to demonstrate that it performs a statutory duty of informing the parent of rights and responsibilities in the termination case.[251] The appellate court thus affirmed.[252]

On the other hand, termination of parental rights based on default can only occur in situations set forth in the Florida statute,[253] which provides for failure to appear in either an advisory or adjudicatory hearing. In *In re C.R.*,[254] the court held that neither a docket sounding nor scheduling conference at which the parent failed to appear allowed for default because the statute did not speak to either of these two settings.[255] The court relied upon other earlier opinions to the effect that termination of parental rights may not be entered on default unless specifically authorized by statute.[256]

Appointed counsel on occasion will seek to withdraw from representation on appeal in termination of parental rights cases where the lawyer concludes that the appeal is frivolous.[257] The Supreme Court of Florida has never established a procedure for withdrawal of counsel in termination cases. However, in *Pullen v. State*, the court did establish a procedure for withdrawal of counsel in involuntary civil commitment cases under the Baker Act.[258] In so doing, the court relied upon *Anders v. California*,[259] in which the United States Supreme Court established the grounds for withdrawal of counsel in criminal proceedings. The lower appellate courts in Florida have used the *Anders* test for some time in termination cases. In *N.S.H. v. Department of Children & Family Services*,[260] the Fifth District Court of Appeal affirmed an earlier Fifth District opinion in *Ostrum v. Department of Health*

249. *Id.* at 1276.
250. *Id.* at 1275.
251. *Id.* at 1276.
252. *Id.*
253. *See* § 39.801(3)(d).
254. 806 So. 2d 646 (Fla. 2d Dist. Ct. App. 2002).
255. *Id.*
256. *Id.* (citing *In re* B.A., 745 So. 2d 962 (Fla. 2d Dist. Ct. App. 1999); *In re* A.L., 711 So. 2d 600 (Fla. 2d Dist. Ct. App. 1998)).
257. Pullen v. State, 802 So. 2d 1113, 1115 (Fla. 2001).
258. *Id.* at 1117.
259. 386 U.S. 738 (1967).
260. 803 So. 2d 877 (Fla. 5th Dist. Ct. App. 2002).

& Rehabilitative Services[261] in which the Fourth District established an *Anders*-like procedure for withdrawal that differs from the approach employed in *Pullen*. Under *Ostrum* the lawyer serves a motion to withdraw on the client with certification in the motion to the court that counsel in good faith has discovered no valid error below, and there is an opportunity for the client to file a brief individually or through counsel.[262] *Anders* as employed in *Pullen* actually requires the filing of a brief indicating that there is no merit to the appeal.[263] The Florida courts are thus split on the particular procedure, and the issue will be decided by the Supreme Court of Florida.[264]

The issue of the application of stays on appeal in termination of parental rights cases was before the Second District Court of Appeal in *In re M.A.D.*[265] In that case the Department filed a petition to terminate parental rights and after an adjudicatory hearing the court denied the petition, ordering that the children be sent to New York for a visit with their mother pending approval of the placement using the Interstate Compact on the Placement of Children.[266] The Department appealed the denial of the petition to terminate.[267] Then after the notice of appeal was filed, the mother filed a motion seeking immediate placement of the children with her.[268] The Department objected on the grounds that the notice of appeal constituted an automatic stay precluding changing placement during the appeal.[269] The trial court agreed and the mother filed an emergency motion for relief of the stay in the appellate court.[270] The appeals court engaged in a process of statutory construction looking at the *Florida Rules of Appellate Procedure*, the *Florida Statutes*, and the *Florida Rules of Juvenile Procedure*.[271] The court concluded that the provisions read together provide for an automatic stay in the termination case when the court terminates parental rights and directs that the child be placed for subsequent adoption.[272] The rationale for the stay avoids the significantly disadvantageous consequences of allowing the child to be

261. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).
262. *N.S.H.*, 803 So. 2d at 879.
263. *Id.*
264. Martinez v. Fla. Power & Light Co., 785 So. 2d 1251, 1253 (Fla. 3d Dist. Ct. App. 2001), *rev. granted*, 819 So. 2d 137 (Fla. 2002).
265. 812 So. 2d 509 (Fla. 2d Dist. Ct. App. 2002).
266. *Id.* at 511; FLA. STAT. § 409.401 (2002).
267. *M.A.D.*, 812 So. 2d at 511.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.; see* FLA. R. APP. P. 9.146(c); FLA. STAT. § 39.815(3) (2002); FLA. R. JUV. P. 8.275(a).
272. *In re* M.A.D., 812 So. 2d 509, 512 (Fla. 2d Dist. Ct. App. 2002).

adopted only to have the termination reversed on appeal.[273] The court explained that the stay did not apply to the situation where the Department had not proven a legal basis to terminate to parental rights, and that obligating children to remain in foster care pending resolution of the appeal would not serve the purposes of chapter 39.[274] Holding children in foster care after the court ordered return of the children would only "prolong the state-imposed absence of stability in the lives of these children."[275] The court did say that while an automatic stay did not exist under the law, the Department was free to seek a stay in the individual case based upon the circumstances of that case.[276]

In a case that may be of first impression, the First District Court of Appeal recently was faced with questions of whether parents are constitutionally entitled to competent court-appointed counsel in a dependency proceeding, and if so, what means should be used to ensure that the right is not denied. The issues were raised in *L.W. v. Department of Children & Family Services*.[277] The closest the court had previously come to these questions was in the context of a dependency proceeding implicating possible permanent termination of parental rights. In *In re M.R.*[278] the court had held that there was the implication that counsel provide competent assistance. The court also noted that the position in *M.R.* was consistent with a large number of other jurisdictions.[279] The court looked at several cases which had indeed dealt with effective assistance in dependency proceedings and concluded that the right to counsel was something more than a meaningless formality.[280] While immediate termination of parental rights might not be in the offing, the court recognized that it is a possibility that the parent could lose custody of the child or be separated from the child for a significant period of time.

The court also determined that the standard to be applied for competence of counsel is that used in a criminal case.[281] The court noted that the vast majority of courts have applied that standard, which had been enunciated by the United States Supreme Court in *Strickland v. Washington*.[282] In that case, the Court held that the performance must be deficient by falling outside the broad range of professionally-acceptable activity and that the

273. *Id.* (citing *In re* J.R.G., 624 So. 2d 273, 275 (Fla. 2d Dist. Ct. App. 1993)).
274. *Id.*
275. *Id.*
276. *Id.*
277. 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).
278. 565 So. 2d 371 (Fla. 1st Dist. Ct. App. 1990).
279. *L.W.*, 812 So. 2d at 554.
280. *Id.* at 555.
281. *Id.* at 556.
282. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)).

deficient performance must prejudice the defense, meaning that there must be a reasonable probability that without the unprofessional errors there might be a different result.[283] The court in *L.W.* concluded that the *Strickland* standard is well-established and straightforward and therefore it concluded that it ought to be applied.[284] The procedure to be used to raise the effective assistance of counsel is habeas corpus because that is the only available remedy.[285] Laches, finally, is available where there has been an unreasonable delay in raising a claim of ineffective assistance of counsel.[286]

Whether a fifteen-year-old minor who is the respondent in a termination of parental rights case with respect to her own minor child has the right to the appointment of a guardian ad litem and an attorney was before the Fourth District in *M.C. v. Department of Children & Family Services*.[287] The court answered the question in the negative, finding that there is no statutory entitlement to both.[288] The court reviewed the relevant rules of juvenile procedure and could find nothing in the rules nor in the statutes making special provision for respondent parents who also happen to be minors.[289] The court discussed the distinction between the role of the guardian ad litem and the lawyer finding that they were not coextensive.[290] Finally, the court found that the term "child" referred to in both statute and court rule was not meant to include parents who were also minors.[291]

The failure of a mother's attorney, who was appointed for her because she is indigent, to appear at a termination of parental rights hearing does not allow the court to conduct a hearing in the absence of counsel without first inquiring as to whether the mother wished to proceed without counsel and whether the mother knowingly and intelligently waived her right to counsel. In *In re L.N.*,[292] the appellate court reversed for this reason stating what ought to be obvious—"that the procedure followed by the trial court failed to satisfy due process requirements that meaningful assistance of counsel be provided to the Mother."[293]

283. *Strickland,* 466 U.S. at 694.
284. *L.W.*, 812 So. 2d at 556.
285. *Id.* at 557.
286. *Id.*
287. 814 So. 2d 449 (Fla. 4th Dist. Ct. App. 2001).
288. *Id.* at 451.
289. *Id.*
290. *Id.*
291. *Id.*
292. 814 So. 2d 1142 (Fla. 2d Dist. Ct. App. 2002).
293. *Id.* at 1144.

V. CONCLUSION

The Florida appellate courts have spoken vigorously and bluntly about the failure of the trial courts to properly advise children of their right to counsel in delinquency cases as has been reported for over a decade in survey articles in this Journal. The appellate courts also spoke to specific issues about the right to counsel and notification in dependency and termination of parental rights cases. Finally, the courts worked this past year to flesh out the rules for prospective neglect, first established by the Supreme Court of Florida in 1991 in *Padgett v. Department of Health & Rehabilitative Services*.[294]

294. 577 So. 2d 565 (Fla. 1991).

2003 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

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I. INTRODUCTION

This survey article limns the several stages of public employment in Florida during 2002-2003, beginning with the law governing the hiring of not only employees, but also of public officials. For example, Florida's efforts to regulate political advertising by public officials in the face of First Amendment challenges are explored in Part II. The growing trend toward privatizing public jobs is also touched on in this section.

Part III surveys the law governing the terms of public employment. Under the heading of hours and wages, this section explores recent developments in the Fair Labor Standards Act involving overtime regulations. Moreover, this section touches on the growing trend among Florida cities and counties to adopt so-called living wage statutes that peg salaries to the cost of living. As for employment benefits law, Part III surveys recent developments involving the Family Medical Leave Act, disability and death benefits, public pensions, health benefits, unemployment compensation, and occupational health and safety issues.

Part IV addresses recent legal developments governing the discipline and discharge of public employees. For example, some public employees have been terminated in retaliation for engaging in protected activity, for blowing the whistle on illegal conduct committed by their employers, or for speaking out critically on matters touching on their employment. Turning to recent case law and legislative action involving employment discrimination, Part IV covers discriminatory practices involving race, national origin, gender, age, disability, same-sex bias, and religion. Finally, Part IV looks at recent developments concerning remedies for employment discrimination such as reinstatement, back pay, and the availability of attorneys' fees for prevailing parties.

Part V covers legal issues involving collective bargaining in the public sector. In addition, recent developments concerning public unions and grievance arbitration are touched upon.

II. HIRING, POLITICAL ADVERTISING, AND EXAMINATIONS

A. *Public Officials' Political Ads*

Public officials are either appointed or elected and serve in the position for a prescribed term or at the pleasure of a higher official. Officials campaigning for public office must heed state laws governing political advertising. For example, Florida law stipulates that ads supporting a particular candidate must disclose if it is a paid political advertisement.[1] "[V]iolation is a misdemeanor punishable by up to $1,000 or a year in jail."[2] In January 2003, a Fort Lauderdale mayoral candidate was accused of violating this law.[3] At the same time states must be wary of treading on political candidates' First Amendment rights when regulating political advertising.

B. *Privatization*

Privatization, whereby formerly governmental services are undertaken by private enterprise, continues to be a controversial issue as even essential governmental tasks such as prison administration are contracted out.[4] Privatization in Florida has come under fire: "[p]oor-quality privatized services have caused children to be stranded when school buses didn't run, disabled people to be stuck with no transportation, sick people to face nightmarish insurance service . . . ."[5] Legal issues raised by privatization in 2002-2003 include the following:

1. Despite a United States Supreme Court ruling sustaining an Ohio school vouchers law, Florida courts are urged by the Florida Teachers' Union to conclude that Florida's voucher law violates the state constitution, which prohibits public money being funneled to promote religion.[6]

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1. *Campaign Ad Apparently Violates State Law*, MIAMI HERALD, Jan. 31, 2003, at 7B.
2. *Id.*
3. *Id.*
4. *See, e.g.*, Ira. P. Robbins, *Privatization of Corrections: Defining the Issues*, 33 FED. B. NEWS & J. 194, 195 (1986).
5. James Fendrich, *Privatization Costs Floridians Millions of Dollars*, MIAMI HERALD, May 4, 2001, *available at* http://www.commondreams.org/views01/0504-03.htm.
6. *Does Voucher Law Violate State Constitution? Judge Hears Lawsuit*, MIAMI HERALD, July 10, 2002, at 8B.

2. In 2000, President Clinton signed an executive order deeming air traffic service "'an inherently governmental function.'"[7] In 2002, President Bush deleted those four words.[8] On June 12, 2003, the Senate voted to bar the government from privatizing air traffic control.[9]

3. On May 29, 2003, the Office of Management and Budget ("OMB") published changes to Circular A-76, its guidelines governing the method federal agencies use in assessing whether a commercial activity should be undertaken by the public or private sector.[10] By these revisions, OMB aims at opening 425,000 federal jobs to private sector competition.[11]

4. Rep. Ralph Arza, R-Hialeah, who serves on the Florida House Education Appropriations Subcommittee, proposed eliminating the public school police force and contracting with city police departments to provide campus security.[12]

C. *Bus Driver's Exam*

In November 2002, Miami-Dade County voters approved a half-penny sales tax in order to double the 1,500 municipal bus drivers force by 2006.[13] The date set for the bus drivers' exam, however, had unexpected consequences for public school students.[14] So many school bus drivers took the exam for the better-paying jobs with Miami-Dade Transit Agency that school authorities struggled to provide school bus transportation after nearly one-quarter of the workforce called in sick.[15]

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7. *Senate Bans Privatizing Air Traffic Control*, L.A. TIMES, June 13, 2003, at A21.
8. *Id.*
9. *Id.*
10. Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).
11. Jason Peckenpaugh, *New Rules Should Make Competition Routine in Government, Says OMB*, GOV'T EXEC. MAG., May 29, 2003, *available at* http://www.govexec.com/dailyfed/0503/052903p1.htm.
12. Matthew I. Pinzur, *Dade is $55 Million Short in Spending on Teachers*, MIAMI HERALD, Oct. 23, 2002, at 8B.
13. David Ovalle, *Schools Hustle as Bus Drivers Miss Work*, MIAMI HERALD, Jan. 25, 2003, at B.
14. *Id.*
15. *Id.*

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act Issues

a. *Overtime*

The Fair Labor Standards Act ("FLSA") governs minimum wage and overtime pay in both the public and private employment sectors.[16] Section 213(a)(1) of the FLSA carves out a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity.[17] For example, in *Hogan v. Allstate Insurance Company*, insurance claims adjustors satisfied the test for exemption from FLSA's overtime rules as bona fide administrative employees.[18]

"Current law exempts workers from overtime pay if they earn more than $155 a week, or $8,060 a year."[19] For the first time in twenty-eight years, the Department of Labor ("DOL") is proposing to update this salary test.[20] The proposal would raise the minimum weekly salaries employees can earn from $155 to $425, to count as "white collar" workers exempt from FLSA's overtime rules.[21] About twenty-two million Americans might be affected by the DOL's new definition of white-collar workers.[22] One clear line the proposal establishes is that all employees earning under $22,100 a year must receive overtime pay.[23] Moreover, white-collar professionals would be exempt from overtime rules if they "manage more than two employees and have the authority to hire and fire, or if they have an advanced degree or similar training and work in a specialized field, or work in the operations, finance, and auditing areas of a company."[24] While organized labor favors the proposal guaranteeing overtime status to all employees earning under $22,100 a year, it worries that the broadened definition of employees

16. 29 C.F.R. § 1-4907 (2002).
17. 29 C.F.R. § 541.1 (2002); 29 U.S.C. § 213(A)(1) (2000).
18. 210 F. Supp. 2d 1312, 1324 (M.D. Fla. 2002); *see also,* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541(2002).
19. Leigh Strope, *Millions May Lose or Gain Overtime Pay*, MIAMI HERALD, Mar. 28, 2003, at C.
20. *Id.*
21. 29 C.F.R. § 541.
22. Strope, *supra* note 19.
23. *Id.*
24. *Id.*

"exempt from overtime pay to include any employee in a 'position of responsibility'" covers too many workers.[25] As it is, many employers already find many ways to get workers to put in extra hours without any compensation, much less overtime as mandated by the FLSA.[26]

On July 10, 2003, the House of Representatives barely sustained proposed labor regulations that might disqualify eight million employees from overtime pay.[27] The 213–210 vote blocked a Democratic bill that would have prevented the Labor Department from implementing the new rules on overtime.[28]

Overtime pay for Florida public employees came into play in *Debrecht v. Osceola County*.[29] Battalion chiefs for an emergency services department sued Osceola County under the FLSA seeking damages for unpaid overtime compensation but lost.[30] The federal district court concluded that the plaintiffs were exempt from the FLSA overtime provisions, given that they were compensated on a salary basis and fell within the statutory definition of administrative, as well as executive, employees.[31]

b. *Miscellaneous Wage and Hour Issues*

Under the FLSA, a group of employees are entitled to sue to recover wages even though such a suit is not literally a class action as defined in rule 23 of the *Federal Rules of Civil Procedure*.[32] The difference is that an employee must "opt-in" to become a member of a FLSA class while a member of the *Federal Rule of Civil Procedure* 23 class must seek exclusion to avoid ending up a member.[33] On May 19, 2003, the Supreme Court handed down its only FLSA case in the term.[34] In *Breuer v. Jim's Concrete of Brevard, Inc.*,[35] the Court ruled that the FLSA does not prohibit removal of suit from state to federal court.[36]

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25. Justin Gest, *Unions Decry Proposed OT Rule*, L.A. TIMES, July 1, 2003, at A17.

26. *See, e.g.*, Edward Wasserman, *Working Overtime Without Compensation*, MIAMI HERALD, Jan. 13, 2003, at 9B.

27. Nick Anderson, *House Lets Bush Proceed With Overtime Revisions*, L.A. TIMES, July 11, 2003, at A17.

28. *Id.*

29. 243 F. Supp. 2d 1364 (M.D. Fla. 2003).

30. *Id.*

31. *Id.* at 1373.

32. 29 U.S.C. § 216(b) (2000). *See generally* FED. R. CIV. P. 23.

33. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); *see* FED. R. CIV. P. 23(c).

34. *See* Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882 (2003).

35. *Id.*

36. *Id.* at 1884.

The circuit courts are split over whether the FLSA allows a district court to count overpayments made in some pay periods against underpayments in other pay periods.[37] In this regard, the Sixth and Seventh Circuits reject such offsets while the Eleventh Circuit permits them.[38]

Finally, the Eleventh Circuit ruled in *Arriaga v. Florida Pacific Farms, L.L.C.*,[39] that two Florida farmers violated the FLSA's minimum wage rules by refusing to compensate Mexican farm workers during their first workweek for travel expenses from Mexico to Florida.[40]

2. Living Wage

"Living wage laws require employers to pay employees enough to keep a family of four at or above the poverty line," which comes out to $18,100 a year, or $8.70 an hour.[41] The living wage concept originated in Baltimore in 1994, and today over eighty cities and counties have embraced the doctrine.[42]

In South Florida, Miami-Dade County was the first to adopt the so-called living wage law.[43] In October 2002, the Broward County Commission voted to pay county employees a living wage of $9.57 an hour beginning in October 2003.[44] Following suit, a Miami City Commissioner urged the city to "pay all its employees a living wage in an effort to combat poverty."[45] The living wage in Miami is $8.56 an hour if health benefits are provided, or $9.81 if they are not.[46] To date, Miami-Dade, Broward, and Palm Beach Counties have adopted living wage laws.[47] Hollywood is the most recent South Florida city to contemplate paying all its workers a living wage.[48]

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37. Singer v. City of Waco, 324 F.3d 813, 827 (5th Cir. 2003); *see also* Herman v. Fabri-Ctrs. of Am., 308 F.3d 580 (6th Cir. 2002); Howard v. City of Springfield, 274 F.3d 1141 (7th Cir. 2001); Kolheim v. Glynn County, 915 F. 2d 1473 (11th Cir. 1990).

38. *E.g.*, *Singer*, 324 F.3d at 817 (noting circuit split on this FLSA issue).

39. 305 F.3d 1228 (11th Cir. 2002).

40. *Id.* at 1232.

41. Brad Bennett, *County Could Raise Minimum Pay Scale*, MIAMI HERALD, Oct. 7, 2002, at 1B.

42. *Id.*

43. *Id.*

44. *Official Calls for Miami to Pay a "Living Wage,"* MIAMI HERALD, Oct. 30, 2002, at 3B.

45. *Id.*

46. *Id.*

47. Brad Bennett, *County Workers to Get "Living Wage,"* MIAMI HERALD, Oct. 9, 2002, at 1A.

48. Jerry Berrios, *"Living Wage" Is Hot Topic for City*, MIAMI HERALD, Apr. 1, 2003, at 1B.

3. Wage Gap

Men, on average, make more money than women.[49] Part of this wage gap can be blamed on continuing gender discrimination, but part of it stems from non-discriminatory reasons such as the fact that many women leave the work force either temporarily or permanently to raise a family. While women have been closing this gap over time, little progress has been made in the last decade.[50] But in 2002-2003, the average female employee received a five percent raise in her weekly pay while men's weekly wages rose only 1.3% to $692.[51] Women are concentrated in the services sector and government employment, the two sectors least affected by the last two years of economic weakness.[52] Men, by contrast, work in industries like manufacturing and technology that have suffered most in the last two years.[53] Full-time female employees made 77.5% of what full-time male employees did in 2002.[54]

4. Teachers' Salaries

The Dollars to the Classroom Act, enacted by the Florida Legislature in 2001, requires school districts that flunk statewide academic standards to raise that part of their next budget to be spent on teachers and teacher training.[55] Despite the law, thirty school districts statewide have failed to comply.[56] For example, Miami-Dade County Public Schools spent fifty-five million dollars less on teachers in 2002 than the act mandated.[57] Arguably, a key reason so many districts feel free to flout state law is because the act imposes no punishment for failure to comply.[58]

According to the Miami Herald, Broward public school teachers received an average pay increase of 5.5% in 2002, raising starting salaries from $31,560 to $32,600.[59] Despite statewide teacher pay raises, Florida remains

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49. *See* David Leonhardt, *Women Outpace Men in Wage Gains,* TIMES UNION (Albany, N.Y.), Feb. 17, 2003, at A1.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Leonhardt, *supra* note 49.
55. Pinzur, *supra* note 12.
56. *Id.*
57. *Id.*
58. *Id.*
59. Steve Harrison, *Broward, Teachers Agree on Pay Hike,* MIAMI HERALD, Oct. 8, 2002, at 1B.

thirty-first in the nation in average teacher salaries.[60] In 2001, Broward had the third-highest starting teacher salary in the state, after Miami-Dade and Palm Beach Counties.[61]

B. *Benefits*

1. Family and Medical Leave Act

Under the Family Medical Leave Act ("FMLA"),[62] public and private eligible employees are entitled to twelve weeks of unpaid leave in a twelve-month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child or parent with a serious health condition; or 3) for the employee's own serious health condition.[63]

During years 2002-2003, the following FMLA issues have been addressed:

1. On May 27, 2003, the Supreme Court ruled 6–3 in *Nevada Department of Human Resources v. Hibbs*,[64] that states enjoy no Eleventh Amendment immunity from damages suits for violating their employees' FMLA guaranteed right to take time off for family emergencies.[65]

2. There is a circuit court split over whether an employer who refuses to reinstate a worker out on FMLA leave bears the burden of establishing that the worker would have been discharged even if he or she had not taken FMLA leave.[66] The Tenth Circuit, agreeing with the Eleventh Circuit and disagreeing with the Seventh Circuit, has concluded that the employer bears the burden.[67]

3. On December 4, 2002, the DOL proposed to repeal regulations aimed at promoting state use of unemployment insurance to provide partial wage replacement for parents on FMLA leave to care for newborns or newly adopted children.[68]

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60. *Id.*
61. *Id.*
62. 29 U.S.C. § 2612 (2000).
63. § 2612(a)(1).
64. 123 S. Ct. 1972 (2003).
65. *See id.* at 1976.
66. *See, e.g.*, Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 963 (10th Cir. 2002).
67. *Id.*
68. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation: Removal of Regulations, 67 Fed. Reg. 72,122 (Dec. 4, 2002).

4. On February 5, 2003, Senator Christopher J. Dodd (D-Conn.), introduced a bill that would expand the FMLA to protect more employees and offer additional grounds for taking leave.[69]

2. Disability and Death Benefits

In *In re Jones*,[70] a Washington State Patrol Trooper was first placed on temporary disability status and then on permanent disability status.[71] In violation of the terms of his disability benefits, Jones received unlawful time loss payments without informing State Patrol.[72] When the State Patrol learned of the payments it sued Jones and recovered a money judgment against him.[73] State Patrol wanted the illicit sums Jones received deducted from his disability benefits.[74]

Later, Jones filed for bankruptcy under Chapter 7.[75] Although the bankruptcy court discharged Jones' debt to State Patrol, State Patrol continued to deduct sums from Jones' disability benefits, so Jones sought sanctions.[76] In its defense, State Patrol contended that the sums it continued to deduct amounted to a recoupment of disability benefits unlawfully paid to Jones.[77] At bottom, the issue boiled down to whether the State Patrol's deductions from Jones' disability benefits amounted to a recoupment which survives bankruptcy or was deemed a setoff which is dischargeable.[78] The court concluded that the sums involved were a recoupment and ruled in favor of the State Patrol.[79]

Some public employers have begun offering a new type of disability insurance coverage that compensates employees who are killed or gravely injured during their commute to work.[80] For example, the City of Phoenix, Arizona, purchased "commuter insurance policies after two [city] employees . . . , one of them a police officer, were killed on the way to work."[81]

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69. *See generally* S. 304, 108th Cong. (2003).
70. 289 B.R. 188 (Bankr. M.D. Fla. 2002).
71. *Id.* at 189.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Jones*, 289 B.R. at 189.
76. *Id.* at 190.
77. *Id.*
78. *Id.*
79. *Id.* at 193.
80. Sharon Bernstein, *A New Kind of Insurance: Coverage for the Commute*, L.A. TIMES, July 15, 2003, at B2.
81. *Id.*

Commuter insurance is fairly inexpensive because it only kicks in during commuting and such deaths are infrequent.[82]

3. Public Pensions

Public pension issues affecting Florida public employees during 2002-2003 include the following:

1. Hollywood's new contract with city employees provides for a bonus check for every year the public union's pension fund investment exceeds expectations.[83]

2. Skyrocketing pension costs in Hollywood's labor contract with city firefighters might entail a big tax increase for property owners in 2003.[84]

3. Under Florida law, public officials convicted of certain types of crimes must forfeit their pensions.[85] Miami's Fire and Police Pension Board considered but did not resolve whether a former Miami City Manager was entitled to keep his public pension after he was convicted of misuse of public funds.[86]

4. A United States Bankruptcy judge ordered the Miami Police Relief and Pension Fund to reimburse close to $1 million to investors fleeced by an accountant for the fund.[87] The fund board enabled the accountant to execute his scam so the fund could recoup its losses stemming from the accountant's fraudulent tax-exempt bond fund.[88]

5. Chief investment officers of seven state public pension funds urged the Securities and Exchange Commission on June 30, 2003: to act on the power of shareholders to nominate directors to corporate boards; to bar brokers from voting proxies without explicit consent; and to bar company auditors from performing tax consulting work for their audit clients.[89] The group of state officials consists of "state treasurers and investment officers who

82. *Id.*

83. Elena Cabral, *Hollywood to Consider General Employee Pact, Pay Raises*, MIAMI HERALD, Sept. 18, 2002, at 5B.

84. Elena Cabral, *Pension Costs Surprise Officials*, MIAMI HERALD, Oct. 22, 2002, at 1B; *see also* Elena Cabral, *Pension Shock is Blamed on Mix-Up,* MIAMI HERALD, Oct. 23, 2002, at 3B.

85. FLA. STAT. § 112.3173(3) (2002).

86. *Ex-manager May Hear Pension Decision Today*, MIAMI HERALD, Jan. 25, 2003, at 3B; *see Season's Greetings from Behind Bars*, MIAMI HERALD, Jan. 7, 2002, at 3B.

87. Jay Weaver, *Miami Police Fund Ordered to Repay Bilked Investors*, MIAMI HERALD, Apr. 15, 2003, at 6B.

88. *Id.*

89. Kathy M. Kristof, *California; States Urge Faster Wall St. Reform; The Officers Who Oversee Public Pension Funds Say the SEC Needs to Act Quickly on Shareholder Rights Issues*, L.A. TIMES, July 1, 2003, at C2.

serve as trustees of public pension funds that invest the assets of [public] employees."[90]

4. Health Benefits

Under the Age Discrimination in Employment Act ("ADEA"), an employer owes no duty to grant health benefits, which are otherwise covered by Medicare.[91] But in 2000, the Third Circuit Court of Appeals ruled, in *Erie County Retirees Association v. County of Erie, Pennsylvania*,[92] that a public employer violates the ADEA when it accords Medicare-eligible retirees fewer health insurance benefits than those accorded non-Medicare eligible retirees.[93] In response, the Equal Employment Opportunity Commission drafted regulations that would permit employers to cut back or eliminate health benefits when a retiree becomes eligible for Medicare without running afoul of the ADEA.[94]

Federal law, such as the 1996 Health Insurance Portability and Accountability Act ("HIPAA"), curtails the use of exclusions for preexisting conditions when an employee moves from one job to another.[95] Pursuant to this federal statute, the Department of Health and Human Resources issued a "Privacy Rule," which includes an April 14, 2003 compliance deadline for virtually all covered entities.[96] In addressing the department's power to issue this rule, the Fourth Circuit Court of Appeals ruled, in *South Carolina Medical Association v. Thompson*, that the provisions of HIPAA that govern rulemaking do not improperly delegate legislative power to the Department of Health and Human Services.[97]

"Employers and managed care companies paid $1.5 billion to $3 billion through higher [health insurance] rates to cover part of the $24 billion hospitals spent caring for [uninsured] patients . . . in 2001."[98] According to some experts, employers are subsidizing the uninsured at the expense of their own

90. *Id.*

91. Regulations Relating to Labor, 29 C.F.R. § 1625.10(e) (2003).

92. 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2003).

93. *Id.* at 215.

94. *EEOC Proposal Would Allow Retirement Plans to End at Medicare Without Age Act Violation*, 71 U.S.L.W. 2088 (2002).

95. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 1940 (codified at 42 U.S.C. § 201 (2000)).

96. S.C. Med. Ass'n v. Thompson, 327 F.3d 346, 349 (4th Cir. 2003).

97. *Id.* at 352.

98. Milt Freudenheim, *Businesses Begin to Consider the Cost for the Uninsured*, N.Y. TIMES, Mar. 6, 2003, at C5.

employees.[99] For this reason, some insurers are supporting proposals for universal health insurance.[100] Florida is one of a dozen states that permit health plans to provide lower-cost policies to the uninsured that omit some or all state mandates.[101]

Of all benefits offered by employers, the cost of health insurance has risen far faster and far more. For example, Fort Lauderdale city employees face huge hikes in their health insurance premiums in 2003: employee contributions for families under the least costly option will increase from $40 to $82.28 per worker every two weeks.[102] For its part, the city pays $1.6 million a year to ease the burden on employees.[103] Fort Lauderdale has a self-funded health insurance plan which enabled it to offer its workers a wide choice of doctors.[104]

5. Unemployment Compensation

Under Florida law, an employee who is "discharged for misconduct connected with . . . work" is disqualified from receiving employment benefits.[105] In *Anderson v. Unemployment Appeals Commission*,[106] Anderson had served several years as a senior community corrections officer for Orange County, Florida.[107] She was fired for misrepresentations in her efforts to convince "a judge to sign a violation of probation warrant before the defendant's probation period expired."[108] Subsequently, the Division of Unemployment Compensation of the Florida Department of Labor and Employment Securities disqualified her from receiving unemployment benefits for "'misconduct connected with work.'"[109] An unemployment compensation appeals referee ruled Anderson was entitled to benefits, but this decision was reversed by the unemployment appeals commission.[110]

On appeal, the Fifth District Court of Appeal made clear that "in determining whether misconduct has occurred, the statute should be liberally con-

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99. *Id.*
100. *Id.*
101. *Id.*
102. Brad Bennett, *City Workers Health Insurance Rates Up*, MIAMI HERALD, Feb. 7, 2003, at 6B.
103. *Id.*
104. *Id.*
105. FLA. STAT. § 443.101(2) (2001).
106. 822 So. 2d 563 (Fla. 5th Dist. Ct. App. 2002).
107. *Id.* at 564.
108. *Id.*
109. *Id.* at 564–65.
110. *Id.* at 565.

strued in favor of the employee and in favor of awarding benefits."[111] After reviewing the record, the court concluded that Anderson's conduct amounted at most to poor judgment, and did not constitute willful, wanton, or deliberate acts, and therefore was not misconduct as defined by statute.[112] Anderson's poor judgment did not disqualify her from receiving unemployment benefits.[113]

6. Workers' Compensation

Florida's Insurance Commissioner, Tom Gallagher, told the Miami Herald that the "'state's workers' compensation system is failing,'" and urged the legislature to reform the system in a special session.[114] Among other proposals, the Commissioner recommended premium reductions for Florida employers and better delivery of medical services to insured workers, but rejected a 21.5% rate increase urged by the industry.[115] Instead, he agreed to an increase that would raise rates an average of fifteen percent for most businesses in 2002.[116] A specific company's rate increase is tied to its safety record and the nature of work undertaken among other factors.[117] "[W]orkers' compensation rates in Florida [rank] among the highest in the country."[118] At the same time, benefits paid to Florida employees injured on the job are paltry when compared with most states.[119] Some insurance companies no longer do business in Florida given that studies "found their costs for workers' comp[ensation] were 127 percent of the premium."[120]

7. Occupational Health and Safety Issues

Violence in schools is a growing problem, so most states prohibit public employees from carrying concealed guns on school property.[121] Unlike most states, however, Utah enacted a law "allowing teachers and other public

111. *Anderson*, 822 So. 2d at 566 (citing Mason v. Load King Mfg. Co., 758 So. 2d 649, 655 (Fla. 2000)).
112. *See id.* at 567–68.
113. *Id.* at 569.
114. Gregg Fields, *Workers' Comp Issue in Limbo*, MIAMI HERALD, Nov. 14, 2002, at 1C.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. Fields, *supra* note 114.
120. *Id.*
121. John R. Lott, Jr., *Letting Teachers Pack Guns Will Make America's Schools Safer*, L.A. TIMES, July 13, 2003, at M5.

workers to carry concealed guns on school property."[122] Today thirty-five states have right-to-carry laws that issue permits for concealed weapons after applicants pass a criminal background check, pay fees, and sometimes, undergo training.[123] The effect of this law may increase the odds that someone will be able to protect himself and strengthen deterrence.[124] Before 1995, federal law allowed teachers with concealed-handgun permits to carry guns at school in some states.[125] According to one study, individuals with guns helped stop nearly one-third of public school shootings since 1997.[126]

C. *Ownership of Copyright*

Under federal copyright law, a "work made for hire" considers the employer the author of the work "unless the parties have expressly agreed otherwise in a written instrument signed by them . . . ."[127] In *Genzmer v. Public Health Trust of Miami-Dade County*,[128] a former employee and his employer contested ownership of a computer program that the former employee designed during the time he was working for the employer.[129] "Genzmer wrote the program . . . on his own time, during non-business hours, and using his home computer."[130] Genzmer conducted the test phase of the program's development on his former employer's computers.[131] Moreover, Genzmer secured a copyright in the software.[132]

The federal district court began its analysis by making clear that Genzmer's copyright certificate shifted the burden to the employer "to overcome the presumption of the validity of Genzmer's copyright in the software."[133] The court spelled out the "two elements to the work for hire definition: (1) the author must be an employee, and (2) the work must be [developed] within the scope of the [employee's] employment."[134] Since Genzmer was clearly an employee, the court turned to the three-part test governing whether an employee has developed a work within the scope of employment:

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* Lott, *supra* note 121.
127. 17 U.S.C. § 201(b) (2000).
128. 219 F. Supp. 2d 1275 (S.D. Fla. 2002).
129. *Id.* at 1276.
130. *Id.* at 1277.
131. *Id.*
132. *Id.* at 1278.
133. *Genzmer*, 219 F. Supp. 2d at 1279.
134. *Id.* at 1279–80.

"(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master."[135]

Addressing the first element, the court ruled that Genzmer's creation of the computer program was "incidental to his authorized acts of [conducting] a research program, acts he was clearly employed to perform."[136] As for the second element, the court made clear that the key is that Genzmer created the program during the time period he was hired to complete the research program.[137] Turning finally to the third element, the court concluded Genzmer's work was driven, "at least in part," by a motive to serve his employer.[138] This was evidenced by the fact that the program was tailored to suit his employer's needs and by the fact that the "program was [actually] used in the [d]epartment to computerize reports."[139] For these reasons, the court concluded that the computer program was "work made for hire" and Genzmer was not entitled to the copyright.[140]

IV. DISCIPLINE, DISCHARGE, DISCRIMINATION, AND REMEDIES

A. *Retaliation, Whistle-blowing, and the First Amendment*

1. Retaliation

To establish a prima facie case of retaliation, a plaintiff must show that: 1) the employee was engaged in protected activity; 2) the employer was aware of that activity; 3) the employee suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action.[141] Two Florida cases raised retaliation issues,[142] calling into question the meaning of an "adverse employment action" and what constitutes a "causal connection."[143]

Broward County, Florida, reached a settlement with its former human rights division director who claimed her dismissal was retaliation for filing her own racial bias suit against the county with the Equal Employment Op-

135. *Id.* at 1280 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1957)).
136. *Id.* at 1281.
137. *Id.* at 1282.
138. *Genzmer*, 219 F. Supp. 2d at 1282.
139. *Id.* at 1283.
140. *Id.*
141. Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).
142. *See id.*; State v. Fla. Comm'n on Human Relations, 842 So. 2d 253 (Fla. 1st Dist. Ct. App. 2003).
143. *See Brochu*, 304 F.3d at 1155.

portunity Commission ("EEOC").[144] While Broward's Human Rights Board accused her of failing to investigate discrimination claims, the former employee pointed out that she was terminated despite good evaluations and raises over nineteen years.[145]

2. Whistle-blowing

Under Florida's Whistle-blower's Act, state agencies are enjoined from taking adverse action against state employees who make protected disclosures to appropriate authorities.[146] In *State v. Florida Commission On Human Relations*, Ms. Georgalis, a Department of Transportation ("DOT") manager, opted for resignation only in response to coercion.[147] Ms. Georgalis claims she was discharged because she took part in a complaint filed by a contractor under her supervision.[148] Ms. Georgalis filed a whistle-blower complaint with the Florida Commission on Human Rights ("FCHR").[149] DOT refused to reinstate Ms. Georgalis, claiming she resigned her position.[150] The circuit judge ruled that Ms. Georgalis was in fact dismissed and so ordered the DOT to temporarily reinstate her pending the final outcome of the complaint.[151]

On appeal, the First District Court of Appeal addressed FCHR's failure to follow the statutory deadlines.[152] The court excused FCHR's failure for the following reasons: 1) the statute provides no remedy;[153] 2) time limit statutes are directory rather than mandatory;[154] and 3) it would not serve the Whistle-blower Act's legislative purpose to bar a complaining employee from securing relief owing to FCHR's failure to follow statutory directives.[155]

In *Allocco v. City of Coral Gables*,[156] former university public safety officers unsuccessfully sued the city and university alleging, among other

144. Brad Bennett, *Fired Human-Rights Official, County Agree to Settlement Terms*, MIAMI HERALD, Oct. 15, 2002, at 5B.
145. *Id.*
146. FLA. STAT. § 112.3187(4) (2002).
147. 842 So. 2d at 254.
148. *Id.* at 254–55.
149. *Id.* at 254.
150. *Id.* at 255.
151. *Id.*
152. *Fla. Comm'n on Human Relations*, 842 So. 2d at 253.
153. *Id.* at 256.
154. *Id.*
155. *Id.*
156. 221 F. Supp. 2d 1317 (S.D. Fla. 2002).

things, that they were discharged for reasons other than their alleged whistle-blowing activities.[157] On the whistle-blower counts, the public employees lost on the following grounds: 1) they failed to show that they had exhausted administrative state remedies;[158] 2) the public employees' whistle-blower claims against the university were time-barred;[159] 3) the public employees failed to demonstrate a causal connection between their discharge and their protected activity of reporting alleged wrongdoing by the city and university;[160] and 4) the university identified a legitimate, non-pretextual reason for dismissing the public safety officers.[161] They violated a department order barring "bicycle patrol officers from riding together and prohibiting more than one bicycle patrol officer per shift;" the officer remained silent in response to questions posed by the supervisor investigating the incident.[162]

3. The First Amendment

When a public employee alleges retaliation for exercise of free speech rights, a court must first assess the legal issues of whether the employee's speech was on a matter of public concern and whether the employee's interest in speaking outweighs the employer's interest in efficient public service.[163] Then, the fact-finder assesses whether the speech played a significant role in the adverse employment action and whether the employer would have made the same decision even in the absence of the protected speech.[164] This is known as the *Pickering* balancing test.[165]

Over the last year, two state cases within the Eleventh Circuit have addressed issues raised by the *Pickering* balancing test. One case simply noted a circuit court split over whether the test for deciding if a public employee's free speech rights have been violated, i.e., the *Pickering* balancing test, also governs freedom of association claims.[166] In *Board of Regents v. Snyder*,[167] the *Pickering* balancing test arose in the context of whether supervisors were

157. *Id.* at 1323–24.
158. *Id.* at 1366.
159. *Id.* at 1367.
160. *Id.* at 1368.
161. *Allocco*, 221 F. Supp. 2d at 1370.
162. *Id.*
163. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
164. Bd. of Regents v. Snyder, 826 So. 2d 382, 388 (Fla. 2d Dist. Ct. App. 2002).
165. *Id.*
166. *See, e.g.*, Acevedo-Delgado v. Rivera, 292 F.3d 37, 45 n.11 (1st Cir. 2002) (citing Tang v. R.I. Dep't of Elderly Affairs, 163 F.3d 7, 11 n.4 (1st Cir. 1998) (noting, without taking part in, the split between the Seventh and Eleventh Circuits over this issue)).
167. 826 So. 2d at 382.

entitled to qualified immunity.[168] Immunity, the court made clear, turns in part upon the nature of the constitutional right asserted and the degree to which that right is well established within the law.[169] It is the rare First Amendment claim that survives a qualified immunity defense.[170] Turning to the first element of *Pickering*, while Snyder alleged that his speech was a matter of public concern because it involved violations of state law and ethical standards, the court concluded that Snyder was speaking primarily as an employee upon matters of personal interest rather than as a citizen upon matters of public concern.[171] Qualified immunity protects government actors unless their conduct violates clearly established federal statutory or constitutional rights.[172] Under the First Amendment, "a right is clearly established only if the plaintiff can provide case precedent involving essentially the same speech or show that no reasonable person could believe that the first two prongs of *Pickering* had not been met."[173] Since no case law involving the same speech exists, and since Snyder's speech flunked the first prong of *Pickering*, the court concluded that reasonable people could believe that Snyder's speech was not protected under the first two prongs of *Pickering*, thus the supervisors were entitled to qualified immunity.[174]

In *Brochu v. City of Riviera Beach*,[175] a former police officer alleged that he faced adverse employment actions in response to conduct he claimed was protected by the First Amendment.[176] The Eleventh Circuit began its analysis by making clear that "[w]hether a plaintiff engaged in speech protected by the First Amendment is a question of law which must be determined by the district court before a § 1983 claim can be submitted to the jury."[177] Turning to the first element in *Pickering*, the court concluded that speech involving corruption and mismanagement of a police department "might be a matter of public concern."[178] What doomed plaintiff's case, however, was the fourth prong, the "but-for" causation element of the Pickering balancing test.[179] No reasonable jury, the court insisted, could

168. *Id.* at 387–88.
169. *Id.* at 388.
170. *Id.*
171. *Id.* at 389.
172. *Snyder*, 826 So. 2d at 390.
173. *Id.* at 390 (citing Martin v. Baugh, 141 F.3d 1417, 1420 (11th Cir. 1998)).
174. *Id.*
175. 304 F.3d 1144 (11th Cir. 2002).
176. *Id.* at 1147.
177. *Id.* at 1155 (citing Bryson v. City of Waycross, 888 F.2d 1562, 1566 n.2 (11th Cir. 1989)).
178. *Id.* at 1158.
179. *Id.* at 1159.

deny that the city had a strong "legitimate reason for placing Brochu on paid administrative leave."[180] By creating a secret plan to overthrow his superiors and by sharing that plan with members of the community, Brochu knew he would cause havoc in the police department.[181] For these reasons, the court concluded that the district court erred when it rejected the city's "motion for judgment as a matter of law on the § 1983 claim."[182]

The United States Supreme Court expanded governmental liability under the First Amendment in two rulings rendered in 1996, *O'Hare Truck Service, Inc., v. City of Northlake*[183] and *Board of County Commissioners v. Umbehr*.[184] In these two seminal cases, the Court ruled that the First Amendment protects at-will independent contractors against dismissal in retaliation for political activity.[185] However, lower courts continue to struggle over what constitutes an ongoing independent contractor relationship.[186] For example, in *Mangieri v. DCH Healthcare Authority*,[187] the Eleventh Circuit held that a government contractor who had previous contracts for the same sort of services before being denied contract renewal over free speech had an ongoing commercial relationship with the government sufficient to sustain its First Amendment claim, even absent an automatic renewal provision in its contract.[188]

B. *Employment Discrimination*

1. Generally

Although the pair of Supreme Court rulings endorsing affirmative action, handed down June 23, 2003, narrowly involved student admissions policies at public colleges and universities,[189] there is already speculation that these decisions might guide "employers toward wider acceptance of affirmative action policies in hiring, training and promoting workers."[190]

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180. *Brochu*, 304 F.3d at 1159.
181. *Id.* at 1160.
182. *Id.* at 1161.
183. 518 U.S. 712 (1996).
184. 518 U.S. 668 (1996).
185. *O'Hare*, 518 U.S. at 726; *Umbehr*, 518 U.S. at 685.
186. *See* Mangieri v. DCH Healthcare Auth., 304 F.3d 1072 (11th Cir. 2002), *cert. dismissed*, 123 S. Ct. 1511 (2003).
187. *Id.*
188. *Id.* at 1076.
189. *E.g.*, Grutter v. Bollinger, 123 S. Ct. 2325 (2003).
190. Richard B. Schmitt & Justin Gest, *Supreme Court Rulings; Decisions May Lead to More Lawsuits*, L.A. TIMES, June 24, 2003, at A16.

On June 9, 2003, the United States Supreme Court ruled that the Civil Rights Act of 1991 intended to make it easier for victims of discrimination to win their cases.[191] Specifically, in a "mixed motive" case, circumstantial evidence of bias, even though short of "direct evidence" of discrimination, is sufficient for the case to go to the jury.[192]

On March 6, 2003, Senator Susan Collins (R-ME) re-introduced the Civil Rights Tax Relief Act of 2003,[193] under which employment discrimination damages would be excluded from income taxes.[194]

On June 12, 2003, the House of Representatives enacted legislation that would transfer all class action lawsuits, including employment discrimination class actions, from state to federal courts, if the claims totaled $5,000,000 and if the key defendant and fewer than one-third of the claimants were from different states.[195] Federal courts are widely regarded as less sympathetic to plaintiffs in class action suits.[196]

2. Race

A Jamaican-born, former Fort Lauderdale firefighter lost her suit against the city based on claims of race, gender, and nationality discrimination.[197] A federal jury disagreed with a ruling from the EEOC that the city had targeted the former firefighter.[198] She received a written reprimand for injuring a duck while driving to a fire call while, allegedly, her white male counterparts suffered no discipline for similar conduct.[199]

In December 2002, Fort Lauderdale agreed to correct long-standing discriminatory practices in order to settle its largest race bias lawsuit.[200] The settlement came in the wake of warnings by the Department of Justice that the city would be sued if it refused to settle chronic claims of employment bias.[201]

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191. *See* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2155 (2003).
192. *Id.* at 2154.
193. S. 557, 108th Cong. (2003).
194. *Id.*
195. 149 Cong. Rec. H5281-03 (2003).
196. Justin Gest, *For Third Time, House OKs Reforming Class-Action Suits*, L.A. TIMES, June 13, 2003, at A24.
197. Brad Bennett, *Worker Loses Bias Suit Against Fort Lauderdale*, MIAMI HERALD, Sept. 24, 2002, at 1B.
198. *Id.*
199. *Id.*
200. Brad Bennett, *Lauderdale, City Employee Agree to Settle Racial Bias Suit*, MIAMI HERALD, Dec. 14, 2002, at 9B.
201. *Id.*

3. National Origin

On December 2, 2002, the EEOC issued a compliance manual on language issues as guidance on how employers can avoid committing national origin discrimination.[202]

4. Gender

Women make up about two percent of career firefighters nationwide, and hazing incidents have left them uncertain as to whether they are facing sexual harassment.[203] The City of Coral Springs Fire Department faced charges of violating its own policies which ban extreme misconduct which is defined as "'engaging in any intentional horseplay or misconduct which may inflict bodily harm on anyone.'"[204]

An employer's liability for sexual harassment expands if it fails to remedy complaints.[205] In *Watson v. Blue Circle, Inc.*,[206] the Eleventh Circuit ruled that an employer may have failed to take quick and proper corrective action in response to a sexual harassment complaint.[207] For example, the manager's report of the incident made no mention that there was an offer of money.[208] Moreover, not only did the manager fail to alert human resources, but he also failed to submit the victim's own written report to human resources.[209]

Grooming cases fall into three categories: hair, dress, and appearance.[210] Employers are on a firmer legal footing when grooming codes apply equally to both genders.[211] The Walt Disney Company has yet to learn this rule, but it is making progress. In 1994, female workers were allowed to use

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202. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, PUB. NO. 915.003, COMPLIANCE MANUAL SECTION 13: NATIONAL ORIGIN DISCRIMINATION (2002), *available at* http://www.eeoc.gov/docs/national-origin.html.

203. Noah Bierman, *Hazing at Fire Station Distressing*, MIAMI HERALD, Mar. 23, 2003, at 1BR.

204. *Id.*

205. Watson v. Blue Circle, Inc., 324 F.3d 1252, 1257 (11th Cir. 2003) (citing Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278–80 (11th Cir. 2002); Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997)).

206. *Id.* at 1252.

207. *Id.* at 1261.

208. *Id.*

209. *Id.* at 1261–62.

210. *See, e.g.*, Richard Verrier, *For Disney Workers, a Hipper Place on Earth*, L.A. TIMES, July 12, 2003, at C1.

211. *See id.*

eye makeup; in 2000, men were entitled to grow mustaches.[212] In 2003, new rules allow cornrows on men's heads, hoop earrings in women's ears, and female employees may wear open-toe and open-heel shoes.[213] Sandals remain banned.[214]

To prove sex discrimination under Title VII, the employee must establish that the misconduct for which she was disciplined was the same or similar to what her counterparts engaged in, but that they were not similarly disciplined.[215] In *Ratley v. City of Jacksonville*,[216] the Eleventh Circuit ruled that the district court did not err in granting summary judgment to the public employer given that the plaintiff did not offer a single potential comparator.[217]

5. Age

The Age Discrimination in Employment Act ("ADEA") protects workers forty years of age and over.[218] Until recently, younger workers shut out of job opportunities have not managed to sell courts on the notion of "reverse age discrimination." In 2002, however, the Sixth Circuit ruled that the ADEA does recognize claims of "reverse discrimination," in which employees younger than forty received fewer benefits than older employees.[219] Indeed, on April 21, 2003, the Supreme Court agreed to decide whether "reverse discrimination" claims are actionable under the ADEA.[220]

On a statute of limitations issue, under the ADEA, the Eleventh Circuit ruled in *Wright v. AmSouth Bancorporation*[221] that an ADEA claim accrued on the date the employer notified the employee that he was being terminated, not on the earlier date when he was notified that he would not earn a salary increase or bonus.[222]

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212. *Id.*
213. *Id.*
214. *Id.*
215. *See, e.g.*. Anderson v. WBGM-42, 253 F.3d 561, 564 (11th Cir. 2001).
216. No. 01-16291, 2002 WL 1155560, at *1 (11th Cir. Apr. 22, 2002), *cert. denied*, 537 U.S. 885 (2002).
217. *Id.*; Petition for Writ of Certiorari at *3, Ratley v. City of Jacksonville, 123 S. Ct. 118 (2002) (No. 02-134), *available at* 2002 WL 32134883.
218. 29 U.S.C. § 631(a) (2000).
219. Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 467 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).
220. David G. Savage, *Supreme Court to Hear Reverse Age Bias Case*, L.A. TIMES, Apr. 22, 2003, at A15.
221. 320 F.3d 1198 (11th Cir. 2003).
222. *Id.* at 1201-02.

In 1998, the Supreme Court addressed the question whether workers who secured enhanced severance packages in exchange for waiving any age-related claims must return their additional benefits before they can challenge the waivers.[223] In *Oubre v. Entergy Operations Inc.*,[224] the Court ruled that employees who sign releases waiving all claims against the employer and keep the money for signing such releases do not waive ADEA claims unless the release meets the requirements spelled out in federal law for release of ADEA claims.[225] The Eleventh Circuit, in *Watkins v. Nortel Networks Inc.*,[226] held that Oubre does not apply when the plaintiff has not raised an ADEA claim.

6. Disability

The Americans with Disabilities Act ("ADA") makes it unlawful for employers to deny reasonable accommodation for the known physical or mental limitations of an otherwise qualified individual with a disability, unless doing so gives rise to undue hardship.[227] The ADA also regulates pre-employment medical examinations and inquiries.[228]

The ADA protects employers with fifteen or more employees.[229] In *Clackamas Gastroenterology Associates, P.C. v. Wells*,[230] the Supreme Court ruled that the common law test of control governs whether four director-shareholder physicians should be counted as employees toward the fifteen-employee minimum for determining whether an employer is bound by the ADA.[231]

7. Same-sex Bias

While Title VII does not prohibit discrimination on the basis of sexual orientation as such, the Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*,[232] ruled that some forms of same-sex harassment may violate Title VII if the bias took place "because of sex."[233] Moreover, the Supreme

223. *See generally* Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).
224. 522 U.S. at 422.
225. *Id.* at 427.
226. No. 02-10330, 2002 WL 1799704, at *1 (11th Cir. July 23, 2002).
227. 42 U.S.C. § 12112(b)(5)(A) (2000).
228. § 12112(d)(2).
229. 42 U.S.C. § 12111(5)(A) (2000).
230. 123 S. Ct. 1673 (2003).
231. *Id.* at 1675.
232. 523 U.S. 75 (1998).
233. *Id.* at 81.

Court's ruling on June 26, 2003, in *Lawrence v. Texas*,[234] striking down Texas' sodomy law that only penalized same-sex sodomy and specifically overruling *Bowers v. Hardwick*[235] will make it harder for employers to tolerate same-sex bias.

In *De La Campa v. Grifols America, Inc.*,[236] the Third District Court of Appeal of Florida held that a woman who alleged that her superior sexually harassed her, including insults and offensive behavior toward her owing to her sexual orientation, did not state a claim for intentional infliction of emotional distress.[237] The court failed to find the requisite level of outrageousness on the part of the abuser.[238]

8. Religion

In the public sector both the First Amendment and Title VII protect public employees against religious discrimination.[239] In *Lubetsky v. Applied Card Systems, Inc.*,[240] the Eleventh Circuit ruled that an unsuccessful job applicant, who offered no proof that the employer knew that the applicant was Jewish when it revoked its provisional offer of employment, failed to establish a prima facie case of religious discrimination in violation of Title VII.[241]

Claims of religious discrimination in the workplace have been rising steadily even before anti-Muslim incidents that occurred in the wake of the September 11th terrorist attacks.[242] A Pentecostal Christian, whose religion bars women from wearing pants, is on a collision course if the job requires a uniform that includes pants.[243] While religious bias claims comprise only a fraction of all work-place bias claims, they are rising at a far quicker pace, especially claims of retaliation against Muslims.[244] Title VII requires employers to make reasonable accommodations for employees' religious beliefs and practices.[245] In one case, a postal worker alleged that he was harassed

234. 123 S. Ct. 2472 (2003).
235. 478 U.S. 186 (1986).
236. 819 So. 2d 940 (Fla. 3d Dist. Ct. App. 2002).
237. *Id.* at 944.
238. *Id.*
239. 42 U.S.C. § 2000e-2(a)(1) (2000).
240. 296 F.3d 1301 (11th Cir. 2002).
241. *Id.* at 1307.
242. Adam Geller, *Workplace Tension over Religious Diversity*, MIAMI HERALD, Jan. 22, 2003, at 1C.
243. *Id.*
244. *Id.*
245. U.S. CONST. amend. I; 42 U.S.C. § 2000e-2(a)(1).

because he practices Wicca, a form of witchcraft.[246] He was not allowed to wear a T-shirt that said "Born Again Pagan" while crucifixes could be worn.[247]

C. *Remedies*

1. Attorneys' Fees

Many federal statutes, including employment discrimination statutes, provide for awarding attorneys' fees to a prevailing plaintiff.[248] Whether an award of attorneys' fee is proper entails a two-step inquiry.[249] First, the party must be a prevailing party in order to recover.[250] Second, the fee requested by the prevailing party must be reasonable.[251] The primary consideration in assessing the reasonableness of a fee is the degree of success obtained.[252]

Courts disagree over what constitutes a "prevailing party" when a lawsuit is settled. For example, the Ninth Circuit has ruled that plaintiffs who secure a settlement in their bias suit against a state agency constitute "prevailing parties" entitled to attorneys' fees even though the terms fall short of the relief initially sought.[253] By contrast, the Eleventh Circuit noted in *American Disability Association, Inc. v. Chmielarz*,[254] that the circuit courts are split over whether a private settlement, without judicial action, amounts "to an alteration in the legal relationship of the parties" sufficient to qualify a plaintiff as a prevailing party entitled to attorneys' fees.[255]

In 2001, the Supreme Court issued an opinion narrowing the definition of "prevailing party" for purposes of recovering attorneys' fees.[256] In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[257] the Court rejected the so-called "catalyst test" for awarding attorneys' fees in federal civil rights cases.[258] Under this theory,

246. Geller, *supra* note 242.
247. *Id.*
248. *See* 42 U.S.C. § 1988(b) (2000).
249. *Id.*
250. Farrar v. Hobby, 506 U.S. 103, 109 (1992).
251. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).
252. *Id.* at 434.
253. Richard S. v. Dep't of Developmental Servs. of Cal., 317 F.3d 1080, 1087 (9th Cir. 2003).
254. 289 F.3d 1315 (11th Cir. 2002).
255. *Id.* at 1319, n.2.
256. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).
257. *Id.*
258. *Id.* at 610.

fees are recoverable if a plaintiff's lawsuit produces the desired alteration in the defendant's conduct.[259] Instead, the Court made clear, a prevailing party must also achieve judgment on the merits or a court-ordered consent decree before qualifying for an award of fees.[260]

The Eleventh Circuit, in *Loggerhead Turtle v. County Council*,[261] has read *Buckhannon* as applicable only to federal fee-shifting statutes that provide for fee awards to "prevailing parties."[262] In other words, the "catalyst theory" remains viable under federal statutes[263] that authorize reasonable attorneys' fees "*whenever* the court determines such award is *appropriate*."[264]

On November 14, 2002, Senator Russ Feingold introduced a bill that would overturn the *Buckhannon* decision and restore the "catalyst theory."[265] When an employer requires mandatory arbitration as a condition of employment, can employees be made to bear part of the costs including attorneys' fees? On this question, the Supreme Court of California has ruled that employers cannot shift these costs onto employees.[266]

Florida law authorizes elected officials, who must defend themselves while in office, to request that their city pay attorneys' fees.[267] A former mayor of Weston invoked this law after he paid his own attorneys' fees defending against conflict-of-interest charges while in office.[268] In *Florida Department of Insurance v. Amador*,[269] a former employee of Florida International University sued the Department of Insurance, claiming that the Department's withdrawal of legal representation for acts committed in the course and scope of his employment constituted a breach of contract.[270] Although the court never reached this issue, it did note in passing that there is no constitutional right in Florida to have one's attorneys' fees paid.[271] Moreover, whether a public employee is entitled to statutory reimbursement for attorneys' fees incurred in defending against acts committed in the course

259. *Id.* at 605.
260. *Id.*
261. 307 F.3d 1318 (11th Cir. 2002).
262. *Id.* at 1326.
263. *Id.* at 1325.
264. *Id.* at 1323 (citing 16 U.S.C. § 1540(g) (2000)).
265. *See* S. 3161, 107th Cong. (2d Sess. 2002).
266. Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669, 681 (Cal. 2000).
267. *See* FLA. STAT. § 111.07 (2002).
268. Jasmine Kripalani, *Ex-Weston Mayor Seeks Payment*, MIAMI HERALD, Aug. 22, 2002, at 5B.
269. 841 So. 2d 612 (Fla. 3d Dist. Ct. App. 2003).
270. *Id.* at 613.
271. *Id.* at 614.

and scope of employment is a matter for "the respective governmental unit . . . not the judiciary."[272]

2. Reinstatement and Back Pay

In *Hoffman Plastic Compounds Inc. v. NLRB*,[273] the United States Supreme Court denied undocumented employees the right to seek reinstatement or back pay because federal law makes it unlawful to hire such workers.[274] In light of *Hoffman*, the EEOC decided it will no longer seek these remedies for undocumented employees who are fired or not hired.[275] Despite *Hoffman*, however, the DOL will persist in seeking back pay for undocumented workers for violations of the FLSA.[276]

V. PUBLIC SECTOR, COLLECTIVE BARGAINING ISSUES

A. *Public Unions*

"Florida . . . is a 'right-to-work' state, which means an employee cannot be forced to join a union to hold a job."[277] Many northern states, however, have laws that allow unions to charge non-union members the cost of negotiating for nonmembers.[278] For the first time in Florida, a public union has proposed a plan under which non-union members must pay an "administrative fee" to defray the cost of negotiating new contracts that would benefit all bargaining unit workers.[279] It is unclear whether such a fee violates Florida's "right-to-work" laws.[280]

Many states have enacted statutes modeled on the Federal Hatch Act, which regulates the partisan political activities of public employees.[281] For

272. *Id.*
273. 535 U.S. 137 (2002).
274. *Id.* at 147–52.
275. Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, EEOC Pub. 915.002 (June 2002), *available at* http://www.eeoc.gov/docs/undoc-rescind.html.
276. *See* Fact Sheet #48 Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* Decision on Laws Enforced by the Wage and Hour Division, United States Dep't of Labor (Sept. 2003), *available at http://www.dol.gov/ esa/regs/compliance/whd/ whdfs48.htm.*
277. Daniel A. Grech, *UTD Seeks to Collect Fee from Nonunion Teachers*, MIAMI HERALD, July 22, 2002, at 3B.
278. *Id.*
279. *Id.*
280. *See id.*
281. 5 U.S.C. § 7324(a) (2000).

example, under a Miami-Dade County School District board rule, "[n]o employee shall use his/her official authority or influence for the purpose of coercing or influencing another person's vote."[282] Nevertheless, days before Florida's gubernatorial race in 2002, thousands of public school teachers in Miami-Dade County were asked by their public union to send home a letter to parents endorsing one candidate for governor whose election would "significantly improve public education in Florida."[283] This endorsement by Florida's largest teachers' union has been criticized as an illegal attempt to coerce or influence another person's vote.[284]

B. *Collective Bargaining Issues*

Whether certain public employees are entitled to unionize in Florida turns on the statutory definition of "public employee." In *Murphy v. Mack*,[285] the Supreme Court of Florida ruled that deputy sheriffs were not public employees.[286] But twenty-two years later, in *Service Employees International Union, Local 16 v. Public Employees Relations Commission*,[287] the same court largely undermined the rationale of *Murphy* by ruling that deputy court clerks were public employees entitled to collective bargaining rights under state law.[288] In *Coastal Florida Police Benevolent Ass'n v. Williams*,[289] the Supreme Court of Florida largely overruled *Murphy* by ruling that deputy sheriffs were "employees" entitled under the Florida Constitution to collectively bargain.[290] Applying strict scrutiny, the court concluded there was no compelling state interest in denying deputy sheriffs their right to engage in collective bargaining.[291]

Under the *Florida Statutes*, managerial employees and administrative personnel are prohibited from engaging in collective bargaining.[292] In *Dade County School Administrators Ass'n, Local 77 v. School Board of Miami-Dade County*,[293] a public employee union sought to represent a bargaining

282. Matthew I. Pinzur, *Union Asks Dade Teachers to Push McBride in Letters*, MIAMI HERALD, Nov. 2, 2002, at 9B.
283. *Id.*
284. *Id.*
285. 358 So. 2d 822 (Fla. 1978).
286. *Id.* at 826.
287. 752 So. 2d 569 (Fla. 2000).
288. *See id.* at 573–74.
289. 838 So. 2d 543 (Fla. 2003).
290. *Id.* at 545.
291. *Id.* at 552.
292. FLA. STAT. § 447.501(1)(f) (2002).
293. 840 So. 2d 1103 (Fla. 1st Dist. Ct. App. 2003).

unit made up of assistant principals and vice principals.[294] The Florida Public Employees Relations Commission denied the union's petition concluding that the assistant principals were managerial employees and administrative personnel.[295] On appeal, the court declined to reach the question of the constitutionality of the state statute barring such employees from joining a union.[296]

In *Ponce Inlet Professional Fire Fighters, Local 4140 v. Town of Ponce Inlet*,[297] a union representing firefighters filed an unfair labor practice claim with the state labor board alleging that the town had violated state law[298] by unilaterally changing the compensation of firefighters by putting in place a new pay plan.[299] The board found that while the town was aware that the union opposed the new pay plan, it failed to make an effective demand to bargain.[300] Absent such demand, the board ruled that the union did not establish a prima facie statutory violation of the duty to negotiate in good faith over the terms and conditions of employment.[301]

In *International Union of Painters & Allied Trades v. Cape Coral, Local Union 2301*,[302] a public union petitioned the state labor board to modify a bargaining unit comprised of clerical and administrative personnel employed by the city.[303] The test for adding positions to an existing bargaining unit is whether the classifications at issue share a "community of interest" with the classifications within the bargaining unit.[304] The board accepted the hearing officer's recommendation to add the two classifications to the bargaining unit.[305]

In *South Walton Professional Firefighters Ass'n v. South Walton Fire District*,[306] a firefighters' union filed a bargaining unit clarification petition with the state labor board seeking to exclude the newly created classification of division chief/EMS coordinator from the unit.[307] Both the hearing officer and the board dismissed the union's petition, concluding that since the new

294. *Id.* at 1104.
295. *Id.*
296. *Id.*
297. 28 Fla. Pub. Employee Rep. ¶ 33287 (2002).
298. FLA. STAT. § 447.501(1)(a), (c) (2002).
299. *Ponce Inlet*, 28 Fla. Pub. Employee Rep. at ¶ 33287.
300. *Id.*
301. *Id.*
302. 28 Fla. Pub. Employee Rep. ¶ 33288 (2002).
303. *Id.*
304. *Id.*
305. *Id.*
306. 28 Fla. Pub. Employee Rep. ¶ 33289 (2002).
307. *Id.*

position had never been included in the bargaining unit, it was unnecessary to exclude it.[308]

Often in Florida, when public employees are renegotiating labor contracts with their governmental employers, the two parties resort to public displays to bring pressure to bear on the opposing party to agree to its terms. For example, in January 2003, the United Teachers of Dade threatened to "launch protests across the county and stonewall the district's plan to start school in early August until the two sides settle on pay increases."[309] Moreover, the teachers' union refused to negotiate any other term in the contract until salaries had been settled.[310]

C. *Arbitration*

The Supreme Court of Florida has made it clear that where a public union retains contractual control over the arbitral portion of the grievance procedure and it refuses to process a grievance to arbitration because the complaint lacks merit, the governmental employer owes no duty to arbitrate the dispute.[311] In *Austin v. Pembroke Pines, Fire Department*,[312] two firefighters scored high enough on a promotion test to be placed on an eligibility list, but were later deleted from the list when a qualification for taking the test changed.[313] Without union assistance, the two firefighters sought to arbitrate this dispute with the city; the city, however, refused to pursue arbitration because the firefighters were not represented by the union.[314] The firefighters then claimed before the state labor board that the city committed an unfair labor practice by refusing to arbitrate the firefighters' promotion grievance.[315] The state labor board summarily dismissed the firefighters' petition as procedurally defective.[316] Not only did the petition fail to include the parties' contract or the grievance, but it also failed to include the names of the individuals involved and the time and place of acts triggering the dispute.[317]

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308. *Id.*
309. Matthew I. Pinzur, *Salary Stalemate Prompts Warning by Teachers*, MIAMI HERALD, Jan. 25, 2003, at 3B.
310. *Id.*
311. Galbreath v. Sch. Bd. of Broward County, 446 So. 2d 1045 (Fla. 1984).
312. 28 Fla. Pub. Employee Rep. ¶ 33286 (2002).
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Austin*, 28 Fla. Pub. Employee Rep. at ¶ 33286.

Moreover, the charge was time-barred by the six-month statute of limitations.[318]

VI. CONCLUSION

The year spanning from 2002–2003 offered a typical array of public employment law issues. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, summons up its own set of issues at the federal, state, and local levels. Post-retirement also encompasses such issues as public pensions, disability retirement, death benefits, and others. In contrast to private sector employment, which by and large goes unnoticed by the media, public sector employment draws widespread microscopic news attention. Besides case law and legislative enactments, news stories provide a wealth of curious facts and figures in this precinct of the law.

318. *Id.*

FREEING THE INNOCENT: OBTAINING POST-CONVICTION DNA TESTING IN FLORIDA

CATHERINE ARCABASCIO*

> Some were sentenced to death. Without warning or just cause, all were one day swept off the streets, forcibly separated from their families and friends, and ultimately bound over into a maddening nightmare.
>
> Post-conviction DNA tests performed on critical pieces of biological evidence proved they were innocent simply, elegantly, and definitively. But resurrecting their lives, and those of their loved ones, all shattered by unthinkable injustice, is a complex and messy process. Yet it must be undertaken at once, as a matter of common decency,

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> as a signal we can face the truth, as a measure to redeem our aspiration that America should be, can be, fair and just.[1]

I. INTRODUCTION

To date, 138 people have been exonerated in the United States through the use of DNA testing.[2] On October 1, 2001, section 925.11 of the *Florida Statutes*, entitled "Postsentencing DNA Testing," went into effect; its procedural counterpart, rule 3.853 of the *Florida Rules of Criminal Procedure*, entitled "Motion for Postconviction DNA Testing," went into effect on October 18, 2001.[3] The purpose of both section 925.11 and rule 3.853 is to provide movants a means by which they can challenge a conviction when there is "a credible concern that an injustice may have occurred and DNA testing may resolve the issue."[4] Both section 925.11 and rule 3.853 set forth the requirements that must be met before a convicted movant will be allowed access to physical evidence from his case that could be subjected to DNA testing.[5]

Since section 925.11 and rule 3.853 went into effect, the Florida Innocence Project[6] and other organizations like it have been working together to represent many indigent movants in the State of Florida.[7] The litigation strategies that are contained in this article are a direct result of the combined experience and efforts of all the members of these organizations.

The organization of this article primarily will track the structure of rule 3.853, because the rule procedurally dictates the format of the motion. If it is necessary to the flow and understanding of the concepts presented in this article, a section of rule 3.853 may be discussed out of chronological order. There are some differences between the rule and the statute that will be discussed throughout this article; cites to both the rule and statute will be in-

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1. TARYN SIMON, THE INNOCENTS 8 (Lesley Martin ed., 2003).

2. *See* The Innocence Project, *at* http://www.innocenceproject.org/ (last visited Aug. 22, 2003).

3. FLA. STAT. § 925.11 (2002); FLA. R. CRIM. P. 3.853.

4. Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2d Dist. Ct. App. 2002) (quoting *In re* Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636 (Fla. 2001) [hereinafter *Amendment*]).

5. § 925.11(2)(a)(1)-(6); FLA. R. CRIM. P. 3.853(b)(1)-(6).

6. The Florida Innocence Project was founded in 1999 at Nova Southeastern University, Shepard Broad Law Center. It provides *pro bono* legal assistance to convicted defendants who maintain that they are innocent and that DNA can exonerate them.

7. There is no automatic right to counsel in these post-conviction proceedings. *See infra* Section V.

cluded in the footnotes. As is customary in practice, the motion for DNA testing will be referred to as a "3.853 motion."

II. WHO MAY SEEK RELIEF

Not all movants are entitled to relief under section 925.11. "A person who has been tried and found guilty of committing a crime and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence . . . ."[8] Rule 3.853 is silent with respect to this distinction, although the rule proposed by the Florida Bar Criminal Procedure Rules Committee did include language that authorized testing for those who entered guilty or nolo contendere pleas.[9] The Supreme Court of Florida chose to remove it.[10] Accordingly, a movant who enters an outright guilty plea will be barred from seeking DNA testing under the statute.[11] In *Reighn v. State*,[12] the First District Court of Appeal held that the movant's motion requesting DNA testing was barred under section 925.11 because section 925.11(1)(a) of the statute only allows one who "has been tried and found guilty of committing a crime" to file a 3.853 motion.[13] Because the movant had pleaded nolo contendere prior to her trial, the First District Court of Appeal found that she, too, was barred.[14]

While a full discussion of this issue is beyond the scope of this article, there is a valid argument that excluding those who plead guilty from obtaining DNA testing is unjust and may be unconstitutional. In his concurring opinion in the Fourth Circuit Court of Appeals decision, *Harvey v. Horan*,[15] denying a rehearing *en banc* for a movant seeking DNA testing through a § 1983 action, Judge Luttig included some strongly worded dicta regarding a movant's right to access evidence.[16] He stated, "that there is a residual, core liberty interest protected by the Due Process Clause of the Fourteenth Amendment which, in certain, very limited circumstances, gives rise to a procedural due process right to access previously-produced forensic evidence

8. § 925.11(1)(a).
9. *See generally* FLA. R. CRIM. P. 3.853. *See also Amendment*, *supra* note 4, at 634.
10. *See Amendment*, *supra* note 4.
11. *Id.*
12. 834 So. 2d 252 (Fla. 1st Dist. Ct. App. 2002).
13. *Id.* at 253 (quoting § 925.11(1)(a)).
14. *Id.*
15. 285 F.3d 298 (4th Cir. 2002) (reviewing petitioner's section 1983 action that sought access to the evidence in his case sometime after his conviction in a Virginia court). The sole issue before the court was whether a section 1983 action was the appropriate vehicle for him to access that evidence. *See id.*
16. *Id.* at 308.

for purposes of STR DNA testing."[17] Judge Luttig further explained, "[a]t least as classically understood, it is not a right of procedural due process. And neither is it a typical substantive due process right. But it is a right that legitimately draws upon the principles that underlay all of these—a conceptual and constitutional fact" that eluded the majority.[18] While Judge Luttig did not discuss this principle within the context of guilty pleas, his reasoning should nonetheless apply to those who pleaded guilty. Indeed, the process of negotiating pleas is so deeply rooted in our criminal justice system that it should not be treated differently than a conviction when determining who should be entitled to access evidence. Innocent people do sometimes take pleas, just as they sometimes confess to crimes they did not commit.[19]

Similarly, in the Supreme Court of Florida's opinion adopting rule 3.853, Justice Anstead concurring in part and dissenting in part, also objected to the denial of 3.853 relief for those who plead guilty:

> Of course, we know as a fact the overwhelming majority of criminal cases are resolved through plea negotiations and, hence, any DNA testing under the legislation excluding those cases will be limited to a small percentage of convicted defendants. To be sure, however, we also know that plea bargaining often results in many cases of pleas of convenience or best interests where the defendant simply acknowledges that the uncertain risk of trial on additional and more serious charges compels him to accept conviction and punishment even while maintaining innocence. We have consistently recognized that courts should grant relief when a fundamental injustice has been demonstrated regardless of whether the defendant was convicted by trial or by plea.[20]

Justice Anstead also pointed out that access to DNA testing is in essence a claim of illegal detention under the "constitutional writ of habeas corpus," which is provided for in Florida's Constitution.[21] Moreover, the Supreme Court of Florida possesses exclusive jurisdiction over proper pro-

17. *Id.*

18. *Id.* at 311.

19. *See, e.g., Prosecutors Seek Reversal in Central Park Jogger Case*, REUTERS NEWS SERV. (N.Y.), Dec. 6, 2002, *available at* http://www.bet.com/articles/1,,clgb4807-5525,00.html (reporting that after another man confessed to the crime and DNA testing confirmed he was guilty, prosecutors asked the court to reverse the convictions of five defendants for the rape of a jogger in New York's Central Park on April 19, 1989 on the grounds that the videotaped confessions of the then teenaged defendants were coerced by police).

20. *Amendment, supra* note 4.

21. *Id.*

cedures for invoking the writ.[22] The ability to file a writ of habeas corpus is available to a movant, regardless of whether or not he pleads guilty.[23] The only issue, according to Justice Anstead, is whether a "fundamental injustice has occurred."[24]

III. STATUTE OF LIMITATIONS FOR FILING 3.853 MOTIONS

Despite the recommendations of numerous attorneys across the State of Florida, the Supreme Court of Florida adopted a rule that included a statute of limitations.[25] The Florida Innocence Project suggested in its comments to the Rules Committee that:

> The inclusion of a two year time limitation in Proposed Rule 3.853 (d)(1) compromises the very purpose of the rule. No one can predict what changes in DNA testing will occur in the future. The only thing that can be predicted is that new methods and new technologies will be developed. History reinforces science's unequivocal record of endless discovery and refinement of knowledge.[26]

In addition, because this particular group of cases is so old, a proper and thorough investigation takes more than two years.[27] These and other comments opposing the time limitation failed to persuade the supreme court.[28] It adopted a rule that includes time limitations for three categories of cases, so that it would mirror section 925.11.[29]

The first states that a movant must file a 3.853 motion "[w]ithin 2 years following the date that the judgment and sentence in the case became final if no direct appeal was taken . . . or by October 1, 2003, whichever occurs later."[30] The second applies to cases where there has been a direct appeal. In

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22. *Id.*
23. *Id.*
24. *Id.* at 637.
25. *See* Emergency Petition to Create Rule 3.853 Florida Rules of Criminal Procedure (DNA Testing) at App. B, *In re* Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001) (No. SC01-363), *available at* http://www.flcourts.org/sct/clerk/briefs/2001/201-400/01-363_appendixB.pdf (last visited Oct. 16, 2003) [hereinafter Emergency Petition].
26. *Id.*
27. Unpublished data compiled from the over 700 requests for assistance received by the Florida Innocence Project; *see also* Emergency Petition, *supra* note 25.
28. *Amendment*, *supra* note 4, at 635.
29. *Id. See generally* FLA. R. CRIM. P. 3.853; § 925.11.
30. FLA. R. CRIM. P. 3.853(d)(1)(a); § 925.11(1)(b)(1).

those cases, the motion must be filed "within 2 years following the date that the conviction was affirmed on direct appeal . . . or by October 1, 2003, whichever occurs later."[31] Finally, in a death penalty case, the motion must be filed "within 2 years following the date that collateral counsel was appointed or retained subsequent to the conviction being affirmed on direct appeal" or by October 1, 2003, whichever occurs later.[32] Thus, all motions involving cases in which the convictions were final prior to October 1, 2001 must be filed by October 1, 2003.[33] That many of the cases that fall under the purview of rule 3.853 will be barred by the statute of limitations is obvious because DNA technology did not exist as it does now.

This is particularly troubling because this group of cases is most burdened by the statute of limitations. Many of the affected cases are fifteen or twenty years old. It is not uncommon to find cases from the 1970's, which have records that have been archived for many years, if they still exist at all.[34] The Florida Innocence Project has received requests for assistance in cases dating back as early as 1959.

The same problem exists in locating the physical evidence in these cases.[35] These are the cases that were tried during a time when DNA testing did not exist, was too new to be available in all cases, or was in its infancy and less reliable tests were being conducted on the evidence.

Although a majority[36] of the states that have enacted DNA statutes do not include a testing deadline in their statute, the Florida Legislature chose to include such a provision.[37] The inclusion of this time limitation makes it entirely possible that innocent movants will have lost their opportunity to be exonerated.

If the deadline passes, a movant still may be able to file a 3.853 motion. Rule 3.853(d)(1)(a) allows a motion to be filed at any time "if the facts on which the petition is predicated were unknown to petitioner or the peti-

31. *Id.*

32. *Id.*

33. *Id.*

34. *See, e.g.*, Zollman v. State, 820 So. 2d 1059, 1060 (Fla. 2d Dist. Ct. App. 2002) (deciding the filing of a 3.853 motion twenty-three years after rape conviction); Galloway v. State, 802 So. 2d 1173 (Fla. 1st Dist. Ct. App. 2001) (deciding the filing of a 3.853 motion based upon a 1979 conviction of two counts of robbery and one count of sexual battery).

35. *See, e.g.*, King v. State, 808 So. 2d 1237, 1241 (Fla. 2002) (dismissing defendant's motion for DNA testing due to determination that vaginal washings and rectal swab no longer existed).

36. This includes states that allow testing during the entire period of a defendant's incarceration.

37. *Compare* FLA. STAT. § 925.11(1)(b)(1), *with* ARIZ. REV. STAT. § 13-4240(A) (2001), N.J. STAT. ANN. § 2A:84A-32a (West 2003), *and* N.Y. CRIM. P. LAW § 440.30 (McKinney Supp. 2003).

tioner's attorney and could not have been ascertained by the exercise of due diligence."[38] Rule 3.853's due diligence requirement is similar to the due diligence requirement in rule 3.850, which governs motions to vacate, set aside, or correct sentences.[39] If a fact could have been discovered with due diligence but was not, most courts will deny a 3.850 motion as being untimely.[40] The question of due diligence under 3.853 is not yet ripe and thus no caselaw exists that interprets it. It would seem, however, that the courts would interpret rule 3.853's due diligence requirement the same way that it interprets rule 3.850. This section however, is crippled by the fact that government agencies have the right to destroy the evidence once the two-year statute of limitations has expired.[41]

A less elegant option would be to file a 3.853 motion that is facially sufficient, but not thoroughly investigated. The court will review the motion and based upon the facts provided in the motion, may deny it for facial insufficiency. If it is denied for facial insufficiency after the October 1, 2003 deadline has passed, the decision will have to be appealed. In that case, the district court of appeal may simply give the movant leave to file a facially sufficient motion. If it is denied substantively, the movant may still have an opportunity to file a second 3.853 motion. Currently there is no caselaw barring successive 3.853 motions. However, 3.853's statutory cousin, 3.850 has a healthy body of caselaw that bars successive motions on the theory of finality.[42]

There are several strong constitutional arguments that exist which may prevent the statute of limitations from acting as a bar to accessing evidence. Should Florida legislators during the coming legislative session choose to ignore the call to extend the statute of limitations, the battle to conduct DNA testing after the October 1, 2003 deadline in this class of cases no doubt will be fought in court on constitutional grounds.[43]

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38. FLA. STAT. § 925.11(1)(b)(2) (2002).

39. *Compare* FLA. R. CRIM. P. 3.853(d)(1)(B), *with* FLA. R. CRIM. P. 3.850(b)(1).

40. Correll v. State, 698 So. 2d 522, 523–24 (Fla. 1997).

41. § 925.11 (4)(a), (b); *see also infra* Section IV.A.3.

42. *See, e.g.*, Foster v. State, 614 So. 2d 455, 458 (Fla. 1992) (holding that interpretation of FLA. R. CRIM P. 3.850(f) means that a successive motion may be dismissed if it fails to allege new or different grounds for relief).

43. For a more detailed discussion of the constitutional arguments, *see* Emergency Petition, *supra* note 25; *see also* NAT'L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (Sept. 1999), *at* http://www.ncjrs.org/pdffiles1/nij/177626.pdf [hereinafter RECOMMENDATIONS FOR TESTING].

IV. FACIAL SUFFICIENCY FOR A 3.853 MOTION

Rule 3.853 requires that a motion for DNA testing contain five statements that must be made "under oath" by the sentenced movant.[44]

A. *The Statement of the Facts*

In order to be considered facially sufficient, a 3.853 motion must contain "a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained."[45]

Normally, one can use the trial transcripts to provide the court with a recitation of the underlying facts in a case. If the conviction is old, however, it is likely that some documents, including the transcript, will be difficult to locate because there is no one set rule that governs how long public offices must keep transcripts. In some circumstances, the movant or his family may have a copy of the trial transcript. If neither has it, then it is possible that one of the movant's prior lawyers may have a copy, so make sure to inquire with both the trial lawyers and the appellate lawyers. If that also leads to a dead-end, most of the trial transcripts in criminal cases are warehoused by the Attorney General's Office in Tallahassee.

If all else fails, neither the rule nor the statute technically requires that the trial transcript be the only source regarding the facts.[46] In *Zollman v. State*,[47] the Second District Court of Appeal held that the determination of whether the 3.853 motion is facially sufficient "requires consideration of the facts of the crime itself *and the other available evidence*."[48] Nothing prohibits the use of facts from other transcribed proceedings such as hearings and depositions as long as the facts of the crime itself are established. Like 3.850 motions, which allow the defense to argue that newly discovered evidence should permit the movant to obtain a new trial, it appears that facts outside the record may also satisfy the requirements of rule 3.853.

A movant or his attorney wishing to file a 3.853 motion also should collect all of the police records and other documents from the case. These documents should have been turned over during discovery and should be obtainable through the movant or his prior counsel. However, because these

44. FLA. R. CRIM. P. 3.853(b); § 925.11(2)(a).
45. FLA. R. CRIM. P. 3.853(b)(1); § 925.11(2)(a)(1).
46. *See* FLA. R. CRIM. P. 3.853; § 925.11.
47. 820 So. 2d 1059 (Fla. 2d Dist. Ct. App. 2002).
48. *Id.* at 1063 (emphasis added).

cases are normally very old, it may be difficult to retrieve them. Thus, an attorney should make a public records request, commonly known in Florida as a Chapter 119 request, to each and every law enforcement agency involved in the movant's case and to the State Attorney's Office.[49] Pursuant to Chapter 119, a movant is entitled to obtain copies of public records that are maintained in a state public agency.[50] Some of these documents also may help in establishing the underlying facts of the crime should the transcript not be located.

1. Determining Which Underlying Facts to Include

Developing a persuasive factual recitation that provides the basis for an exoneration claim is one of the most difficult and important parts of drafting a 3.853 motion. The facts should be presented as completely as possible.[51]

Similar to a direct appeal or a 3.850 motion, a 3.853 motion should contain basic factual information regarding the charges presented to the jury, the crime or crimes of which the movant was convicted, the sentence he received, and the trial judge who presided over the case.[52] The facts section also should contain specific details about the actual underlying crime, i.e. where and when the crime occurred, whether there were any witnesses, how the movant was identified, whether or not there were other suspects, and most importantly, what physical evidence was collected.[53]

Other facts that relate to the prosecution and defense theories at trial also should be presented. For example, if a prosecutor proceeded on the theory that only one person raped the victim, that fact should be included in the statement of facts. At the post-conviction stage, a prosecutor may attempt to argue that even if the results of a DNA test indicate that the semen does not belong to a movant, that result does not necessarily exonerate him. Some of these arguments are founded upon new theories that were never presented at trial. Even though there was never another person alleged to have been involved in a crime, the prosecution may attempt during post-conviction pro-

49. FLA. STAT. § 119.011 (2002).

50. § 119.011(2) (meaning of agency is, "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law").

51. *See, e.g.,* Galloway v. State, 802 So. 2d at 1174 (denying *pro se* defendant's 3.853 motion on the grounds that his allegations failed to properly assert how DNA testing could exonerate him. Court held that the fact that only co-defendant's DNA was on the defendant and at the scene of the crime did not mean that the defendant was not present when the sexual battery was committed).

52. *See* FLA. R. CRIM. P. 3.853(b)(1)-(5).

53. *Id.*

ceedings to argue in a single perpetrator rape case that there could have been another person present who participated in the crime and who deposited the semen. Thus, it is important to present the facts as completely as possible.

In *Knighten v. State*, the prosecutor argued during trial that a pubic hair, found in the bedroom where the rape of two women had taken place, could have been Knighten's.[54] At trial, the defense relied upon a misidentification theory.[55] To rebut that theory, the prosecution "relied heavily" on the pubic hair:

> She also told you that those two pubic hairs could have originated from Toney Knighten. No emotionalism, no room for mistake. Ask yourself what is the probability that someone with pubic hairs exactly like Toney Knighten's was in that trailer in that bedroom and on that carpet. Its [sic] not very likely.[56]

The prosecutor then argued that the chances of a mistaken identity were slim given the hair evidence.[57] The Second District Court of Appeal clearly took the prosecutor's closing arguments into account when it held not only that Knighten's motion was facially sufficient but also that DNA testing of the pubic hair should be granted.[58]

Keep in mind that each case is factually distinct and, apart from the traditional facts like conviction, date of conviction, judge and sentence, a separate determination will have to be made regarding what facts may prove pivotal and crucial. The cases cited above suggest that a somewhat holistic and broader view of 3.853 litigation is more effective. While a bare bones recitation of the facts might meet minimal facial sufficiency, other facts may prove necessary in establishing that DNA can exonerate the movant. Having a narrow focus will only allow the prosecution more leeway to argue against exoneration. Moreover, if the motion is denied summarily without a hearing at the trial level, the record on appeal will be limited to the allegations in the motion.[59] Thus, providing the court with a full record is crucial.

2. Describing the Physical Evidence

The second component of rule 3.853(b)(1) requires the movant to include "a description of the physical evidence containing DNA to be tested

54. 829 So. 2d 249, 250 (Fla. 2d Dist. Ct. App. 2002).
55. *Id.*
56. *Id.*
57. *Id.* at 251.
58. *Id.* at 252.
59. Zollman v. State, 820 So. 2d 1059, 1060 (Fla. 2d Dist. Ct. App. 2002).

and, if known, the present location or last known location of the evidence and how it was originally obtained."[60] Note that this section does not place the burden specifically upon the movant to establish with absolute certainty the whereabouts of potential evidence. It merely states that if it is known, the movant should provide the court with that information. Indeed, in this post-conviction process, the movant or his attorney are in the most disadvantaged position to locate the evidence. Fairness demands that the burden should squarely be on the prosecution to find out whether or not evidence in a case still exists and where it is located.

To date, there has been no Florida district court of appeal case that explicitly states how this burden is to be allocated or satisfied. In *Huffman v. State*,[61] the movant stated in his 3.853 motion "that the last known location of the evidence was at the Florida Department of Law Enforcement in Tampa or at the Sarasota County Police Department."[62] In response to the motion, the State did not "indicate whether the rape kit was still available for testing."[63] "The trial court acknowledged that the State failed to allege whether the evidence sought to be tested was still available for testing," but it never fully addressed the issue in its opinion, having decided to deny the 3.853 motion on other grounds.[64] However, it appears that the Second District Court of Appeal did not assume that the burden rested completely with the movant.[65] In *Borland v. State*,[66] the Second District Court of Appeal held that "a finding by the trial court that DNA evidence does or does not exist is a factual determination" and thus, the trial court must conduct an evidentiary hearing.[67] If the State provides an unsworn statement that evidence does not exist, that assertion alone will be insufficient and the court must hold an evidentiary hearing.[68] Moreover, an affidavit from the State will not suffice.[69] "'An affidavit serves as the functional equivalent of testimony which is contradictory to the allegations sworn as true by the movant.'"[70]

Despite an urge to take the inflexible position that the defendant should not conduct a diligent search for the evidence, a defendant or attorney filing a 3.853 motion nevertheless should make an attempt to locate the evidence.

60. FLA. R. CRIM. P. 3.853(b)(1); FLA. STAT. § 925.11(2)(a)(1) (2002).
61. 837 So. 2d 1147 (Fla. 2d Dist. Ct. App. 2003).
62. *Id.* at 1148.
63. *Id.*
64. *Id.* at 1149.
65. *Id.*
66. 848 So. 2d 1288 (Fla. 2d Dist. Ct. App. 2003).
67. *Id.* at 1289; *see also* Marsh v. State, 852 So. 2d 945 (Fla. 2d Dist. Ct. App. 2003).
68. *Borland*, 848 So. 2d. at 1290.
69. *Id.*
70. *Id.* (quoting Clark v. State, 662 So. 2d 729, 730 (Fla. 2d Dist. Ct. App. 1995)).

First, knowing exactly what evidence exists will assist in formulating stronger exoneration arguments. Second, even though an evidentiary hearing should be granted, it remains unclear if there is some due diligence requirement attached to locating the evidence.

3. Locating and Preserving the Evidence

If the transcript is available, it will be easy to determine whether any physical evidence was admitted at trial. That information also is easily obtained from the court's records. However, the record will not reveal what other evidence was collected but never tested. Police reports can provide information about what evidence the police collected regardless of whether any testing was done on it.[71]

When DNA testing was first used, a large sample of blood, saliva, semen, or other bodily fluid was necessary in order to conduct the testing. With today's methodologies, a sample of physical evidence the size of a pinhead can be tested.[72] Thus, DNA can be found on a small cigarette butt, toothpick, a sweaty article of clothing, the handle of a weapon, eyeglasses, facial tissues, stamps, tape, mouthpiece of a bottle or can, urine, feces, a bullet, bite mark, or fingernails.[73] A pin-sized stain on a garment that was collected at the scene of the crime could easily have been overlooked and never tested. Or, a hair that may only have been subjected to microscopic comparison could today be subjected to mitochondrial DNA testing even if there is no root.[74] It can even be tested using the newer PCR/STR method to determine whether there is semen on the hair.[75]

If a garment or other item has been subjected to either earlier rudimentary DNA testing or to ABO blood typing, the "stain," in all likelihood, was cut from the item of clothing. The cutting may have been used entirely in the earlier testing and therefore it will not be available for new testing. However, there may be tiny fluid spatters around the area where the garment was cut that now can be subjected to new testing. In short, DNA can be found on

71. *See* FLA. STAT. § 119.011 (2002); *see also* discussion *infra* Section IV.A.

72. ANDRES A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 910–911 (4th ed. 1995).

73. NAT'L INST. JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE: WHAT IS DNA?, http://www.ncjrs.org/nij/DNAbro/id.html (last modified September 1999).

74. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24. Mitochondrial testing can be done on samples that are not suited for other types of testing. *Id.* at 28. It can be done on dried bones, teeth, or hair shafts or on samples that contain little or degraded nuclear DNA. *Id.*; *see also infra* Section IV.B.

75. *See also infra* Section IV.B.

virtually anything. "[W]herever anyone goes, whatever anyone does, he leaves something behind . . . ."[76] Thus, the net in the search for evidence should be cast as widely as possible.

In very old cases, there is a strong possibility that the evidence has been destroyed. With the exception of section 925.11(4)(b), there are no set rules governing the period of time for which an agency must keep evidence before it is allowed to be destroyed.[77] In fact, some jurisdictions had no rules in place ten or twenty years ago. More recently however, many jurisdictions have implemented rules that require the evidence to be maintained for extended periods of time, such as the length of the sentence or until an execution in a death penalty cases has been imposed.

Whether or not the evidence is destroyed will depend largely on where the evidence has been maintained. In addition, some offices will not find the evidence during a first attempt and will hastily report that the evidence does not exist. Do not automatically assume that this is true or accurate. With some luck and persistence, you still may be able to find the evidence.

In Florida, if the evidence was introduced at the movant's trial, it will remain under the jurisdiction of the clerk's office in the courthouse. If evidence was not used at trial, usually because it was not or could not be subjected to any forensic testing or the testing was deemed inconclusive, then the police department that arrested the movant usually will store the evidence.[78] In order to locate this evidence, provide the police or sheriff's department that arrested the movant with the original case number and if possible, the evidence identification numbers. If the police department is unwilling to provide this information over the phone, file a Chapter 119 request.[79] In recent years, several law enforcement organizations, such as the Broward Sheriff's Office and other local police departments, have merged so it may be quite time consuming to track down where evidence wound up after the merger.

There are other places where evidence may be located. In rape cases, slides are made as part of a "rape kit" at the hospital where the victim was treated.[80] Some of those hospitals may have kept a slide or set of slides. It is worthwhile to find out which hospital treated the victim. If that information cannot be discovered however, the movant or his attorney should make sure to include the name of the hospital in the 3.853 motion as a possible source of evidence. If it can be determined that the hospital's common practice

76. MOENSSENS ET AL., *supra* note 72, at 963.
77. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.
78. *Id.*
79. *See* § 119.011-.19.
80. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 46.

requires that slides be kept a particular amount of time, that information also should be included in the motion. That way, the movant can request that the court order the hospital to look for any slides related to the case. In addition, there may be evidence located at pathology departments, clinics, or doctor's offices.[81] If the case involves a murder, also check at the medical examiner's office.[82]

Sometimes the lab that did the original testing will keep some of the slides or photographs of the results of earlier DNA tests.[83] In Florida, the common places to search are the Florida Department of Law Enforcement Laboratories, which are located in Jacksonville, Tallahassee, Daytona Beach, Pensacola, Fort Myers, Orlando, and Tampa Bay.[84] In addition, there are local county labs such as the Broward Sheriff's Office or the Miami-Dade County Laboratories that may have evidence. In some cases, samples also may have been sent to other private independent labs either by the prosecution or by the defense.[85] Samples also may have been sent to the Federal Bureau of Investigation Laboratory for testing.[86]

Regardless of whether the movant actually locates the evidence or not, he should send a letter to each and every agency where the evidence could be located requesting that the evidence be preserved and that notice be given to the defense should the agency wish to destroy any evidence in the case.[87] In the letter, the movant should cite to section 925.11(4)(a), which states:

> Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.[88]

Section 925.11(4)(b) requires that the evidence shall be maintained for at least the time periods of section 925.11(1)(b), which outlines the statute of

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81. *Id.*
82. *Id.*
83. *Id.*
84. *See* FLA. DEP'T OF LAW ENFORCEMENT, CRIME LABORATORY SERVICES, *at* http://www.fdle.state.fl.us/crimelab/ (last visited Aug. 27, 2003).
85. *See, e.g.*, Murray v. State, 838 So. 2d 1073 (Fla. 2002).
86. *Id.* at 1076. For more information on the FBI laboratory visit http://www.fbi.gov/hq/lab/labhome.htm.
87. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 46.
88. FLA. R. CRIM. P. 3.853 (containing no language regarding the destruction of evidence).

limitations for filing 3.853 motions. Thus, if a defendant does not take a direct appeal, the evidence in his case must be maintained for two years following the date that the judgment and sentence became final, or October 1, 2003, whichever is later.[89] If the defendant files a direct appeal, the evidence in his case must be preserved for two years following the date that the conviction is affirmed on direct appeal or October 1, 2003, whichever is later.[90] In a death penalty case, the evidence must be preserved for sixty days after the execution of sentence.[91] Rule 3.853 contains no provisions regarding the destruction of evidence.[92]

However, a government agency may dispose of the evidence before the expiration of these time periods if the following conditions are met. First, the agency must notify the defendant, any counsel of record, the prosecuting authority, and the Attorney General.[93] Second, the agency must not "receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired."[94]

This portion of the statute is internally inconsistent with section 925.11(1)(b)(2), which allows a movant to file a motion for DNA testing after the statute of limitations has expired if the facts upon which the motion is predicated could not have been ascertained with due diligence.[95] Thus, even though the statute allows for testing beyond the two-year period, the evidence can be destroyed immediately after the statutes of limitations have run.

Even if the search for evidence is unsuccessful, the motion should nonetheless be filed. It should list all of the places the evidence was last known to have been located and include a request that the court order the prosecution to search for the evidence in all of the listed locations. If the prosecution alleges that it cannot locate the evidence, the movant should request that the court require the prosecution to provide proof that the evidence has been destroyed. That proof should be submitted in the form of a sworn affidavit from the person responsible for the evidence in the particular location where it was allegedly destroyed. The affidavit should either detail the futile attempt to locate the evidence or should have the affiant swear that the evi-

89. FLA. STAT. § 925.11(1)(b), (4)(b) (2002).
90. *Id.*
91. *Id.*
92. *See* FLA. R. CRIM. P. 3.853.
93. § 925.11(4)(c)(1).
94. § 925.11(4)(c)(2).
95. *Compare* § 925.11(c)(1)-(2), *with* § 925.11(1)(b)(2).

dence was destroyed. If the evidence was destroyed, the court should require the agency that destroyed it to provide documentation of its destruction procedures and also to provide proof of destruction.

B. *Statement that the Evidence Was not Tested Previously or That Previous Testing Was Inconclusive*

Rule 3.853(b)(2) requires a statement "that the evidence was not tested previously for DNA."[96] In the alternative, if testing was done previously, the movant must include a statement that the results of previous DNA testing were "inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result."[97] If the case falls within the first category of cases, then satisfying this part of the rule is relatively simple. If DNA testing was not done, then that statement alone will satisfy rule 3.853(b)(2).

Prior to 1988, one can almost assume that no DNA testing was conducted in a case. While trace evidence items including hair, blood, semen, or other bodily fluids routinely were collected, at best they were subjected to rudimentary tests such as ABO blood typing, tests to determine whether there was spermatozoa present, and microscopic hair comparison. In 1988, however, Tommie Lee Andrews became the first person in the United States to be tried and subsequently convicted using DNA evidence.[98]

Yet, one cannot assume that all cases that were prosecuted after 1988 utilized DNA testing. Cases exist dating from 1988 to 2001 in which the prosecution did no DNA testing even though DNA testing could have produced exonerating results. There are various reasons why there may not have been testing. In some cases, the labs may not have been able to complete testing either because they were too busy, machine malfunctions occurred, or the prosecutor simply did not request testing. In addition, DNA testing routinely was done, for example, in rape and murder cases but other cases such as burglaries were not considered "DNA" cases even though there now are ways to test the collected trace evidence.

Today, many labs conduct a type of DNA testing called PCR/STR.[99] With a more modern testing method, such as PCR/STR, a pin-size amount of

96. FLA. R. CRIM. P. 3.853(b)(2); § 925.11(2)(a)(2).
97. *Id.*
98. Andrews v. State, 533 So. 2d 851 (Fla. 5th Dist. Ct. App. 1988).
99. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 27.

sample can be replicated and then tested.[100] PCR is the acronym for Polymerase Chain Reaction and STR is the acronym for Short Tandem Repeat.[101]

The term PCR applies to different types of testing that can vary in "reliability and effectiveness."[102] PCR is not actually a testing method but rather it is a way to amplify or duplicate a DNA sample and thus "may be likened to a molecular xeroxing machine."[103]

In some cases, even though results were reported as being conclusive, by today's standards they should be deemed inconclusive. For example, rudimentary PCR-DQ Alpha testing provides results that are not sufficiently discriminating.[104] According to the National Commission on the Future of DNA Evidence, "[a] falsely accused individual may be included as a possible donor of a DNA sample with this test system."[105] However, an inclusion with DQ-Alpha testing, would have, in the past, been interpreted as a "conclusive" result.[106] If an older version of DNA testing was done, and "results" were obtained, ask an expert to review the data and determine whether those results should be deemed inconclusive.[107]

Another type of testing that is used is called Restriction Fragment Length Polymorphisms, or RFLP.[108] This type of DNA testing however, requires a greater amount of sample to test.[109] The sample should be dime-sized or larger.[110] The use of RFLP testing could have produced inconclusive results either because the DNA sample was too small or too degraded.[111] If testing was done previously, a lab report will indicate whether the results were inconclusive.

In addition to the PCR/STR and PCR Mitochondrial DNA testing methods, there are other new testing methods available today.[112] For example, Y-chromosome testing is useful when only the male portion of a mixed DNA sample is relevant to the case.[113] It also may be useful to test fingernail scrapings from a female victim when the assailant was a male or in multiple

100. *Id.*
101. *Id.* at 68.
102. Donald E. Riley, *DNA Testing: An Introduction for Non-Scientists*, SCI. TESTIMONY ¶ 19 (1998), *at* http://www.scientific.org/tutorials/articles/ riley/riley.html.
103. MOENSSENS ET AL., *supra* note 72, at 877.
104. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.
105. *Id.* at 27.
106. *Id.* at 34.
107. *Id.*
108. *Id.* at 26.
109. MOENSSENS ET AL., *supra* note 72, at 891.
110. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 26.
111. *Id.*
112. *Id.* at 29–30; *see also* Riley, supra note 102.
113. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 29–30.

male assailant cases.[114] While ultimately the laboratory conducting the DNA test may be in the best position to determine which type of testing is best for a case, the movant should be aware of the options available to him and should request in his 3.853 motion that these new testing methods be used.

Both rule 3.853 and section 925.11 require that the Florida Department of Law Enforcement's Laboratory conduct post-conviction testing.[115] While section 925.11 does not offer an alternative to this mandate, rule 3.853 does provide one.[116] Rule 3.853 allows that the court "on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing."[117] If the Florida Department of Law Enforcement ("FDLE") is not equipped to conduct the more specialized types of DNA testing needed in a particular case, then that should be sufficient "good cause" for the court to order testing at an independent certified laboratory.[118]

A movant also should consider requesting that tests be conducted at a laboratory other than the FDLE for another reason. The FDLE laboratories have 2100 backlogged cases.[119] According to a recent newspaper article in the Miami Herald, the average turnaround time for DNA testing at the five FDLE laboratories is currently 164 days, or more than five months.[120] Such serious delays in obtaining testing should establish good cause to send the specimens to another lab. That is assuming that the movant can absorb the cost of doing so.[121]

Whichever lab ultimately does the testing, the movant should always request that the lab split the sample.[122] This will ensure that there is sufficient sample remaining should additional testing be required.[123]

If DNA testing was done previously in a case, then there are two other issues to consider before submitting a 3.853 motion. First, assess whether re-

114. *Id.*

115. FLA. R. CRIM. P. 3.853 (c)(7); § 925.11(2)(h).

116. *Id.*

117. FLA. R. CRIM. P. 3.853 (c)(7).

118. Some prosecutors have stipulated to testing the evidence at a different laboratory.

119. Wanda J. DeMarzo & Daniel de Vise, *DNA Testing a Challenge For Busy Crime Labs*, MIAMI HERALD, June 29, 2003, at 1A. In January of 2003, the St. Petersburg Times reported that the FDLE had almost 2700 backlogged open cases and 8300 additional samples from prison inmates awaiting testing. *FDLE Labs Have Thousands of DNA Requests Pending, Paper Says*, MIAMI HERALD, Jan. 28, 2003, at 3B [hereinafter *FDLE*].

120. *FDLE*, *supra* note 119.

121. *See* FLA. R. CRIM. P. 3.853(c)(7).

122. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.

123. *Id.*

analyzing the DNA will exonerate the movant. In *Hartline v. State*,[124] the pro se movant argued that he was entitled to new DNA testing on the grounds that the state's expert witness testified the DNA evidence was inconclusive.[125] However, in denying the motion, the court held that even if the DNA were re-examined, he had admitted to engaging in sexual activity with the minor/victim.[126]

Second, strongly consider having an expert review the testimony of the expert witnesses and the lab reports to ensure that the conclusions drawn by the expert are in fact correct and that the protocols used by a lab were proper and were followed. In *Murray v. State*,[127] the Supreme Court of Florida reversed the murder, burglary, and sexual battery convictions of Gerald Murray because of errors made during DNA testing by the state's expert.[128] At the 1994 trial, the state admitted hair evidence that the prosecution maintained matched Murray's.[129] The defense presented its own witnesses, one of whom had worked with the state's expert and who actually performed the DNA test.[130] Dr. Warren testified that he had committed "several serious errors" during the testing and that they had not maintained the proper testing controls.[131] The defense witness testified that the results were inconclusive and unreliable. In addition, Dr. Howard Baum, an assistant medical examiner in New York City also testified for the defense that these results were inconclusive and unreliable.[132]

In order for a DNA test to be considered reliable, "there must be an independent review by a second qualified analyst."[133] After the testing, Dr. Warren concluded that the tests were inconclusive.[134] His supervisor, the prosecution witness, disagreed and submitted a lab report, which concluded that the results were conclusive, and that they were consistent with Murray's.[135] As the Court noted, "one of the elements of a second independent review is to ensure that the results of the initial review were reliable, and

124. 806 So. 2d 595 (Fla. 5th Dist. Ct. App. 2002).
125. *Id.* at 595–96.
126. *Id.*
127. 838 So. 2d 1073 (Fla. 2002).
128. *Id.* at 1081.
129. *Id.* at 1076.
130. *Id.* at 1077.
131. *Id.*
132. *Murray*, 838 So. 2d at 1077.
133. *Id.* at 1080.
134. *Id.*
135. *Id.*

should the two analysts disagree, the tests should be deemed inconclusive in the absence of further analysis."[136]

The defense also questioned Dr. Warren about the failure to document some of the tests:

> Q: Do you have an explanation for why there were those clerical errors that you'd like to share with the jury?
> A: Well, we were quite busy at the time. We were very busy, as a matter of fact. If you look at the evidence on some of these work sheets you will see gels from different—evidence from different cases ganged together on the same gel and it was, at the time, an expedient issue there.
> Q: And, sir, I know that this is not easy for you. Would you admit that the paperwork and the documentation that came out of Micro Diagnostics at that time was below what would be normally accepted?
> A: It was, to be blunt, sloppy.
> Q: Thank you, sir.
> A: And below standards.[137]

Needless to say, this exchange raises serious concerns and highlights the problems that may occur at the testing phase. Unlike the circumstance in Murray, however, some of those failings at the testing level may not necessarily come to light at trial. Thus, it always is a good idea to work with an expert so that she can give an independent opinion about the results that were provided by the state.

C. *Statement of Innocence and Exoneration*

Rule 3.853 requires a movant to explicitly state that he is innocent of the crime.[138] This rule was adhered to strictly in *Coombs v. State*,[139] where the trial court denied the petitioner's pro se motion in part because he failed to state that he was innocent. The movant also must explain how DNA testing will exonerate him.[140] Neither the rule nor the statute provides a definition of exoneration. In *Galloway v. State*,[141] the First District Court of Appeal provided a dictionary definition of exoneration and incorrectly at-

136. *Id.* at 1081.
137. *Murray*, 838 So. 2d at 1081 n.7.
138. FLA. R. CRIM. P. 3.853(b)(3); § 925.11(2)(a)(3).
139. 824 So. 2d 958 (Fla. 3d Dist. Ct. App. 2002).
140. *Id.* (citing FLA. R. CRIM. P. 3.853(b)(3)).
141. 802 So. 2d 1173 (Fla. 1st Dist. Ct. App. 2001).

tempted to use that as the standard by which to measure whether a motion for DNA testing should be granted.[142]

However, the rule and the statute do provide the correct legal standard to apply in determining whether to deny or grant the motion. A court is required to make a finding, *inter alia*, of "[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."[143] The Supreme Court of Florida has applied this standard.[144]

Drafting this part of the motion also can be quite difficult. If it is drafted inartfully, it will be fatal to the success of the motion. Part of the problem lies in failing to provide the court with the different types of testing that can be done and the numerous possibilities regarding exoneration. The trouble does not arise with the "one perpetrator/one victim" type of cases but with those that are factually more complicated. For example, if there are two or more perpetrators in a rape, one could first make an argument that if none of the samples match the movant, then he should be exonerated. In some multiple perpetrator cases, however, that argument will not be enough to satisfy a court. The court could find that if the sample does not match the movant, he has nonetheless been convicted as a principal in the case under an acting in concert theory and as such, will not be exonerated. However, the defense should make a much more thorough argument to the court. The better argument would include an additional statement that if none of the samples match the movant or his co-movants, then the movant should be exonerated with DNA testing. This argument also should be included if there is trial testimony that the perpetrator of the crime did not ejaculate during the rape, but other co-perpetrators did ejaculate. If the sample does not match the co-defendants and there is testimony that both raped her, there could be a reasonable probability that the jury would have acquitted the movant at trial.

In *Galloway*, the court affirmed the trial court's denial of the appellant's 3.853 motion.[145] Appellant had been convicted with two co-defendants of robbery and sexual battery.[146] In his 3.853 motion, he merely alleged that his DNA would not match the DNA recovered at the scene of the crime and from the victim's body. The court noted that the evidence could not demon-

142. *Id.* at 1175.

143. FLA. R. CRIM. P. 3.853(c)(5)(C); § 925.11(2)(f)(3).

144. *See, e.g.*, King v. State, 808 So. 2d 1237, 1247 (Fla. 2002); *see also* Huffman v. State, 837 So. 2d 1147 (Fla. 2d Dist. Ct. App. 2003); Dedge v. State, 832 So. 2d 835 (Fla. 5th Dist. Ct. App. 2002); Hartline v. State, 806 So. 2d 595 (Fla. 5th Dist. Ct. App. 2002).

145. 802 So. 2d at 1175.

146. *Id.* at 1174.

strate that defendant did not participate in the crime.[147] That may be true. However, if DNA testing had been done and one or more semen samples were found from the sample taken from the victim and none matched any of the defendants, then those results could indeed exonerate the defendant.[148]

In the alternative, a movant can provide a statement of how DNA testing will mitigate his sentence.[149] To date, there has been no case in which a movant in a non-capital case has argued that testing could mitigate a sentence. However, in a case where the movant has been convicted in one trial of various different crimes, it is conceivable that he could be exonerated of one of those charges and not the others. Accordingly, there could be a mitigation of the overall sentence meted out to the movant.

D. *Identification of Movant*

Rule 3.853 also requires a statement that identity was a genuinely disputed issue at trial.[150] The movant also must explain why identification was an issue at trial.[151] The fact that a victim identifies a defendant does not mean that identity is a genuinely disputed issue at trial.[152] Perhaps the most comprehensive discussion regarding this point can be found in *Zollman*.[153] In *Zollman*, the victim was forced into her car, driven to a remote area, and raped.[154] After the attack, she identified Zollman in a line-up as her attacker. She then identified him again at trial.[155] Zollman's "defense at trial was misidentification."[156] Nonetheless, "the trial court found that identity was not 'genuinely disputed' at trial" because the victim identified the movant at trial.[157] The Second District Court of Appeal disagreed, finding that "[t]he supreme court has recognized that there is a substantial body of academic work challenging the reliability of eyewitness identifications in criminal

147. *Id.* at 1175.

148. Without reading the full transcript of the case, it is impossible to establish with certainty that the argument could have established the exoneration element of Galloway's 3.853 motion. However, the case does provide a fairly common factual scenario in which this strategy can be implemented.

149. FLA. R. CRIM. P. 3.853(b)(3); § 925.11(2)(a)(3).

150. FLA. R. CRIM. P. 3.853(b)(4); § 925.11(2)(a)(4).

151. *Id.*

152. Knighten v. State, 829 So. 2d 249, 251 (Fla. 2d Dist. Ct. App. 2002) (citing Zollman v. State, 820 So. 2d 1059 (Fla. 2d Dist. Ct. App. 2002)).

153. 820 So. 2d at 1062.

154. *Id.* at 1060.

155. *Id.* at 1061.

156. *Id.* at 1062.

157. *Id.*

cases."[158] "Thus, the fact that the victim identified Zollman as her assailant . . . does not mean that identi[fication] was not genuinely disputed."[159]

Even if there is significant evidence of guilt presented at trial, including some sort of identification, a movant will nonetheless be entitled to DNA testing if the testing will shed light on the movant's guilt or innocence.[160]

In contrast, in *Marsh v. State*,[161] the court held that a defense of consensual sex at trial would preclude a movant from claiming in a 3.853 motion that identity was at issue.[162] Similarly, a self-defense defense claim presented at trial may also be a bar to obtaining DNA testing.

In sum, an attorney should argue that identity is an issue in any case where the movant claims he did not commit the crime, regardless of whether the movant was known to the victim or other witnesses or was merely identified by the victim or other witnesses.

E. *A Statement of any Other Facts Relevant to the Motion*

Because there is no requirement that the verified 3.853 motion contain only facts from the trial transcript, the decision to include other facts must be made on a case-by-case basis. If there are facts outside of the record that are helpful to the case, then they ought to be included in the motion. For example, there are situations where, during the course of the police investigation or of the defense's investigation, facts are discovered but are not elicited at trial. Some of those facts, in retrospect, may support the theory that someone else committed the crime. If that is true, then those facts should be included in the motion.

V. PROCEDURE

A copy of the motion must be served on the prosecutor and a certificate of service must be attached to the motion.[163] Similar to a 3.850 motion, once the 3.853 motion is filed it will be sent to the assigned judge.[164] This is normally the judge who originally tried the case. If that judge is no longer on the bench or has been transferred to a different court, the case will be as-

158. *Zollman*, 820 So. 2d at 1062.

159. *Id.*

160. Huffman v. State, 837 So. 2d 1147, 1149 (Fla. 2d Dist. Ct. App. 2003) (including evidence at trial of a fingerprint match, phone calls traced to defendant's house that were made to the victim's house after the attack, and a voice identification of defendant at trial).

161. 812 So. 2d 579 (Fla. 3d Dist. Ct. App. 2002).

162. *Id.* at 580.

163. FLA. R. CRIM. P. 3.850(b)(6); § 925.11(2)(a)(6).

164. FLA. R. CRIM. P. 3.853(c)(1); § 925.11(2)(b).

signed to another judge. The court must then determine if the motion is facially sufficient.[165] If the court finds that the motion is facially insufficient, it will deny the motion without requiring the prosecution to respond.[166] However, a trial court may not summarily deny a 3.853 motion "if the record conclusively shows that the defendant is not entitled to relief."[167] If the motion is facially sufficient, it must order the prosecution to respond.[168]

If the court deems the motion facially sufficient, it will issue an order to show cause and the prosecutor will have thirty days to respond.[169] Rule 3.853 also allows the court to provide the prosecution with more time to respond.[170] Subsequently, the court will review the prosecution's response and must enter an order on the merits or set it for hearing.[171] If the case proceeds to a hearing, the court may appoint counsel if there is a finding of indigence and if the court determines that counsel is necessary.[172] The movant may file for rehearing from an order denying relief within fifteen days after the service of the order.[173] This will toll the time for filing an appeal.[174] Either party may take an appeal from an adverse ruling within thirty days from the day the order was rendered.[175]

The court must make three findings in its ruling.[176] First, the court must determine "[w]hether it has been shown that physical evidence that may contain DNA still exists."[177] Second, the court must determine "[w]hether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing."[178] Finally, it must determine "[w]hether there is a reasonable prob-

165. FLA. R. CRIM. P. 3.853(c)(2); § 925.11(2)(c).
166. *See id.*
167. Zollman v. State, 820 So. 2d 1059, 1063 n.2 (Fla. 2d Dist. Ct. App. 2002).
168. *Id.*
169. FLA. R. CRIM. P. 3.853(c)(2); § 925.11(2)(c).
170. *See* FLA. R. CRIM. P. 3.853(c)(2). Section 925.11(2)(c) of the *Florida Statutes* contains no such language.
171. FLA. R. CRIM. P. 3.853(c)(3); § 925.11(2)(d).
172. FLA. R. CRIM. P. 3.853(c)(4); § 925.11(2)(e).
173. FLA. R. CRIM. P. 3.853(e); § 925.11(3)(c).
174. *Id.*
175. FLA. R. CRIM. P. 3.853(f); § 925.11(3)(a)-(b).
176. FLA. R. CRIM. P. 3.853(c)(5); § 925.11(f).
177. FLA. R. CRIM. P. 3.853(c)(5)(A); § 925.11(2)(f)(1).
178. FLA. R. CRIM. P. 3.853(c)(5)(B); § 925.11(2)(f)(2). The language of section 925.11 differs slightly from rule 3.853 in that it does not use the word "authentic" but rather, requires that the evidence cannot have been "materially altered."

ability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."[179]

If the court orders DNA testing, the movant may have to pay for the testing unless he is indigent.[180] If the movant is indigent, the state bears the cost of the testing.[181]

If the DNA testing provides exonerative results, the movant must file a motion to vacate the sentence or move for a new trial by filing a 3.850 motion based upon newly discovered evidence.[182] Realistically, it is quite difficult for the prosecution to retry these old cases, especially when the DNA results will be admissible at trial. However, they still may attempt to do so.

VI. CONCLUSION

Advances in science finally have provided us with a means to challenge a criminal justice system that is by no means perfect and to correct the injustices that it has created. New DNA testing methodologies now allow us to determine someone's innocence with virtual certainty.

While section 925.11 is a step in the right direction, it does not go far enough to remedy the failings of the criminal justice system. As long as we continue to rely upon rote pleas for the disposition of the vast majority of criminal cases and ignore such serious issues as misidentification and false confessions, there always will exist the possibility that an innocent person will be convicted of a crime. If what we strive for is a criminal justice system that provides us with fair and precise results, then DNA testing should be available as a remedy to anyone at anytime who can establish that he has met the requirements of section 925.11.

No one knows exactly how many wrongfully convicted individuals who long ago gave up any hope of being exonerated remain incarcerated. These are the very same people who may not even know that there are new technologies that can exonerate them or that there are organizations, like the Florida Innocence Project, who will assist them. If we do not allow these individuals to request DNA testing, our system will always be plagued by the unacceptable reality that an innocent person has been convicted and remains incarcerated for a crime he did not commit.

179. FLA. R. CRIM. P. 3.853(c)(5)(C); § 925.11(2)(f)(3).
180. FLA. R. CRIM. P. 3.853(c)(6); § 925.11(2)(g).
181. *Id.*
182. FLA. R. CRIM. P. 3.853(d)(2).

VII. ADDENDUM

On September 5, 2003, the Florida Criminal Procedure Rules Committee voted by a two-thirds majority to propose to the Supreme Court of Florida an emergency amendment to rule 3.853 of the *Florida Rules of Criminal Procedure*, which would extend the October 1, 2003 deadline for one year. That motion was filed on September 17, 2003. On September 19, 2003 the Florida Innocence Project filed an Emergency Petition to Invoke All Writs Jurisdiction asking the Supreme Court of Florida for a constitutional writ that would prevent the destruction of biological evidence without notice.

On September 30, 2003, the Supreme Court of Florida consolidated the emergency petition filed by the Criminal Procedure Rules Committee and the emergency writ filed by the Florida Innocence Project. The court noted the urgency of this matter and expedited oral argument. That argument is set for November 7, 2003.

In order to allow the court more time to consider the petitions, it suspended the October 1, 2003 deadline in *Florida Rule of Criminal Procedure* 3.853 (d)(1)(A) until further order from the Court. Moreover, the Court held in abeyance the October 1, 2003 deadline in *Florida Statutes* section 925.11 (1)(b)(1).

Justice Lewis, in a special concurrence, stated that there was no question that the court had jurisdiction to consider issuance of the writ. Moreover, Justice Lewis wrote that the Supreme Court of Florida has the constitutional authority to amend Rule 3.853. Chief Justice Anstead and Justices Pariente and Quince concurred with Justice Lewis. Justices Wells, Cantero and Bell dissented, finding that the majority did not have jurisdiction to suspend a provision of the statute nor the constitutional authority to mandate that evidence be maintained.

On October 21, 2003, the Senate Committee on Criminal Justice and the Senate Judiciary Committee held a joint meeting to discuss the possibility of amending section 925.11 of the *Florida Statutes* to extend the testing deadline.

FLORIDA MEDIATION CASE LAW: TWO DECADES OF MATURATION

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The author dedicates this article to the memory of Professor Lawrence Kalevitch, late of the faculty of the Shepard Broad Law Center. Larry was a keen observer and zealous advocate, yet a true mediator in heart and spirit.

I. INTRODUCTION AND BACKGROUND

Charles Dickens wrote that being involved in a suit in England's Court of Chancery was like: "being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains."[1] One hundred and fifty years later, lawsuits still evoke similar feelings in litigants. However, as one association of attorneys has pointed out, Dickens' warning still fails to keep them away from the courts:

> Hundreds and hundreds of people are exposed to such torture each year, some of them actually choosing to initiate the process. They invariably find the experience painful, protracted, and expensive. Yet there remains a queue of victims impatient for their turn . . . .[2]

Yet an ever-increasing throng has discovered the pursuit of justice need not involve protracted pain. Presently in Florida, parties and attorneys routinely mediate their legal disputes, highlighting Florida's national recognition as a leader in the field of mediation.[3]

> "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties

1. CHARLES DICKENS, BLEAK HOUSE 53 (Oxford University Press 1987) (1853). Earlier in the novel, Dickens suggests that the following motto hang over the doors of the Court of Chancery: "'Suffer any wrong that can be done you, rather than come here!'" *Id.* at 3.

2. Collaborative Law Alliance of New Hampshire, *available at* http://www.collaborativelawnh.org (wrongly attributed the quotation to Dickens' Bleak House) (last visited Feb. 2, 2003).

3. Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, FLA. B. J., Oct. 1996, at 44.

> in identifying issues, fostering joint problemsolving, and exploring settlement alternatives.[4]

With over two decades of court-connected mediation, Florida courts have developed an extensive body of case law.[5] This article seeks to memorialize mediation's coming of age by collecting, discussing, and analyzing the significant cases that comprise Florida's mediation common law, dividing cases into five subject areas: confidentiality, appearance at mediation, mediation agreements upheld by courts, mediation agreements overturned by courts, and procedural and related matters. To avoid duplication, with few exceptions, cases appear in only one subject area, although many appropriately fit within two or more. Discussion of the over fifty Florida statutes that mention mediation, as well as the applicable rules of procedure, lies beyond the scope of this article. They will, of course, be noted when necessary to understand or distinguish a case or concept, as will specific *Florida Rules for Certified and Court-Appointed Mediators.*

Mediation is a household word. One need only read the newspaper, listen to the news on radio or television, or surf the net to learn that distinguished statesmen are mediating in the Middle East, owners and players of professional sports teams are mediating to divert a strike, or union members and employers are mediating a new employment contract. If individuals have not been directly involved with mediation, they probably know someone who has. The breadth of mediated matters ranges from a peer mediation at school to mediation of a murder case following mistrial.[6]

Mediation is not new. "Use of mediation, similar to that which we see today, can be traced back several hundreds, even thousands of years."[7]

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4. FLA. STAT. § 44.1011(2) (2002).

5. Florida's experience typifies that of the rest of the country. "In this new era, mediation is becoming more institutionalized, regularized and uniform. Or, expressed in different terms, mediation is now reflecting the interests and values of the legal order. During the past two decades we have witnessed an explosion of interest in mediation among judges and lawyers." James J. Alfini, *Mediation's Coming of (Legal) Age,* 22 N. ILL. U. L. REV. 153, 153 (2002).

6. Despite the doubts of some commentators, Escambia County Judge Frank Bell sent the case of Derek and Alex King, two brothers convicted of killing their father, to mediation. Following trial, the judge threw out the murder convictions, and sent the case to mediation for determination of appropriate sentences. The matter was fully resolved in mediation. State v. King, Escambia County Circuit Court Case No. 2001 CF 005612 *available at* http://205.152.130.14/cv_web_1b.asp?ucase_id.=31993884; ABA Journal eReport, Friday, Oct. 25, 2002.

7. KIMBERLEE A. KOVACH, MEDIATION PRINCIPLES & PRACTICE 25 n.16 (2d ed. 2000). "Use of mediation has been documented in ancient China over two thousand years ago. See,

"Florida entered the ADR [Alternative Dispute Resolution] movement in the mid-1970s with the establishment of 'citizen dispute settlement' (CDS) centers and pilot divorce mediation programs . . . ."[8]

> In 1987, after Florida had experienced its great success with the early CDS and divorce mediation programs, the Florida Legislature adopted one of the nation's most comprehensive court-connected (read: [I]nstitutionalized) mediation and arbitration statutes. Trial judges were given the broad discretion to order any civil case to mediation or arbitration subject to Florida Supreme Court rule.[9]

In 2001, over 100,000 cases were referred to court-connected mediation programs.[10] Numerous other cases were privately mediated by the parties before, during, or subsequent to suit. For many cases, mediation obviated the need for court intervention. At the present time, all twenty judicial circuits refer a portion of their caseload to mediation.[11] In addition, state appellate as well as federal cases are being mediated.

Over 5000 individuals have been certified as mediators by the Supreme Court of Florida, and approximately 14,000 have completed Supreme Court of Florida certified mediation training programs.[12] Displaying commitment to excellence in Alternative Dispute Resolution, the Supreme Court of Florida has created three standing ADR committees: the Supreme Court Committee on ADR Rules, the Supreme Court Committee on ADR Policy, and the Mediator Ethics Advisory Committee. It has also created two grievance boards: the Mediation Training Review Board and the Mediator Qualifications Board. Additionally, Florida's Dispute Resolution Center offers an ADR Innovative Grant Program allowing courts to apply for seed money to create innovative dispute resolution projects.[13] To foster confidence in the mediation process, and encourage mediators to keep abreast of ethical responsibilities and new developments in the law, Florida requires certified mediators to comply with the *Florida Rules for Certified and Court-*

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for example, Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 55 CAL. L. REV. 1201, 1205 (1996)."

8. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 905 (1997).

9. *Id.* at 907.

10. FLORIDA MEDIATION ARBITRATION PROGRAMS: A COMPENDIUM viii (Kimberly Ann Kosch & Sharon Press eds., 15th ed. 2002).

11. *Id.*

12. *Id.* at ix.

13. *Id.* at vii.

Appointed Mediators and to complete sixteen hours of continuing mediator education every two years.

Mediation has a long rich history, setting it apart from other ADR processes. Unique in its peacekeeping mission, mediation employs a neutral third party who does not render a decision for the parties.[14] Rather, it stresses self-determination of the parties, respecting their ability to make decisions.[15] "Mediation is not presented here as a panacea for the existing ills of our judicial institutions, but rather as a dynamic process that must be understood before being applied and one that can be particularly helpful in a number of different kinds of disputes, including family conflicts and divorces."[16] The body of case law discussed in this article reflects the extent to which mediation has become an accepted and expected part of our legal system.

II. CONFIDENTIALITY

A. *Protection of Confidentiality*

"One of the fundamental axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process."[17] Confidentiality is the foundation on which mediation rests, allowing parties to build trust, share information, problem solve, and decide whether to reach resolution. "The assurance of confidentiality is essential to the integrity and success of the Court's mediation program, in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys."[18] "Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached."[19]

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14. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.210.

15. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.230. Mediation emphasizes self-determination, the needs and interests of the parties, fairness, procedural flexibility, confidentiality, and full disclosure. *Id.*

16. Esdale v. Esdale, 487 So. 2d 1219, 1221 (Fla. 4th Dist. Ct. App. 1986) (citing Margaret S. Herrman, Book Review, 19 FAM. L.Q. 465 (1986) (reviewing Jay Folberg & Alison Taylor, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984), 19 FAM. L.Q. 465 (1986)).

17. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U. C. DAVIS L. REV. 33, 35 (2001).

18. *In re* Anonymous, 283 F.3d 627, 636 (4th Cir. 2002) (citing Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979)).

19. D.R. Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

Mediation confidentiality may be bolstered by statutory privileges, rules of evidence, rules of procedure, ethical rules, and contract law. "Although mediators usually tell the parties that the proceedings are confidential, the mediators [sic] promise does not create an evidentiary privilege or other protection that will be judicially recognized."[20] In Florida, mediation confidentiality is granted by statutory privilege.[21] The privilege is held by the parties, but may be asserted by the mediator on their behalf. "Each party in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceeding."[22] Similarly, statutory privileges also protect family,[23] mobile home,[24] and citizen dispute settlement center mediation communications.[25]

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20. Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 92 (1999).

21. In *State v. Castellano*, 460 So. 2d 480, 481 (Fla. 2d Dist. Ct. App. 1984), the court found no authority for the mediator's statement that the parties' communications during mediation were confidential and identified the legislature as the "proper branch of government from which to obtain the necessary protection." *Id.* at 482. "[P]rivileges in Florida are no longer creatures of judicial decision." *Id.* at 481 (citing Marshall v. Anderson, 459 So. 2d 384 (Fla. 3d Dist. Ct. App. 1984)). Subsequently, in 1987 the legislature enacted a confidentiality privilege for court ordered mediation. Ch. 172, 1987 Fla. Laws (enacting FLA. STAT. § 44.302(2) (1987)). In 1990 Ch. 188, 1990 Fla. Laws amended and renumbered this statute as FLA. STAT. § 44.102(3). Prior to creating a privilege for court-ordered mediation, the legislature enacted a confidentiality privilege for family mediation (Ch. 96, 1982 Fla. Laws creating FLA. STAT. § 61.21(3), renumbered § 749.01(3) (1982)), a confidentiality privilege for Citizen Dispute Settlement Center mediation (Ch. 228, 1985 Fla. Laws creating FLA. STAT. § 44.201(5) (1985)), and a confidentiality privilege for mobile home mediation (Ch. 198, 1990 Fla. Laws adding FLA. STAT. § 723.038(9) (1990)). The confidentiality privilege for family mediation was renumbered § 44.101(3) in 1985. Since 1986 the confidentiality privilege for family mediation has been codified at FLA. STAT. § 61.183(3). (Ch. 220, 1986 Fla. Laws).

22. FLA. STAT. § 44.102(3) (2002). This statutory section further provides that "all oral or written communications in mediation proceedings, other than the executed settlement agreement, are exempt from the requirements of [*Florida Statutes*] chapter 119, and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise." *Id.*

23. FLA. STAT. § 61.183(3) (2002).

> Each party to a mediation proceeding has a privilege during and after the proceeding to refuse to disclose and to prevent another from disclosing communications made during the proceeding, whether or not the contested issues are successfully resolved. This subsection shall not be construed to prevent or inhibit the discovery or admissibility of any information that is otherwise subject to discovery or that is admissible under applicable law or rules of court, except that any conduct or statements made during a mediation proceeding or in negotiations concerning the proceeding are inadmissible in any judicial proceeding.

Id.

24. FLA. STAT. § 723.038(8) (2002). "Each party involved in the mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from

Mediators governed by *Florida Rules for Certified and Court-Appointed Mediators* have a duty to protect the confidentiality of the mediation process.[26] "A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law."[27] During the orientation session, the mediator must inform the mediation participants that "communications made during the process are confidential, except where disclosure is required by law."[28] Additionally, "[i]nformation obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party."[29] Mediators must also maintain confidentiality regarding mediation records, and while participating in training and research activities may not disclose identifying information.[30]

Attorneys and parties may mistakenly assume that all mediation communications are confidential. However, only some mediators are required to comply with the *Florida Rules for Certified and Court-Appointed Media-*

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disclosing, communications made during such proceeding, whether or not the dispute was successfully resolved." *Id.* This statutory section further provides:

> [T]here is no privilege as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or a fraud. Nothing in this subsection *shall be* construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

Id. The last sentence is the original language from the privilege for court-ordered mediation enacted in 1987. Ch. 172, 1987 Fla. Laws. In 1990 this language was deleted from the privilege for court-ordered mediaion. Ch. 1988, 1990 Fla. Laws.

25. FLA. STAT. § 44.201(5) (2002).

> Any information relating to a dispute obtained by any person while performing any duties for the center from the files, reports, case summaries, mediator's notes, or other communications or materials, oral or written, is confidential and exempt from the provisions of section 119.07(1) and shall not be publicly disclosed without the written consent of all parties to the dispute. Any research or evaluation effort directed at assessing program activities or performance shall protect the confidentiality of such information. Each party to a Citizen Dispute Settlement Center proceeding has a privilege during and after those proceedings to refuse to disclose and to prevent another from disclosing communications made during such proceedings, whether or not the dispute was successfully resolved.

Id.

26. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360. The ethical rules provide standards of conduct for certified and court-appointed mediators. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200. For other mediators, the rules are merely advisory. Accordingly, only mediators governed by the ethical rules are subject to disciplinary proceedings pursuant to the rules. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.700.

27. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

28. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.420(a)(3).

29. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(b). Caucus refers to private meetings between the mediator and one or some of the mediation participants. *Id.*

30. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(c).

tors,[31] and only some mediated matters are covered by statutory privileges.[32] Additionally, Florida's evidentiary exclusion is more limited than the mediation statutory privileges, as it only limits admissibility of settlement negotiations at trial.[33] Consequently, in an attempt to safeguard the confidentiality of mediation communications, attorneys, mediators, and parties are entering into carefully crafted confidentiality agreements prior to mediation to provide contractual protection and clarity.[34]

Florida Statutes provide inconsistent direction regarding a mediator's role in protecting the confidentiality of the mediation process. The statutory privilege for court-ordered mediation provides that each party to a mediation has a privilege to refuse to disclose and prevent anyone present at the mediation session from disclosing communications made during the mediation proceeding.[35] Yet, Florida statutory law requires mandatory reporting of child abuse and neglect, as well as abuse and neglect of the elderly and individuals with disabilities.[36] These matters, the statutes direct, must be re-

31. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a). Only certified mediators and court-appointed mediators are obligated to comply with these rules.

32. *See* FLA. STAT. § 44.102(3), § 61.183(3), § 723. 038(8), § 44.201(5) (2002).

33. FLA. STAT. § 90.408 (2002). *See* Ehrhardt, *supra* note 20, at 102, for analysis of the protection provided to mediation proceedings by rule 408 of the *Federal Rules of Evidence*.

34. "[I]t is up to the parties during non-court-ordered mediation to provide by agreement confidentiality of the mediation. Absent that agreement there currently is no statute, constitutional provision/interpretation, or rule that extends confidentiality to non-court-ordered mediation." State v. Trull, 9 Fla. L. Weekly Supp. D289, D290 (7th Cir. Apr. 30, 2002). Statutory confidentiality privileges do apply to court-ordered, family, mobile home, and citizen dispute settlement center mediations. *See supra* notes 22–25.

35. FLA. STAT. § 44.102(3) (2002). The first Florida statute granting a privilege for court-ordered mediation provided in relevant part:

> There is no privilege as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or a fraud. Nothing in this subsection shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

FLA. STAT. § 44.302(2) (1987). This language was deleted in 1990. Ch. 188, 1990 Fla. Laws (amending FLA. STAT. § 44.302(2) (1987)). In 1992, a proposed amendment providing for exceptions to the mediation privilege was not adopted. It read:

> There shall be no privilege and no restriction on disclosure in relation to communications which give the mediator knowledge of, or reasonable cause to suspect, that a child has been abused or neglected. There is no privilege and no restriction on disclosure as to communications made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud. Nothing in subsection (3) shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

H.B. 183 (1992).

36. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002). Additionally, Florida law prohibits the concealment of public hazards. The applicable statute does not require mandatory reporting, but does provide:

> Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful

ported by anyone who knows or has reasonable cause to suspect the prohibited conduct.[37] What then is the mediator's obligation if she learns of child abuse during the mediation? Many court certified mediators construe the statutes in conjunction with their ethical obligation to keep everything confidential except where disclosure is required by law,[38] and read the statutes as requiring confidentiality with the exception of their legal obligation to report abuse and neglect.[39] However, not all who mediate in Florida are bound by Florida's ethical rules for mediators, and some mediators may not believe they are required by law to report abuse and neglect.

Canons of statutory construction, presumptions that vary in strength according to the importance of the policy behind them,[40] are helpful in construing these apparently conflicting statutes. However, as many disagree on when these canons apply as well as their relative weight, they will not provide a definitive answer to our question. They will, regardless, assist in formulating plausible ways to construe the statutes and offer a basis for reasoned interpretation. Speaking off the record, one mediator acknowledges that one judge in the state believes the later statute (mediation privilege) controls the earlier statutes (reporting abuse and neglect), and the statute specific to mediators controls the general mandatory reporting statutes. While a canon does provide that a newer statute controls because it has the effect of repealing the earlier one, it only has that effect to the extent of the inconsistency.[41] This canon applies when it is impossible to interpret two statutes harmoniously. If one reads the mediation confidentiality statute as requiring that everything except the written agreement is confidential, one might choose to employ this canon to reach the conclusion that mediators need not report abuse and neglect. If however, one believes the statutes may be interpreted harmoniously (the mediators keep confidentiality with the limited exceptions required by the other statutes), the canon is not appropriately applied.

Another canon provides that the specific provision controls the general one.[42] Many mediators employ this canon to determine that they have an

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to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

FLA. STAT. § 69.081(4) (2002).

37. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002).

38. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

39. FLA. STAT. § 39.201 (2002); FLA. STAT. § 415.1034 (2002).

40. *See generally*, RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT (NITA 2002).

41. *Id.* at 96 (citing Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1234 (Fla. 2000)).

42. BROWN & BROWN, *supra* note 40, at 90.

obligation to report abuse and neglect which the legislature specifically earmarked for mandatory reporting. This interpretation is consistent with the mediator's ethical obligation to maintain confidentiality except where required by law, and the approach to read *in pari materia* new statutes that concern the same subject matter.[43] "*In pari materia,* 'part of the same material,' provides that new legislation be interpreted to make it consistent with existing statutes that concern the same subject matter."[44] Mediators generally prefer interpreting the statutes as coexisting harmoniously, requiring them to honor confidentiality, yet report child and vulnerable adult abuse and neglect.

Nonetheless, neither statutory construction nor case law adequately advises a mediator as to the breadth of and possible exceptions to mediation confidentiality privileges. One case does highlight the tension between the public policy to communicate child abuse and the public policy to honor confidentiality.[45] In *C.R. v. E.*, the parties agreed to resolve their differences through the mediation/arbitration forum offered by the Christian Conciliation Service of Central Florida, Inc. ("CCS").[46] The matter to be resolved was the parents' allegation that a Catholic priest had fondled their minor daughter.[47] CCS rules included one entitled "Confidentiality" which read: "All statements made during the conciliation process will be of a confidential nature and will not be made known to persons not involved in the process."[48] The CCS arbitrators reached a decision, finding that "the priest had touched the daughter in an inappropriate manner on several occasions and that the Church was negligent in retaining and supervising him."[49] The arbitration panel found against the priest and the Church jointly and severally in the amount of $250,000.[50] Subsequent to payment of the full amount by the local Diocese to the parents, counsel for the parents informed church counsel that they considered any confidentiality agreement null and void.[51] The court of appeal disagreed, affirming per curiam the trial court's refusal to dissolve a temporary injunction enjoining the parents from communicating with third parties regarding the proceeding.[52] The strong well-reasoned dissent maintained the requirement of confidentiality was void as a matter of public pol-

43. *Id.* at 45.
44. *Id.*
45. *See* C.R. v. E., 573 So. 2d 1088 (Fla. 5th Dist. Ct. App. 1991).
46. *Id.* (Cobb, J., dissenting).
47. *Id.*
48. *Id.*
49. *Id.* at 1089.
50. *C.R.*, 573 So. 2d at 1089 (Cobb, J., dissenting).
51. *Id.*
52. *Id.* at 1088.

icy,[53] and moreover, a person who takes money on an agreement to conceal a felony is guilty of a third degree felony.[54]

Florida mediators, attorneys, and parties need clear guidance as to what is not confidential during mediation. The statutory confidentiality privileges apply to only some of the many mediated cases. The mediation privilege for court-ordered cases leaves doubt as to the mediator's obligation to report matters that may be deemed "required by law," and does not clarify what, if anything, is required by law. Additionally, mediators who are not certified or court-appointed do not have the ethical obligation to keep mediation communications confidential unless required by law. Given the many variables, confidentiality will vary greatly based on whether a privilege applies, the court ordered mediation, the mediator is certified, and the parties entered into a confidentiality agreement. The legislature would do well to clarify the confidentiality privilege with careful attention to the experiences and concerns of the mediators, attorneys, judges, and parties. In *State v. Trull*, a circuit court respectfully suggested "the Legislature review the wisdom of extending confidentiality to non court-ordered mediation conducted by certified mediators who are subject to the Florida Rules for Certified and Court-Appointed Mediators."[55]

B. *Enforcement of Confidentiality*

Florida judges have recognized the importance of confidentiality to mediation and have enforced mediation confidentiality agreements and privileges. Judges may also severely sanction mediation participants who do not abide by confidentiality agreements. In *Paranzino v. Barnett Bank*, the trial court dismissed plaintiff's case with prejudice finding that plaintiff and her attorney deliberately and willfully breached the confidentiality provision in their Mediation Report and Agreement.[56] After attending court-ordered me-

53. *Id.* The public policy cited by dissent provides "any person . . . who knows, or has reasonable cause to suspect, that a child is . . . abused . . . shall report such knowledge or suspicion to the (Department of Health and Rehabilitative Services) . . . ." *C.R.*, 573 So. 2d at 1089 (citing FLA. STAT. § 415.504 (1989)).

54. *Id.* (citing FLA. STAT. § 843.14(4) (1989)).

55. 9 Fla. L. Weekly Supp. D289 (7th Cir. Apr. 30, 2002).

56. 690 So. 2d 725, 726 (Fla. 4th Dist. Ct. App. 1997). The parties and their counsel, signers of the report and agreement, agreed to be bound by confidentiality agreements and not to disclose any discussions unless agreed to in writing by the parties or ordered by the court. *Id.* Further, they agreed that the mediation was covered by the provisions of Chapter 44 of the *Florida Statutes* and rule 1.700 *et seq.* of the *Florida Rules of Civil Procedure*. *Id.* at 728. Section 44.102(3) of the *Florida Statutes* provided that communications in a court-ordered

diation at which the parties did not settle, Victoria Paranzino and her attorney disclosed to a Miami Herald reporter the settlement offer made by Barnett Bank during their mediation conference.[57] The resulting article which appeared in the Miami Herald's Tropic Magazine recounted Paranzino's version of the facts of her case and statements, attributed to her attorney, discussing the settlement offer.[58] The appellate court affirmed the imposition of the harshest sanction of dismissing the case with prejudice, finding that appellant Paranzino and her attorney deliberately violated the court order setting the matter for mediation, breached the confidentiality provision in the Mediation Report and Agreement, and disregarded the governing statute and rule of procedure by disclosing the settlement offer to the Miami Herald.[59] The trial court based its ruling on strong public policy honoring mediation confidentiality.[60] "If the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process."[61]

"The confidentiality of the mediation negotiations should remain inviolate until a written agreement is executed by the parties."[62] Each party to a court-ordered mediation has a privilege to prevent disclosure of the communications made during the mediation proceeding.[63] Other than an executed settlement agreement, all oral and written communications are confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties otherwise agree.[64] Courts will neither recognize oral mediation agreements nor hear testimony alleging their existence.[65] In *Hudson,* the wife and her attorney appeared at the final hearing for dissolution of marriage alleging an oral mediated agreement and presenting an unsigned version of the alleged agreement, with the mediator's signature on the back.[66] Although the mediation agreement was never reduced to writing, and neither the husband nor his attorney appeared at the final hearing, the trial court en-

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mediation proceeding be confidential and inadmissible in subsequent legal proceedings. The court ordered the parties to mediate at appellant's request. *Id.* at 726.

57. *Paranzino*, 690 So. 2d at 726.

58. *Id.*

59. *Id.* at 729–30.

60. *Id.* at 728.

61. *Id.* at 729; *see also* Floyd v. St. Johns County Fla., 5 Fla. L. Weekly Supp. 440 (7th Cir. Feb. 24, 1998).

62. Hudson v. Hudson, 600 So. 2d 7, 9 (Fla. 4th Dist. Ct. App. 1992); Cohen v. Cohen, 609 So. 2d 785, 786 (Fla. 4th Dist. Ct. App. 1992) (quoting *Hudson*, 600 So. 2d at 9).

63. *Hudson*, 600 So. 2d at 8 (citing FLA. STAT. § 44.102(3) (Supp. 1990)).

64. *Id.*

65. *Id.* at 9.

66. *Id.* at 8.

tered a judgment and later denied the husband's motion to vacate.[67] The appellate court found that the admission of the "agreement" poisoned the well, necessitating that the judgment be vacated and the matter be tried anew.[68]

Disclosure of confidential mediation information has also been proposed as possible justification for disqualifying judges.[69] The Supreme Court of Florida in *Enterprise Leasing* addressed the certified conflict "on the issue of whether the disclosure of confidential mediation information to the trial judge is in and of itself sufficient to disqualify the trial judge."[70] The court held "we approve the decision in *Enterprise Leasing*, which held a judge is not automatically disqualified from presiding because of knowledge of confidential mediation information, and disapprove the Fourth District's decision in *Fabber* to the extent that it is inconsistent with this opinion."[71] A party seeking disqualification of a judge in a mediation context must allege specific facts to demonstrate a reasonable belief he could not get a fair trial.[72]

> Florida's supreme court recognized that confidentiality of the proceedings is crucial to mediation by mandating that '[i]f the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court *without comment or recommendation,*' and by further requiring that '[i]f an agreement is reached, it shall be reduced to writing.'[73]

Comparable rules of procedure similarly restrict what a mediator may report to the court for family[74] and dependency mediation.[75]

Not only may mediators assert the confidentiality privilege on behalf of the parties, mediators governed by the *Florida Rules for Certified and Court-Appointed Mediators* have an affirmative obligation to do so, including moving for a protective order.[76] In *Royal Caribbean Corp. v. Modesto,* the par-

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67. *Id.*

68. *Hudson*, 600 So. 2d at 9.

69. *See* Enterprise Leasing Co. v. Jones, 789 So. 2d 964 (Fla. 2001).

70. *Id.* at 965.

71. *Id.* In *Fabber v. Wessel*, 604 So. 2d 533 (Fla. 4th Dist. Ct. App. 1992) the trial judge was disqualified from continuing as judge on the case because in the course of denying a motion to compel compliance with the settlement agreement, he was privy to the terms of the parties' alleged agreement. *Id.* at 534.

72. *Enterprise Leasing Co.*, 789 So. 2d at 968.

73. Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 519 (Fla. 3d Dist. Ct. App. 1994) (citing FLA. R. CIV. P. 1.730) (emphasis in original).

74. FLA. FAM. L. R. P. 12.740(f).

75. FLA. R. JUV. P. 8.290(o).

76. "A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law." FLA. R. CERT. & CT.-APPTD. MEDIATORS

ties failed to reach a written agreement during court ordered mediation.[77] Nonetheless, Royal Caribbean moved to enforce an oral mediation agreement and subpoenaed the mediator to testify at the hearing on their motion.[78] The court of appeal recognized that the privilege afforded to the parties in mediation proceedings, and asserted by the mediator in the trial court, was codified by the Florida Legislature.[79] Accordingly, it affirmed the trial court's decision to grant the mediator's motion to quash the subpoena and to refuse to hear testimony regarding the mediation.[80]

In a second case involving Royal Caribbean, following court-ordered circuit civil mediation, the mediator submitted a report to the court indicating that the parties had reached total impasse on all issues.[81] Royal Caribbean moved to enforce settlement, claiming that a settlement was reached by the parties and sought to have the court review a document purporting to be the settlement agreement.[82] The appellate court found that the trial court had departed from the essential requirements of law by ordering an in camera inspection of the purported agreement and holding an evidentiary hearing on Royal Caribbean's motion.[83] "In order for a settlement agreement reached during mediation to be binding, FLA. R. CIV. P. 1.730 clearly mandates that it be reduced to writing and executed *both* by the parties and their respective counsel, if any."[84] If the parties do not effectuate an agreement in accordance with the dictates of rule 1.730(b) of the *Florida Rules of Civil Procedure*, "the confidentiality afforded to parties involved in mediation proceedings must remain inviolate."[85]

10.360. Additionally, "the mediator should not voluntarily testify, and, if subpoenaed, should either file a motion for protective order, or notify the judge in accordance with local procedures, that the mediator is statutorily required to maintain the confidentiality of mediation proceedings." Mediator Qualifications Advisory Panel, Op. 96-005. This is an advisory opinion issued by the Mediator Qualifications Advisory Panel, subsequently renamed Mediator Ethics Advisory Committee.

77. 614 So. 2d 517, 518 (Fla. 3d Dist. Ct. App. 1992).

78. *Id.*

79. *Id.* at 520.

80. *Id.*

81. Gordon v. Royal Caribbean Cruises Ltd., 641 So. 2d 515, 516 (Fla. 3d Dist. Ct. App. 1994).

82. *Id.*

83. *Id.* at 517.

84. *Id. Contra* Jordan v. Adventist Health Sys., 656 So. 2d 200, 202 (Fla. 5th Dist. Ct. App. 1995) (enforcing mediation agreement signed by the parties, but not their counsel, when parties operated under the terms of the mediation agreement).

85. *Gordon*, 641 So. 2d at 517 (citing Royal Caribbean v. Modesto, 614 So. 2d 517 (Fla. 3d Dist. Ct. App. 1992)).

Nonetheless, if the parties at mediation do not effectuate an agreement, the real parties in interest, even if not present at the mediation proceedings, are entitled to know about the issues in dispute and mediation efforts.[86] In a court-ordered mediation between a condominium association and a developer, the parties did not reach agreement.[87] Subsequent to the mediation, the developer wrote a letter to the individual unit owners advising them of the proceedings and the settlement offer the association had rejected.[88] Reversing the trial court's order imposing sanctions on the developer, the court of appeal interpreted section 44.102(3) of the *Florida Statutes* to grant a privilege to each party involved in a mediation proceeding, and found nothing in the statute that precluded parties from disclosing communications to other parties, whether present at or absent from the mediation proceeding.[89]

C. *Rules of Procedure Impact Confidentiality*

Executed mediated agreements survive the mediation process, but must bear the requisite signatures to be recognized as valid by the courts.[90] Rules of procedure in conjunction with applicable substantive and mediation law provide the answer as to who must sign the agreement. In the circuit civil matter of *City of Delray Beach v. Keiser*, "[a]t the mediation, a handwritten memorandum was prepared, which set forth the terms of a settlement."[91] The attorney for the City of Delray Beach signed the memorandum, but neither party signed the document.[92] Subsequent to the mediation, the City Commission declined to approve the settlement.[93] The appellate court reasoned that there was no mediation settlement agreement for rule 1.730 of the *Florida Rules of Civil Procedure* requires that parties sign their mediation agreement.[94] Thus, the court of appeal found that the trial court erred in enforcing the agreement.[95] "[C]ounsel's signature, even when executed in the presence

86. Yacht Club S.E., Inc. v. Sunset Harbour, 843 So. 2d 917, 918 (Fla. 3d Dist. Ct. App. 2003).

87. *Id.*

88. *Id.*

89. *Id.* at 918–19.

90. FLA. STAT. § 44.102(3) (2002). The privilege for court-ordered mediation provides that "[a]ll oral or written communications in a mediation proceeding, other than an executed settlement agreement, . . . shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise." *Id. See also* additional mediation privileges identified in notes 23–25 *supra.*

91. City of Delray Beach v. Keiser, 699 So. 2d 855, 856 (Fla. 4th Dist. Ct. App. 1997).

92. *Id.* at 856.

93. *Id.*

94. *Id.*

95. *Keiser*, 699 So. 2d at 855.

of the party, was insufficient to satisfy the signature requirement of Rule 1.730."[96] Conversely, when the parties sign the mediation agreement but counsel do not, the agreement may be upheld by the court.[97] In *Jordan v. Adventist Health System/Sunbelt, Inc.*, the court found the lack of signatures by counsel was a technical detail, and held that the parties' signatures were sufficient to bind them to their settlement agreement when the parties had operated under the terms of the agreement.[98] While attorneys' signatures may be a technical detail, parties' signatures are required on circuit civil mediated settlement agreements.

In determining whether mediated agreements should be recognized, family law courts also look to requirements established by the applicable rules of procedure.[99] In *Graves v. Graves*, the court held that the only way the parties may enter into an enforceable agreement was to follow the rules of procedure, and parties may not avoid the requirements by orally agreeing to an alternative procedure during mediation.[100] During the mediation, the parties reached an oral agreement which they recited before a court reporter.[101] The wife refused to sign the written agreement the husband's attorney prepared by incorporating the terms of the oral agreement.[102] When *Graves* was decided, family mediation matters were governed by *Florida Rules of Civil Procedure.* They are now governed by *Florida Family Law Rules of Procedure*, which specifically address the matter raised in *Graves*, and provide that the mediation agreement may be electronically or stenographically recorded.[103]

Attorneys and mediators must be well-versed in the rules of procedure in their specific courts, for the various rules differ markedly. *Florida Family Law Rules of Procedure* do not bind parties to the agreement if counsel was not present when the mediation agreement was reached, and counsel serves a written objection within ten days from service of a copy of the agreement.[104] Rules governing small claims actions do not require either parties or attor-

96. *Id.* (citing *Gordon*, 641 So. 2d at 517).

97. Jordan v. Adventist Health Sys./Sunbelt, Inc., 656 So. 2d 200 (Fla. 5th Dist. Ct. App. 1995), *rev. denied* 663 So. 2d 630 (Fla. 1995).

98. *Id.* at 202.

99. Graves v. Graves, 649 So. 2d 284 (Fla. 2d Dist. Ct. App. 1995).

100. *Id.* at 286.

101. *Id.* at 285.

102. *Id.*

103. FLA. FAM. L. R. P. 12.740(f)(1) (2002).

104. *Id.*; *see* Kalof v. Kalof, 840 So. 2d 365, 366 (Fla. 3d Dist. Ct. App. 2003) (interpreting this rule as applying to the limited circumstance in which counsel for one of the parties leaves the mediation before the settlement agreement is ready, and not establishing a ten-day window within which anyone present at mediation can move to set aside the agreement).

neys to attend mediation if the party sends a representative with full authority to settle.[105] For dependency mediation, parties attending the mediation must sign the written mediation agreement.[106] The parties and participants who must attend are identified in the court order, which also names the parties and participants who are prohibited from attending the mediation sessions.[107]

D. *Waiver of Privilege of Confidentiality*

The parties to the mediation hold the mediation confidentiality privilege and may elect to waive it. Should all parties involved in the mediation waive the privilege, the mediator may not assert the privilege on anyone's behalf. An individual party may intentionally or unintentionally waive the privilege. In *McKinlay v. McKinlay*, the wife wrote a letter to her then-attorney informing him that the stipulation agreement she entered into during mediation was not fair, that she was "under severe emotional distress," and pressured into signing the agreement. [108] When the husband's counsel sought to have the mediator testify in response to wife's allegations of intimidation and duress, her counsel objected, asserting that mediation matters are privileged and confidential.[109] "The trial court found that Wife had not waived her statutory privilege," and refused to allow the mediator to testify or proffer testimony.[110] The court of appeal reversed and concluded "Wife waived her statutory privilege of confidentiality and that, as a result of the waiver, it was error and a breach of fair play to deny Husband the opportunity to present rebuttal testimony and evidence."[111] Similarly, another case held "it was proper for the trial court to allow the former husband to testify about the mediation proceeding where the . . . wife sought relief from the plain terms of the settlement agreement . . . ."[112] "A party seeking relief from a written settlement agreement on the basis of his or her intent [or] thoughts at the time the agreement was entered into may not assert that matters discussed during the negotiations of that agreement are privileged."[113]

105. FLA. R. CIV. P. 1.750(e).
106. FLA. R. JUV. P. 8.290(o)(1).
107. FLA. R. JUV. P. 8.290 (l)(1).
108. Mckinlay v. Mckinlay, 648 So. 2d 806, 807 (Fla. 1st Dist. Ct. App. 1995).
109. *Id.* at 808.
110. *Id.* at 809.
111. *Id.* at 810.
112. Taylor v. Taylor, 650 So. 2d 662, 663 (Fla. 1st Dist. Ct. App. 1995).
113. *Id.* (citing Mckinlay v. Mckinlay, 648 So. 2d 806, 810 (Fla. 1st Dist. Ct. App. 1995)).

The mediation confidentiality privilege extends to physical evidence.[114] In *Chabad House-Lubavitch v. Banks*, the court of appeal found the trial court had erred in admitting into evidence the site plan that was a direct product of the parties' mediation.[115] Had the site plan been otherwise discoverable the result would have been different for the mediation privilege, applying only to mediation communications, does not suspend discovery or prevent the introduction of otherwise discoverable evidence.[116] In fact, information obtained during mediation may lead to additional discovery requests, and may form the basis for appropriate motions.[117] In *Broward School Board v. Cruz*, the School Board received at mediation, for the first time, a report from the Plaintiff's neuropsychologist.[118] The report constituted otherwise discoverable evidence, and is therefore distinguishable from the site plan in *Chabad*.[119] Previously, the trial court had denied the School Board's request for an independent medical examination of the Plaintiff, based on Plaintiff's representation that he had not placed his neurological condition at issue, had not retained a neurologist, and did not intend to present testimony from a neurologist.[120] The court of appeal found: "[b]ecause the cause of Cruz's mental condition and, specifically, the change, if any, in his neurological state, was the central issue in this trial, the School Board should have been allowed the opportunity to have its own expert conduct an independent [medical] examination."[121]

An ever-growing body of mediation case law responds to the parties' various pleas for court intervention to correct, modify, or set aside mediation agreements. When courts look behind the mediation agreements and take testimony from the parties as to what transpired at mediation, they cast aside confidentiality. In *Haffa v. Haffa*, the wife alleged that the mediation agreement contained a serious scrivener's error, reflecting that her husband was to transfer twenty-five shares of stock to her, when they had agreed the number

114. Chabad House-Lubavitch v. Banks, 602 So. 2d 670, 672 (Fla. 4th Dist. Ct. App. 1992).

115. *Id.*

116. FLA. STAT. § 44.102(3) (2002); FLA. R. CIV. P. 1.710(c); FLA. FAM. L. R. P. 12.741(a).

117. In contrast, hearsay evidence as to information learned at mediation is inadmissible. *See* Price v. City of Boynton Beach, 847 So. 2d 1051 (Fla. 4th Dist. Ct. App. 2003) ("[t]estimony of a witness that a . . . mediator had expressed concerns about threats made by a [party] was inadmissible as hearsay").

118. 761 So. 2d 388, 392 (Fla. 4th Dist. Ct. App. 2000), *aff'd*, 800 So. 2d 213 (Fla. 2001).

119. The site plan in *Chabad* was a mediation communication and therefore protected by the mediation privilege. The doctor's report in *Cruz* existed independent of the mediation, was not covered by the privilege, and was otherwise discoverable.

120. *Cruz*, 761 So. 2d at 391.

121. *Id.* at 393.

was 2,505.[122] The wife's attorney subpoenaed the mediator to testify. Over the mediator's objection, the circuit court judge ordered the mediator to testify on the limited issue of the alleged scrivener's error.[123]

Courts balance the benefit of honoring confidentiality with the detriment of denying a party the opportunity to seek the relief of modifying or setting aside the mediation agreement. In *D.R. Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach*, the court of appeal directly addressed the issue of confidentiality, focusing on whether the mediation resulted in an executed settlement agreement.[124]

> The reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling. There is, of course, no confidentiality as to "an executed settlement agreement."[125]

Courts have given parties the opportunity to prove, among other matters, fraud,[126] extortion,[127] mutual mistake,[128] misrepresentation,[129] and mediator misconduct[130] as bases for seeking relief from mediation agreements. The section after next will discuss cases pertaining to mediation agreements, interpreted, modified, upheld, or overturned by the courts.

III. APPEARANCE AT MEDIATION

A. *Obligation to Attend Mediation*

The term "voluntary court-ordered mediation" seems oxymoronic. While the process of mediation may occur by operation of law, parties determine their level of participation. Judges do order parties to attend mediation sessions. However, once at mediation, the parties have self-

122. Haffa v. Haffa, No. 93-13422-FC12 (Fla. 11th Cir. Ct. 1994). Conversation with mediator Meah R. Tell on September 17, 2003.

123. *Id.*

124. 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

125. *Id.* at 973–74 (citing FLA. STAT. § 44.102(3) (2001)).

126. Gostyla v. Gostyla, 708 So. 2d 674 (Fla. 2d Dist. Ct. App. 1998).

127. Cooper v. Austin, 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).

128. *D.R. Lakes, Inc.*, 819 So. 2d at 974.

129. Still v. Still, 835 So. 2d 376 (Fla. 3d Dist. Ct. App. 2003).

130. Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1095 (Fla. 4th Dist. Ct. App. 2001).

determination and decide whether they will settle all, some, or none of the matters in controversy.[131] Florida courts have sternly sanctioned both parties and attorneys who failed to attend court-ordered mediation sessions. Sanctions include case dismissal, struck pleadings, attorney's fees, and costs charged against attorneys or clients. With the widespread utilization of mediation and relatively new proliferation of rules of procedure specifically geared to the mediation process, case law clarifies the attorney's obligation to attend and advise clients to attend mediation. Attorneys who improperly advise their clients run the risk of irate clients sanctioned by the court and diminished coffers following their personal assessment.

For circuit civil court-ordered mediation, attorneys representing parties have an obligation to both attend and have their clients attend.[132] In *Carbino v. Ward,* the Fifth District Court of Appeal of Florida found that defendant Ward failed to appear at mediation without good cause despite the fact that he, in good faith, relied on his attorney's advice that he need not attend.[133] The appellate court further found that the trial court, upon motion, was obligated to award attorney's fees and costs against the party failing to appear.[134] "To hold otherwise would substantially weaken the sanction mechanism which the Supreme Court saw fit to make mandatory upon a party's failure to appear at mediation without good cause."[135] For circuit civil cases,

> a party is deemed to appear at a mediation conference if the following persons are physically present:
>
> (1) The party or its representative having full authority to settle without further consultation;
>
> (2) The party's counsel of record, if any;
>
> (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full author-

131. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310.

132. Rule 1.720(b) of the *Florida Rules of Civil Procedure* delineates who must attend circuit civil (civil cases over $15,000) mediations. Court orders or stipulations by parties may alter the requirements. *Id.*

133. 801 So. 2d 1028, 1029 (Fla. 5th Dist. Ct. App. 2001).

134. *Id.* at 1031. Rule 1.720(b) of the *Florida Rules of Civil Procedure* provides "If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear."

135. *Carbino,* 801 So. 2d at 1031.

> ity to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.[136]

The *Carbino* court was the first Florida court to address the question of whether a defendant needs to personally appear for mediation when his insurance company sends a representative with full authority to settle up to policy limits.[137] Interpreting rule 1.720(b), it answered in the affirmative, finding that persons from all three applicable categories were required to be present at the mediation.[138] Specifically, the court found that sub-section (b)(1) applied "to a party such as a corporation, partnership, incapacitated person, or minor which must appear through a duly authorized representative."[139] Further, the court found the adjuster, while meeting the settlement requirements of subsection (3), did not meet the requirements of subsection (1) for his authority was only up to policy limits and Plaintiffs' demand was not so limited.[140]

Whether a party, representative, or attorney needs to appear at mediation depends on the governing court order and rules of procedure and practice. The Supreme Court of Florida adopts the rules of practice and procedure for conduct of court-ordered mediation.[141] The most demanding rule requiring appearance at mediation applies to circuit civil mediation matters.[142] The *Florida Family Law Rule of Procedure* governing appearance at mediation only requires that the named party be physically present at the mediation conference, unless otherwise stipulated by the parties.[143] Counsel is not obligated to attend in the discretion of the mediator and with agreement by the parties, unless otherwise ordered by the court.[144] Appearances at dependency mediation are both ordered and prohibited by the court.[145] *The Florida Rules of Juvenile Procedure* direct the court to enter an order naming parties and participants who must appear, as well as parties and participants

136. FLA. R. CIV. P. 1.720(b).
137. *Carbino*, 801 So. 2d at 1030.
138. *Id.*
139. *Id.* at 1031.
140. *Id.*; *see also* Mediator Ethics Advisory Comm., Op. 99–002 (July 3, 1999); Mediator Ethics Advisory Comm., Op. 2001–010 (March 22, 2002); Mediator Ethics Advisory Comm., Op. 2002–001 (March 22, 2002).
141. FLA. STAT. § 44.102(1) (2002).
142. FLA. R. CIV. P. 1.720(b).
143. FLA. FAM. L. R. P. 12.740(d).
144. *Id.* Rule 12.741(2) provides for mandatory sanctions against a party who fails to appear at a duly noticed mediation conference without good cause.
145. FLA. R. JUV. P. 8.290(l).

who are prohibited from attending the mediation.[146] Unlike the other mediation sessions requiring the appearance of parties, in small claims actions an attorney may appear on behalf of a party at mediation if he has full authority to settle without further consultation.[147] A nonlawyer may also appear on behalf of a party with written authority to appear and full authority to settle without further consultation.[148]

Courts are sanctioning parties for failing to attend mediation sessions based on their court orders, as well as applicable rules of procedure. In *Transglobal Land Trust v. Balamour*, the court dismissed the landlord tenant case with prejudice for the plaintiff landlord's failure to attend the court ordered mediation and subsequent failure to show cause why the case should not be dismissed for his nonappearance.[149] Similarly, parties who fail to abide by a court order to attend appellate mediation are subject to sanctions, including the award of attorney's fees and mediator fees.[150] A party's obligation to obey a court order to attend mediation is not negated by presence at the mediation by counsel with full authority to settle.[151]

Attorneys are also the object of court sanctions for their mediation errors. Although rule 1.720(b) of the *Florida Rules of Civil Procedure* only provides for sanctioning parties who fail to appear,[152] trial courts have the inherent authority to appropriately assess attorney's fees and costs.[153] Attorneys who fail to attend court-ordered mediation and advise their clients that they need not attend may face attorneys' fees and costs assessed against them in favor of the opposing party.[154] Similarly, attorneys who fail to timely file mediation summaries without good cause may face the imposition of sanctions personally against them.[155] When the attorney is the transgressor, "it is more appropriate to impose sanctions against counsel rather than dismiss the appeal, as dismissal would punish the client for the transgressions of her attorney."[156]

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146. *Id.* Rule 8.290(l)(5) authorizes sanctions against a party or participant who was ordered to attend mediation, but failed to do so without good cause. The court, in its discretion, may impose sanctions.

147. FLA. R. CIV. P. 1.750(e).

148. *Id.*

149. Transglobal Land Trust v. Balamour, 9 Fla. L. Weekly Supp. 202 (17th Cir. Ct. Jan. 14, 2002).

150. Segui v. Margrill, 844 So. 2d 820, 821 (Fla. 5th Dist. Ct. App. 2003).

151. *Id.*

152. Fredericks v. Sturgis, 598 So. 2d 94, 96 (Fla. 5th Dist. Ct. App. 1992).

153. Nunes v. Ferguson Enters., Inc., 703 So. 2d 491 (Fla. 4th Dist. Ct. App. 1997).

154. *Id.*; *see also* Dunning v. Metro. Ins. Co., 10 Fla. L. Weekly Supp. 39 (Fla. 3d Cir. Ct. Nov. 6, 2002).

155. Carter-Harris v. Williams, 764 So. 2d 687, 688 (Fla. 1st Dist. Ct. App. 2000).

156. *Id.*

Trial courts must find a sufficiently high level of misconduct by the party to justify the severe sanction of striking his pleadings.[157] In *Williams v. Udell*, the trial court abused its discretion by striking appellant's pleadings for failing to attend mediation and properly reply to a request for production, when both incidents of misconduct were attributed to the attorney's dereliction of duty.[158] If a court enters a default judgment against a party for failure to attend a court-ordered mediation, the default order "must contain specific findings of the noncomplying party's willful or deliberate refusal to obey the court order."[159] Additionally, the severe sanction of striking pleadings becomes subject to heightened scrutiny when matters such as child custody and support are at issue.[160]

B. *Authority to Settle at Mediation*

Key to a determination of whether the appropriate people appeared for mediation is whether they had the requisite authority to settle. No statute, rule, or court order requires that parties settle during mediation sessions. "There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle."[161] Courts and rules may require authority to settle; they do not require intent to settle, let alone actual settlement. Florida's statutory definition of mediation clearly states, "decision making authority rests with the parties."[162]

Courts have levied sanctions against parties who sent representatives to mediation without authority to settle. In *Physicians Protective Trust Fund v. Overman*, the circuit court judge ordered the entire board of trustees to attend the resumption of mediation after the self-insured trust failed to send a representative with authority to settle the case to the court-ordered mediation.[163] The court of appeal held the lower court had not departed from the essential

157. Williams. v. Udell, 690 So. 2d 732, 733 (Fla. 4th Dist. Ct. App. 1997).

158. *Id.* at 732–33.

159. Rodriguez v. Kalish, 766 So. 2d 411, 411 (Fla. 3d Dist. Ct. App. 2000); *see also* Smith v. Wal-Mart, 835 So. 2d 353 (Fla. 1st Dist. Ct. App. 2003) (reversing trial court's dismissal of case and remanding for an explicit determination whether party's failure to attend mediation was willful).

160. Brownell v. Brownell, 685 So. 2d 78, 79 (Fla. 2d Dist. Ct. App. 1996).

161. Avril v. Civilmar, 605 So. 2d 988, 990 (Fla. 4th Dist. Ct. App. 1992).

162. FLA. STAT. § 44.1011(2) (2002).

163. 636 So. 2d 827, 827–29 (Fla. 5th Dist. Ct. App. 1994). The mediator had adjourned the mediation because the representative from Physicians Protective Trust had no dollar authority to settle the case. Subsequently, the Overmans filed a motion for sanctions pursuant to rule 1.720(b) of the *Florida Rules of Civil Procedure*. *Id.*

requirements of law and declined to interfere by certiorari.[164] Similarly, in *Semiconductors, Inc. v. Golasa,* the trial court sanctioned the petitioner for sending a representative and an attorney to mediation who were not authorized to pay anything to settle the case.[165] The Fourth District Court of Appeal denied the petition for writ of certiorari seeking to overturn the court order.[166] Chief Justice (then Judge) Anstead, dissenting, aptly noted:

> Mediation is an excellent means of providing the parties with an opportunity to come together in a non-adversarial setting under the guidance of an expert at dispute resolution to determine if they can *agree* to a solution of their dispute without the need for a full-blown court trial and all the baggage and risks such a trial involves.[167]

He continued: "However, mediation is not designed to *force* a settlement in any case, especially those cases where the lines are so clearly and solidly drawn that the parties, in absolute faith, simply take diametrically opposed positions that ultimately require a court-imposed resolution after a trial on the merits."[168]

Judge Anstead had highlighted the importance of parties' self-determination in the mediation process.[169] Precisely because mediation offers the opportunity to come together and share information and perspectives, parties may alter their once diametrically opposed positions. For mediation to truly offer a settlement opportunity, the parties must have the ability to change their minds, should they see fit. Consequently, sending people who have "marching orders" not to settle is a waste of the participant's time and energy.[170] On the other hand, sending people who decide not to settle after participating in the mediation is most appropriate.

Court orders may equate failing to appear for mediation without full authority to settle with failing to appear at all.[171] Consequently, if parties reach agreement, they may not later look to overturn it based on inadequate author-

164. *Id.* at 829.

165. Semiconductors, Inc. v. Golasa, 525 So. 2d 519, 519 (Fla. 4th Dist. Ct. App. 1988) (per curiam).

166. *Id.*

167. *Id.* at 519–20 (Anstead, J., dissenting).

168. *Id.* at 520.

169. *See* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310.

170. *See* FLA. R. CIV. P. 1.720(b) (setting attendance requirements and mandatory sanctions).

171. W. Waste Indus., Inc. v. Achord, 632 So. 2d 680, 681 (Fla. 5th Dist. Ct. App. 1994).

ity to settle.[172] "Since agreement was reached by the parties at mediation, it is nonsensical to say that petitioner was not present at mediation."[173]

IV. COURTS SEEK TO UPHOLD MEDIATION AGREEMENTS

A. *Mediation Environment*

Inevitably, when people enter into settlement agreements, some will try to renege on their agreements. Courts will honor the parties' fundamental right to contract and enforce the contracts even when the bargain seems to favor one side.[174] "The incentive to file an action, impulsively settle, then challenge the settlement after final judgment would permit parties to manipulate the privileges of litigation, waste judicial resources, and compromise finality in these judgments."[175]

Parties looking to overturn settlement agreements have limited bases for doing so. "In fact, the reasons for such limitations are even more compelling in the case of a mediated settlement agreement."[176] In *Crupi v. Crupi*, the appellate court, determining whether to enforce a marital settlement, agreed with the trial court "that three Xanax pills, and anxiety and pressure to settle are insufficient proof of coercion necessary to set aside such an agreement. Otherwise, few, if any, mediated settlement agreements would be enforceable."[177] Identifying the safeguards available to litigating parties who participate in court-ordered mediation, another court said, "[m]ediation agreements are reached under court supervision, before a neutral mediator. The mediation rules create an environment intended to produce a final settlement of the issues with safeguards against the elements of fraud, overreaching, etc., in the settlement process."[178] Courts have also given weight to other factors usually present in court-ordered mediation cases, including representation by counsel and access to discovery, experts, and the court.[179] Addi-

172. *Id.* at 681–82.
173. *Id.* at 682 n.1.
174. Petracca v. Petracca, 706 So. 2d 904, 913 (Fla. 4th Dist. Ct. App. 1998).
175. Macar v. Macar, 803 So. 2d 707, 713 (Fla. 2001).
176. Crupi v. Crupi, 784 So. 2d 611, 614 (Fla. 5th Dist. Ct. App. 2001).
177. *Id.*
178. Trowbridge v. Trowbridge, 674 So. 2d 928, 931 (Fla. 4th Dist. Ct. App. 1996).
179. *See Petracca*, 706 So. 2d at 904. The parties reached a settlement agreement in their dissolution of marriage action after engaging in discovery for two years with each continuously represented by counsel, and the wife having hired an accountant to determine the family finances. *Id.* Although the Petracca parties did not reach their agreement through mediation, the factors the court considers (distinguishing pre- and post-litigation) are factors usually present in court-ordered mediation cases. *Id.* at 905–06. *See also Macar*, 803 So. 2d at 707.

tionally, courts will consider that the parties voluntarily entered into a mediation agreement.[180]

B. *Intent to be Bound by the Mediation Agreement*

To display the parties' intent to reach a final settlement, mediated agreements must be in writing, although they may be handwritten.[181] Further, the agreements need to bind the parties as to the essential terms,[182] but may be "bare bones" agreements.[183] When parties disagree, courts determine whether or not they meant to be bound by the terms of their agreements. In a dependency matter, parents who were represented by counsel entered into a mediation agreement with the Department of Health and Rehabilitative Services ("HRS"), consenting to the withholding of adjudication of dependency for the children provided the parents complied with specific tasks.[184] Shortly thereafter, HRS filed an affidavit alleging parents' noncompliance, and moved for an adjudication of dependency.[185] The trial court, following a hearing on the matter, issued an order declaring the children dependent.[186] While acknowledging that the mediation agreement was not a model of clarity, the appellate court denied parents' motion for rehearing, having determined that the parents had agreed to forgo procedures they would otherwise have been entitled to for the dependency proceedings, and had also agreed that should they fail to comply with the mediation agreement their children would be adjudicated dependent.[187]

Nonetheless, mediated agreements may not be used to deny parents substantive due process rights in termination of parental rights cases.[188]

180. *In re* BB., 820 So. 2d 409, 413 (Fla. 3rd Dist. Ct. App. 2002). The court expressed great distress "by the ease with which the father [was] permitted to needlessly expend the scant resources of the DCF and the dependency court . . . with insufficient evidence in an effort to renege on a mediated settlement agreement he voluntarily entered into with the child's mother." *Id.*

181. Singer v. Singer, 652 So. 2d 454, 455 (Fla. 4th Dist. Ct. App. 1995) (recognizing handwritten agreements); Wilson v. Forte Hotels, Inc., 632 So. 2d 271 (Fla. 1st Dist. Ct. App. 1994) (reversing trial court's order enforcing alleged mediation agreement that was not in writing); Cohen v. Cohen, 609 So. 2d 785 (Fla. 4th Dist. Ct. App. 1992) (requiring mediated agreements to be written).

182. Bowen v. Larry Gross Constr., 781 So. 2d 464, 466 (Fla. 5th Dist. Ct. App. 2001).

183. Stempel v. Stempel, 633 So. 2d 26, 26–27 (Fla. 4th Dist. Ct. App. 1994).

184. A.G. v. Dep't of Children & Family Servs., 716 So. 2d 792 (Fla. 4th Dist. Ct. App. 1998).

185. *Id.* at 793.

186. *Id.*

187. *Id.* at 794.

188. *In re* S.S., 723 So. 2d 344, 347 (Fla. 4th Dist. Ct. App. 1998).

"Substantive due process requires that grounds for termination of parental rights be shown by clear and convincing evidence before the State may sever the rights of a parent in their natural child."[189] Construing a mediation agreement in a termination of parental rights case, the district court of appeal expressed concern with the mediated consent-to-termination clause.[190] The court was troubled by the judge's decision to terminate parental rights based on three weeks of noncompliance with a portion of the agreement, when the mediation agreement provided a ninety day period within which to satisfy the agreement's requirements, and the hearing was held less than ninety days from the date of the agreement.[191] Despite the mediation agreement with its consent-to-termination of parental rights clause, the trial court had the obligation to consider the best interests of the children, and the state retained the burden to establish the elements required for termination of parental rights cases.[192] As the record did not support the termination of parental rights, the case was reversed and remanded for further proceedings.[193]

In a dissolution of marriage proceeding, the court was called upon to determine if a provision in a handwritten mediated agreement was an agreement between the parties or merely their agreement to agree in the future.[194] The mediation agreement read: "'The parties agree to a ninety day per year cumulative cohabitation clause the exact language of which shall be agreed upon by counsel and the parties.'"[195] Finding reversible error by the trial court, the court of appeal concluded that the provision, located in a mediated agreement that was admitted into evidence at trial and incorporated into the final judgment, was an agreement that had gone into effect.[196] Furthermore, by virtue of its incorporation, the mediation "agreement was elevated to the status of judgment to be interpreted, rather than a contract to be enforced."[197]

C. *Finality of Mediation Agreements*

Settlements are highly favored, and courts will seek to enforce them whenever possible.[198] "With the parties' execution of an agreement, media-

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 346.
193. *In re S.S.*, 723 So. 2d at 347.
194. Singer v. Singer, 652 So. 2d 454, 455 (Fla. 4th Dist. Ct. App. 1995).
195. *Id.*
196. *Id.*
197. *Id.*
198. Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla.1985); Treasure Coast v. Ludlum Constr. Co., 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000) (citing Murchinson v.

tion contemplates a prompt and final resolution of the case." [199] "The fact that one party to the agreement apparently made a bad bargain is not sufficient ground, by itself, to vacate or modify a settlement agreement."[200] "Nor is the fact that the complaining party has received incompetent legal advice a basis for vacating an agreement in a dissolution proceeding."[201] In *Tubbs v. Tubbs*, the court of appeal instructed the trial court to enforce the parties' handwritten mediation agreement, signed by the parties, their attorneys, and the mediator, despite the fact the agreement appeared to be slanted in favor of the husband.[202]

"[C]ases settled in mediation are especially unsuited for the liberal application of a rule allowing recission of a settlement agreement based on unilateral mistake."[203] In *Sponga v. Warro*, during mediation, the parties settled a negligence suit arising from a car accident for $12,500.[204] Alleging mistake or "newly discovered evidence," Ms. Warro sought relief from judgment based on her doctor's serious error regarding her injuries, and her reliance on his erroneous report.[205] Following mediation, her doctor cor-

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Grand Cypress Hotel, 13 F.3d 1483, 1486 (11th Cir. 1994); *see also* Metro. Dade County v. Fonte, 683 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1996)).

199. Trowbridge v. Trowbridge, 674 So. 2d 928, 931 (Fla. 4th Dist Ct. App. 1996).

200. Tubbs v. Tubbs, 648 So. 2d 817, 818 (Fla. 4th Dist. Ct. App. 1995) (citing Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987)); Micale v. Micale, 542 So. 2d 415, 417 (Fla. 4th Dist. Ct. App. 1989), *rev. dismissed*, 548 So. 2d 663 (Fla. 1989); Cladis v. Cladis, 512 So. 2d 271, 274 (Fla. 4th Dist. Ct. App. 1987).

201. *Tubbs*, 648 So. 2d. at 818 (citing *Casto*, 508 So. 2d at 334; *Cladis*, 512 So. 2d at 274)).

202. *Id.* The *Tubbs* court used the *Casto* test in determining whether to set aside the parties' settlement agreement. *Id.* Subsequently, the Supreme Court of Florida in *Macar v. Macar*, 803 So. 2d 707 (Fla. 2001) addressed the issue of whether final judgments which incorporate marital settlement agreements achieved after commencement of litigation should be subject to challenges based on *Casto v. Casto*, 608 So. 2d 330 (Fla. 1987). *Macar*, 803 So. 2d at 708–09. The court concluded that they were not, and should be controlled by *Florida Rule of Civil Procedure* 1.540. *Id.* at 709. *See also Casto*, 508 So. 2d at 330, for two grounds established by the Supreme Court to set aside or invalidate a postnuptial agreement: (1)"fraud, deceit, duress, coercion, misrepresentation, or overreaching" by a party in reaching the agreement, and (2) "unfair or unreasonable provision for [a] spouse" given the parties' circumstances. *Casto*, 508 So. 2d at 333. Once the spouse establishes that the agreement is unreasonable, a presumption exists that either (a) the defending spouse concealed information, or (b) the challenging spouse lacked knowledge. The defending spouse then has the burden to rebut the presumption by showing (a) full, frank disclosure of marital property and income of parties to challenging spouse prior to signing agreement, or (b) general knowledge by the challenging spouse of the parties' income and general and approximate knowledge of the marital property. *Id.*

203. Sponga v. Warro, 698 So. 2d 621, 625 (Fla. 5th Dist Ct. App. 1997).

204. *Id.* at 623.

205. *Id.*

rected his report, finding (for the first time) a preexisting condition aggravated by the accident for which he anticipated future treatment.[206] The court of appeal declined to apply the concept of newly discovered evidence, and determined that Ms. Warro entered into the mediated settlement agreement based on unilateral mistake.[207] As a matter of law, the court concluded that she was not entitled to withdraw her settlement agreement based on errors in her doctor's report.[208] "The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone."[209] "The finality of it once the parties have set down their agreement in writing is critical."[210]

"Mediation, like arbitration, is an *alternative dispute* resolution device. It is not to be engaged in casually or carelessly."[211] A heightened standard of review applies when courts consider vacating a final judgment that followed a mediated settlement agreement.[212] When a trial court sets aside a judgment based on a settlement agreement, it is also setting aside the agreement entered into by the parties. "[M]ore stringent principles of law apply in setting aside a contract than in setting aside a judgment."[213]

As parties rely on the finality of their mediation agreements, third parties may also rely on the agreements to seek court determination of their rights.[214] In *Robbins v. Jackson National Life Insurance Co.*, the insurance company brought an action for declaratory judgment to establish its right to continue to sell insurance to the former wife who was insuring her former husband's life.[215] Based on the parties' mediation agreement, the former wife had an insurable interest in the life of her former husband.[216] She was, therefore, allowed to purchase policies insuring his life totaling $200,000.[217] In another dissolution of marriage matter, parties stipulated during "mediation that the husband would maintain a life insurance policy in the amount of $200,000 naming the minor children as beneficiaries."[218] The trial court's

206. *Id.*
207. *Id.* at 624.
208. *Sponga*, 698 So. 2d at 625.
209. *Id.*
210. *Id.*
211. Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, 816 So. 2d 658, 660 (Fla. 5th Dist. Ct. App. 2002) (quoting *Sponga*, 698 So. 2d at 625 (Fla. 5th Dist. Ct. App. 1998)).
212. *Id.*
213. *Id.* (referencing Smiles v. Young, 271 So. 2d 798, 799 (Fla. 3d Dist. Ct. App. 1973)).
214. Robbins v. Jackson Nat'l Life Ins. Co., 802 So. 2d 476 (Fla. 2d Dist. Ct. App. 2001).
215. *Id.* at 477.
216. *Id.*
217. *Id.*
218. Burton v. Burton, 697 So. 2d 1295, 1296 (Fla. 1st Dist. Ct. App. 1997).

decision to require the husband to maintain only $100,000 in insurance was reversible error.[219]

D. *Enforcement of Mediation Agreements*

When enforcing settlement agreements, courts may not fashion their own remedies.[220] In *Treasure Coast v. Ludlum Construction*, the parties following mediation reached a settlement, which provided in relevant part: "If any payment is more than ten days late then the Plaintiff will be entitled to a judgment upon Affidavit against the Defendant for $65,000.00 less payments made."[221] Subsequent to Ludlum making payment seven days beyond the ten day grace period, Treasure Coast moved for final judgment.[222] Finding that entry of an order for the full amount shocked its conscience, the trial court ordered Ludlum to pay interest on its late payment.[223] Consequently, the court of appeal held that the trial court erred in failing to enforce the unambiguous terms of the agreement, and in substituting its own remedy.[224]

Similarly, the trial court cannot "interfere with the parties' agreement by finding it unconscionable and refusing to enforce it."[225] In *Wells v. Wells*, the parties, both of whom were represented by counsel, entered into a mediation agreement.[226] Pursuant to the agreement:

> the husband was to have the exclusive use and possession of the marital home but, . . . in the event he were ever thirty days late in any child support payment, the husband would forfeit his interest in the home and quit-claim it to the wife (unless the lateness were due to injury or disability, in which case the home would be sold and the proceeds divided equally between the parties).[227]

The mediation agreement also provided that the husband would transfer to the wife the $15,863.54 balance in an annuity fund, and if the annuity decreased in value, the husband would pay the difference in value to the wife.[228] The agreement specifically stated that the transfer of the annuity

219. *Id.*
220. Treasure Coast v. Ludlum Constr. Co., 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000).
221. *Id.* at 233.
222. *Id.* at 233–34.
223. *Id.* at 234.
224. *Id.*
225. Wells v. Wells, 832 So. 2d 266, 269 (Fla. 4th Dist. Ct. App. 2002).
226. *Id.* at 268.
227. *Id.*
228. *Id.*

balance was "in full and complete payment of any child support arrearage" through the execution date of the mediation agreement.[229]

The trial court found that the former husband owed the former wife $696 (the decrease in value of the annuity).[230] The trial court characterized the $696 payment as a property settlement, and determined that a judgment in that amount could be entered against the husband, but he could not be held in contempt.[231] The court of appeal disagreed, reasoning that since the obligation was "made to discharge the husband's child support arrearage, it was enforceable by contempt."[232]

"Despite the trial court's determination that the husband was more than thirty days late in paying child support, the court refused to enforce that portion of the mediation agreement, *sua sponte* finding it unconscionable."[233] The court of appeal found no justification for the trial court's invalidation of the mediation agreement.[234]

> In sum, the former husband agreed to the marital settlement provision requiring him to transfer his interest in the marital home if he made a child support payment thirty days or more late. He did not challenge this provision either before or after it was incorporated into the final judgment.[235]

"Bad domestic bargains—meaning unfair or unreasonable property and monetary settlement agreements—are nevertheless enforceable so long as they are knowing, voluntary, and not otherwise against public policy."[236]

Additionally, only when a term in a marital settlement agreement is ambiguous may the trial court consider extrinsic evidence to clarify the language in the agreement.[237] In *Levitt v. Levitt*, the parties entered into a handwritten mediation agreement, superseded by a marital settlement agreement specifically stating that it was the entire agreement of the parties.[238] The

229. *Id.*

230. *Wells*, 832 So. 2d at 268.

231. *Id.*

232. *Id.*; *see also* Kea v. Kea, 839 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 2003) (reversing trial court's finding of contempt because contempt is only proper if the unpaid debt is for alimony or child support, and husband's debt, as defined in the mediation agreement, was neither).

233. *Wells*, 832 So. 2d at 268.

234. *Id.* at 269.

235. *Id.*

236. *Id.* (quoting Petracca v. Petracca, 706 So. 2d 904, 911 (Fla. 4th Dist. Ct. App. 1998) (discussing Castro v. Castro, 508 So. 2d 330, 334 (Fla. 1987)).

237. Levitt v. Levitt, 699 So. 2d. 755, 757 (Fla. 4th Dist. Ct. App. 1997).

238. *Id.* at 756.

agreement provided "that the former husband [would] pay the balance of . . . wife's attorney's fees in an amount not to exceed $12,500, and that 'payment of this amount is subject to the [h]usband's review of and consent to the [w]ife's attorney's billing records, which consent shall not be unreasonably withheld.'"[239] Finding the attorney's fee provision ambiguous, the trial court reviewed extrinsic evidence, and determined that the parties intended to have a flat fee arrangement.[240] The court of appeal, construing the marital settlement agreement as a matter of law, was "on equal footing with the trial court as interpreter of the written document."[241] As the terms of the agreement were clear and unambiguous, "the parties' intent must be gleaned from the four corners of the document." [242] Accordingly, the case was reversed and remanded for the trial court's determination of whether the former husband reasonably or unreasonably withheld his consent to pay attorney's fees of the former wife.[243]

Trial courts must enforce valid mediated settlement agreements in strict accordance with their terms.[244] It is error for a trial court to require a restrictive covenant in a deed when the mediation agreement only provided for "immediate erection of a hog wire fence and the future erection of a chain link fence,"[245] or to require signing an easement which contained terms and conditions parties had not agreed to in their mediated settlement agreement.[246] Courts of appeal similarly reverse family courts that do not follow the plain language of the mediation agreements or go beyond the agreed-upon language. When the mediation agreement provided that the husband could claim tax deductions for the children as long as he was current in his child support and alimony payments, the general master erred by ruling that the husband was not entitled to take the tax deduction for his failure to pay private school tuition.[247] Similarly, when issues of child custody had been satisfactorily resolved by the parties in their mediation agreement, and adopted by the court recognizing the provisions were in the children's best

239. *Id.*
240. *Id.*
241. *Id.*
242. *Levitt*, 699 So. 2d at 756.
243. *Id.* at 757.
244. M & C Assocs. v. State, 682 So. 2d 640 (Fla. 2d Dist. Ct. App. 1996).
245. Boozer v. NCNB Nat'l Bank of Fla., 641 So. 2d 905 (Fla. 2d Dist. Ct. App. 1994).
246. Sinclair v. Clay Elec. Coop., Inc., 584 So. 2d 1065, 1067 (Fla. 5th Dist. Ct. App. 1991).
247. Layman v. Layman, 738 So. 2d 466, 467 (Fla. 4th Dist. Ct. App. 1999). "The agreement provided that the husband could claim the tax deductions if he was current in child support and alimony payments." *Id.* "The plain language of the agreement does not label the husband's portion of the private school tuition as child support." *Id.*

interests, the court went beyond the agreement when it designated primary and secondary residential parents.[248] Nonetheless, the court of appeal declined to disturb the judge's findings, reasoning that the designation of primary residential parent had no significance in the context of the final judgment.[249]

E. *Interpretation of Mediation Agreements*

As with other settlement agreements, parties seek court intervention when they disagree on the interpretation or implementation of their mediation agreements. In *Broward County v. LaPointe*, the parties settled their eminent domain case in mediation, and their settlement terms were incorporated into a stipulated final judgment.[250] "The parties' settlement agreement provided that the court was to reserve jurisdiction over the 'amount of all reasonable costs and attorney's fees, including all costs of environmental contamination issues.'"[251] The court of appeal, construing the contract as a matter of law, determined that since there was no facial ambiguity, the portion of the agreement at issue must be afforded its plain meaning.[252] Finding the omission of 'attorney's fees' in the modifying clause (which only referred to 'costs') significant, the court of appeal construed the parties' agreement to allow reimbursement for costs dealing with environmental contamination issues, but not for attorney's fees for the "administrative and regulatory process."[253]

In *Dows v. Nike, Inc.*, "[b]oth [parties] contended that there was no ambiguity in the settlement agreement and it should be enforced."[254] Further, each side argued that their interpretation, based on the plain meaning of the settlement agreement, should prevail.[255]

The parties had entered into a pre-suit mediation agreement that established a three-tiered settlement structure dependent on an independent examining physician's opinions.[256] They subsequently entered into a final agreement, superseding the original handwritten conceptual agreement, in which they chose a physician who would answer specific questions that would de-

248. Goins v. Goins, 762 So. 2d 1049, 1051 (Fla. 5th Dist. Ct. App. 2000)
249. *Id.* at 1052.
250. 685 So. 2d 889, 891 (Fla. 4th Dist. Ct. App. 1996).
251. *Id.* at 892.
252. *Id.*
253. *Id.* at 892–93.
254. Dows v. Nike, Inc. 846 So. 2d 595, 600 (Fla. 4th Dist. Ct. App. 2003).
255. *Id.*
256. *Id.* at 597.

termine the minor's compensation.[257] The parties agreed to ask the physician (1) whether the minor ever suffered from osteomyelitis as a result of the incident, and (2) if he suffered from osteomyelitis, whether he will require any treatment to the injured area?[258] In the event the physician answered no to the second question, the minor claimant and his guardian agreed to accept $100,000.[259] If however, the physician answered yes, they agreed to accept $300,000.[260]

Nike argued that they were only responsible for paying $100,000 because the physician responded the child would not require further treatment for osteomyelitis.[261] The Dows argued that Nike was required to pay $300,000 because the physician answered that their son would require further treatment to the injured area.[262] The court of appeal did not read the question as limiting future treatment for osteomyelitis only, reversed the trial court's order compelling the $100,000 settlement, and directed the court to enter an order directing Nike to pay the Dows $300,000.[263]

Courts may define terms in mediation agreements when parties have failed to do so.[264] They may also require renegotiation of settlement agreements.[265] A marital settlement agreement reached during mediation provided that the husband would use his "best efforts" to complete a real estate purchase within a specified period of time.[266] Further, "[t]he agreement provided that '[i]f despite all his best efforts and through no fault of his own, the transaction shall not be closed, then the parties' marital settlement agreement shall be subject to renegotiation.'"[267] Finding the husband was not obligated to complete the transaction based on the circumstances, the court of appeal concluded that the contingency in the agreement had occurred, necessitating renegotiation of the marital settlement agreement.[268]

When parties use an undefined term in their mediation agreement, they are bound by the interpretation which the court gives the term.[269] In a medi-

257. *Id.* at 598.
258. *Dows*, 846 So. 2d at 598.
259. *Id.*
260. *Id.*
261. *Id.* at 600.
262. *Id.*
263. *Dows*, 846 So. 2d at 601.
264. *See* Bowen v. Larry Gross Constr., Inc. 781 So. 2d 464, 466 (Fla. 5th Dist. Ct. App. 2001).
265. Faith v. Faith, 709 So. 2d 600, 601 (Fla. 3d Dist. Ct. App. 1998).
266. *Id.* at 600.
267. *Id.* at 601.
268. *Id.*
269. *See Bowen*, 781 So. 2d at 466.

ated agreement between a "homeowner" and a general contractor, the parties entered into an agreement to "repair cracks in plaster."[270] The homeowner wanted replacement of the drywall and plaster, while the contractor maintained that his repair would not be noticeable and would be permanent.[271] Although the parties did not agree on the definition of the term "repair" as used in the mediation agreement, the court held them to their agreement.[272]

> Even though the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto.[273]

Parties to mediation agreements do not always agree on issues having to do with breach or default, and resultant consequences or damages. Courts determining whether mediation agreements have been materially breached will look to the parties' agreement and the applicable established body of law. In a landlord-tenant case, the appellate body (circuit court) found no breach of the mediation agreement and no basis at law to uphold the default judgment for eviction.[274] Prior to the court hearing the landlord's complaint for tenant eviction, the parties reached agreement at mediation and the case was dismissed.[275] Pursuant to the mediation agreement, a breach of the agreement provided for a reopening of the case, placing the parties in the position they were prior to mediation.[276] Therefore, as the landlord had not given the notice required by statute prior to the suit, the defects could not be corrected on remand, and even if the tenant had breached the agreement, the court was not justified in automatically entering a default judgment.[277] Consequently, the appellate court ordered entry of judgment in favor of the tenant.[278]

In *Spanish Broadcasting Systems of Florida, Inc. v. Grillone*, the trial court found that Spanish Broadcasting was "'in wilful breach of the terms of the settlement agreement it entered into with [Grillone] at mediation and has

270. *Id.* at 465.
271. *Id.*
272. *Id.* at 466.
273. *Id.*
274. Hodgson v. Jones, 6 Fla. L. Weekly Supp. 758, 758–59 (17th Cir. Ct. Oct. 29, 1999)
275. *Id.* at 758.
276. *Id.* at 759.
277. *Id.*
278. *Id.*

indicated to the Court that it will not honor the terms of the mediation agreement.'"[279] Consequently, the court of appeal found the trial court had not abused its discretion in imposing sanctions and in declining to reduce the amount of sanctions it had imposed against Spanish Broadcasting.[280] However, in another case involving the media, notwithstanding the fact that late payment by an advertiser to a television station was in violation of their mediation agreement, the court found the advertiser was not in default.[281] The court reasoned that the television station accepted payment and allowed the advertisement, from which the advertiser could have concluded it was not in default.[282] Additionally, the court determined that at a minimum, the television station had a duty to provide notice before seeking an *ex parte* final judgment.[283] The court of appeal vacated the final judgment after default, and notably, ordered the parties to comply with their mediation agreement.[284]

Similarly, in a family law matter, the court did not find the former husband's two-day delay in making the first payment pursuant to the parties' settlement agreement to be a material breach.[285] Distinguishing this case from *Treasure Coast v. Ludlum Construction Co.*,[286] the court noted that the case at bar was not a commercial transaction, and further that the mediation agreement did not specify that time was of the essence, and did not provide a grace period to put the party on notice that a short delay would accelerate payments or trigger default.[287] Interestingly, in a circuit civil case between a college and a former employee, the court of appeal considered the same factors and reached the same result, deciding the case consistent with the family, rather than the commercial case.[288] The parties' settlement agreement reached at mediation provided that Edward Waters College would pay Johnson's back salary and wages in full by March 31, 1997.[289] When the college tendered payment one day late, Johnson invoked the default provision of the agreement permitting entry of judgment in the amount of $250,000.[290] De-

279. 731 So. 2d 160 (Fla. 3d Dist. Ct. App. 1999) (quoting the trial court).
280. *Id.*
281. WFTV, Inc. v. BA Sys. Co., 9 Fla. L. Weekly Supp. 130, 130 (15th Cir. Ct. Jan. 31, 2002).
282. *Id.*
283. *Id.*
284. *Id.*
285. Rose v. Ditto, 804 So. 2d 351, 353 (Fla. 4th Dist. Ct. App. 2001) (discussing Treasure Coast v. Ludlum Constr. Co., 760 So. 2d 232, 234 (Fla. 4th Dist. Ct. App. 2000)).
286. 760 So. 2d 232 (Fla. 4th Dist. Ct. App. 2000).
287. *Rose*, 804 So. 2d at 353.
288. *See* Edward Waters Coll., Inc. v. Johnson, 707 So. 2d 801 (Fla. 1st Dist. Ct. App. 1998).
289. *Id.* at 802.
290. *Id.*

termining 1) that the settlement agreement contained no recital that time was of the essence; 2) the College's failure caused no hardship; and 3) Johnson made no post-default demand for payment, the court of appeal concluded any breach which may have occurred was not material to the performance of the contract.[291]

F. *Parties Decide Mediation Agreement Coverage and Terms*

In mediation, parties may agree to resolve matters beyond those cognizable in the underlying litigation.[292] In *M & C Associates, Inc. v Florida Department of Transportation*, the parties resolved an eminent domain proceeding through mediation.[293] The stipulated final judgment incorporated their mediation agreement, in which they agreed that the court would "reserve jurisdiction to assess any damage to pool caused by construction."[294] The trial court struck M & C Associates' motion to enforce this provision determining that construction costs were not recoverable in eminent domain proceedings.[295] Finding that the trial court and the parties were bound by the agreement, the court of appeal reversed and remanded to the trial court with instructions to address the pool damage claim.[296]

> The fact that construction damages are not generally recoverable as severance damages is not a defense to enforcement of the settlement agreement. There is no requirement that the terms of a settlement agreement be confined to issues cognizable in the litigation giving rise to the dispute. In fact, cases are often settled precisely because the parties agree to assume obligations or confer rights that a jury or the trial court would be unable to reach.[297]

This is particularly important in dissolution of marriage matters when parties may wish to address issues such as children's higher education or grandparents' visitation rights:

> The bench and bar have for years now encouraged divorcing parents to resolve their differences through mediation. In effect, parents have been urged to make their own law, in the hope that they

291. *Id.*
292. M & C Assoc. v. State, 682 So. 2d 640 (Fla. 2d Dist. Ct. App. 1996).
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 641.
297. *M & C Assoc.*, 682 So. 2d at 640–41 (internal citations omitted).

can better live with a decision that is their own, rather than a decision that is externally imposed.[298]

V. COURTS OVERTURN MEDIATION AGREEMENTS AS REQUIRED BY LAW

A. *Mediator Misconduct*

During settlement, the mediation process offers safeguards to the parties that should decrease the occurrence of coercion and increase the likelihood courts will enforce the agreements.[299] The primary safeguard is the trained neutral known as the mediator. Ironically, now courts which inject a mediator into the settlement process may provide a basis for overturning the mediation agreement. Courts may consider mediator misconduct during court-ordered mediation as possible grounds for setting aside mediation agreements.[300] In *Vitakis-Valchine v. Valchine*, the wife sought to set aside a mediated settlement agreement reached after seven hours of mediation at which both parties were represented by counsel.[301] The mediation resulted in a comprehensive twenty-three page agreement.[302] The wife alleged, among other things, that coercion and duress on the part of the mediator caused her to enter into the mediation agreement.[303] Correctly construing Florida law at the time of the case, the trial judge found no basis for setting aside the settlement due to alleged duress or coercion by a third party.[304] In a thoughtful well-reasoned opinion, Judge Stevenson, writing for the Fourth District Court of Appeal, held a court may set aside an agreement reached through court-ordered mediation if it finds that the agreement was reached as a direct result of substantial mediator misconduct.[305]

"During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function."[306] "Comprehensive procedures for conduct-

298. Card v. Card, 706 So. 2d 409, 410 (Fla. 1st Dist. Ct. App. 1998).

299. *See infra* Section IV.A; *see also* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.300, 10.310, 10.400, 10.410, 10.420.

300. Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001), *reh'g granted* No. 4D00-2013, 2001 Fla. App. LEXIS 19262 (Fla. 4th Dist. Ct. App. Sept. 25, 2001).

301. *Id.* at 1096.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Valchine*, 793 So. 2d at 1099. The court would determine whether the mediator substantially violated the Florida Rules for Certified and Court-Appointed Mediators, and whether the agreement was reached as a direct result of the mediator misconduct. *Id.*

306. *Id.* at 1090.

ing the mediation session and minimum standards for qualification, training, certification, professional conduct, and discipline of mediators have been set forth by the Florida Supreme Court in the Florida Rules for Certified and Court Appointed Mediators . . . ."[307] Accordingly, the court of appeal considered it unconscionable to enforce a settlement agreement reached through coercion by a court-appointed mediator, and held "that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures."[308]

B. *Extortion, Fraud, and Misrepresentation*

Party wrongdoing also provides a basis for setting aside mediation agreements. In *Cooper v. Austin*, during a lengthy mediation the wife sent her husband a note which read: "If you can't agree to this, the kids will take what information they have to whomever to have you arrested, etc.[309] Although I would get no money if you were in jail–you wouldn't also be living freely as if you did nothing wrong."[310] Shortly thereafter during the mediation session, the parties settled their property matters.[311] Following the court's adoption of the mediation agreement, the husband sought relief from the agreement alleging it was procured by extortion.[312] Although the trial court recognized the extortionate nature of the note, it declined to grant relief determining that the agreement did not result from the wife's demands.[313] The court of appeal reversed and remanded, finding:

> In this case, the wife's "wake-up call", which demanded the husband either give in to her demands or go to jail, was clearly extortionate and her presentation of the extorted agreement to the court was a fraud on the court making the trial court an instrument of her extortion. Mrs. Cooper should not profit from her actions. Nor should this Court, or any court, ignore them.[314]

307. *Id.* at 1098.
308. *Id.* at 1099.
309. 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).
310. *Id.*
311. *Id.*
312. *Id.* at 712.
313. *Id.* at 711.
314. *Cooper*, 750 So. 2d at 713.

Neither will courts ignore parties' alleged fraudulent actions.[315] In *Gostyla v. Gostyla*, the wife alleged that the former husband lied under oath during the final hearing about matters not covered in the mediation agreement, which the court approved and incorporated into its final judgment.[316] The court of appeal found the trial court erred in denying the wife's motion to set aside the final judgment of dissolution of marriage, and remanded for an evidentiary hearing.[317] A party who sufficiently alleges intrinsic fraud in a motion to set aside a dissolution of marriage is entitled to a hearing on the merits.[318]

Courts may also vacate mediation agreements and grant hearings for relief from judgment based on parties' misrepresentation.[319] The court properly vacated the mediation settlement agreement when the evidence demonstrated the former wife made false statements concerning a material fact, knew the representation was false, intended the representation to induce reliance by her former husband, and the former husband was injured by his reliance on her representation.[320] Similarly, a judgment debtor was entitled to a hearing on his motion for relief from judgment when the creditor represented the debtor defaulted on an obligation in their mediation agreement, but misrepresented the true state of affairs to the court.[321]

C. *Mediation Agreements May Not Violate the Law*

Although parties may decide matters that judges and juries would not, and may be creative in crafting resolutions unique to their needs, there are some decisions they are not authorized to make. "The right to claim federal income tax exemptions under provisions of the parties' marital settlement agreement is one of law, not of fact."[322] Congress delegates to the Internal Revenue Service the authority to interpret tax law and to prescribe rules and regulations for that purpose.[323] Congress specifically permits affected taxpayers, through the exercise of private contract rights, to claim the depend-

315. Johnson v. Johnson, 738 So. 2d 508, 510 (Fla. 1st Dist. Ct. App. 1999) (granting the wife leave to amend her motion to set aside the final judgment of dissolution of marriage to allege fraud with greater particularity or have an evidentiary hearing on the merits).
316. 708 So. 2d 674, 675 (Fla. 2d Dist. Ct. App. 1998).
317. *Id.* at 676.
318. *Id.* at 675.
319. Still v. Still, 835 So. 2d 376 (Fla. 3d Dist. Ct. App. 2003).
320. *Id.*
321. Maresca v. Olivio, 819 So. 2d 855, 857 (Fla. 5th Dist. Ct. App. 2002).
322. Hoelzle v. Shapiro, 736 So. 2d 1207, 1209 (Fla. 1st Dist. Ct. App. 1999).
323. I.R.C. § 7805(a) (2003).

ency exemption.[324] However, federal law prohibits the parties from agreeing on head of household,[325] dependent care credit,[326] or earned income credit.[327] Federal law does allow the parties to designate "that separate maintenance payments are nondeductible by the payor and excludible from the gross income of the payee."[328] Construing the Internal Revenue Code and Treasury Regulations, the Supreme Court of Florida recently held that state courts may order "that alimony payments . . . [be] excluded from the gross income of the payee and not deducted by the payor."[329]

Bankruptcy matters, also governed by federal law, may not be decided by parties or adjudicated by state judges based on state contract law. Bankruptcy judges are not bound by parties' or state judges' characterizations of obligations for purposes of determining dischargeability and exemptions.[330] Nonetheless, bankruptcy judges may consider parties' unmet obligations in state cases when determining bankruptcy matters.[331] A party's failure to comply with provisions in a mediation agreement incorporated into a final judgment may evince fraud denying the debtor a general discharge in bankruptcy.[332]

State law also limits parties in the decisions they may make regarding their children. Courts are the final authority on child custody and child support, considering the best interests of the child as the overriding factor.[333] A trial court may set an agreement aside if it is not in the best interests of the children, and must admit evidence relevant to the best interests standard.[334] Therefore, mediation agreement provisions having to do with child support

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324. *Hoelzle*, 736 So. 2d at 1209 (citing 26 U.S.C. § 152 (e)(2)(A) (2000)). To claim the dependency exemption, one must qualify. *See* I.R.C. §§ 151, 152 (2003) (listing the basic rules for qualifying for the dependency exemption).

325. *See* I.R.C. § 2(b) (2003) (listing head of household status which is based on principal place of abode).

326. *See* I.R.C. § 21(e)(5) (2003) (listing the rules as to which parent qualifies for taking the dependent care credit).

327. *Hoelzle*, 736 So. 2d at 1209; *see* I.R.C. § 32(c)(3)(A) (2003) (listing the rules as to which parent qualifies for taking the earned income tax credit). There is also a child tax credit. *See* I.R.C. § 24(c)(1)(A) (2003) (listing the rules as to which parent qualifies for taking the child tax credit).

328. Rykiel v. Rykiel, 838 So. 2d 508, 509 (Fla. 2003) (quoting Rykiel v. Rykiel, 795 So. 2d 90, 93 n.1 (Fla. 5th Dist. Ct. App. 2000) (citing 26 C.F.R. § 1.71-1T, A-8)); *see also* I.R.C. § 71(b)(1)(B) (2003).

329. *Rykiel*, 838 So. 2d at 511–12.

330. *In re* Ellertson, 252 B.R. 831, 833 (S.D. Fla. 2000).

331. *Rykiel*, 838 So. 2d at 511–12.

332. *See* Shingledecker v. Shingledecker, 242 B.R. 80 (Bankr. S.D. Fla. 1999).

333. *See* Wayno v. Wayno, 756 So. 2d 1024 (Fla. 5th Dist. Ct. App. 2000).

334. *See* Feliciano v. Feliciano, 674 So. 2d 937 (Fla. 4th Dist. Ct. App. 1996).

and visitation are not subject to the same enforceability as alimony and marital property provisions.[335] Further, the court has an obligation to consider the availability and propriety of health insurance for the parties' minor children even if the parties did not include such a provision in their mediation agreement.[336] Additionally, courts are not bound by parents' mediation agreements as to reunification with their children.[337] "The ultimate determination on reunification would be for the trial court."[338]

Courts must also follow the strict procedural requirements and findings set forth by the Supreme Court of Florida before permitting Human Leukocyte Antigen ("HLA") testing even when the parties have agreed to the testing in their mediation agreement.[339] "Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests."[340] Additionally, the child's father has an "unmistakable interest in maintaining the unimpugned relationship with his child."[341] The courts' obligation to protect children extends to non-domestic relations cases. In *Hernandez v. United Contractors Corp.*, the children's mother settled a wrongful death action on their behalf with the workers' compensation carrier at mediation.[342] "No guardian was appointed to represent the children in the workers' compensation proceeding. Absent a determination that the settlement was in the minor children's best interests, the settlement was invalid."[343]

D. *Mutual Mistake and Lack of Consideration*

In a recent case of first impression, the Fourth District Court of Appeal addressed the issue of "whether the [mediation] privilege applies where there

335. *Id.*

336. *See* Butler v. Butler, 622 So. 2d 73 (Fla. 2d Dist. Ct. App. 1993).

337. L.F. v. Dep't of Children & Family Servs., 837 So. 2d 1098, 1101 (Fla. 4th Dist. Ct. App. 2003).

338. *Id.*

339. Ownby v. Ownby, 639 So. 2d 135, 137 (Fla. 5th Dist. Ct. App. 1994). The husband brought a dissolution of marriage action which by order of the court went to mediation. *Id.* at 136. During mediation, the parties entered into an agreement stipulating to HLA blood testing to determine the paternity of the youngest of their six children. *Id.* The husband contends he is the biological father of the six children, and further contends that even if he is not the biological father of the youngest child, he is the legal father because the parties considered him to be the father. *Id.*

340. *Id.* at 137 (quoting Dep't of Health and Rehab. Servs. v. Privette, 617 So. 2d 305, 307 (Fla. 1993)).

341. *Ownby*, 639 So. 2d at 137.

342. 766 So. 2d 1249, 1251 (Fla. 3d Dist. Ct. App. 2000).

343. *Id.* at 1252.

has been a mutual mistake in a settlement agreement."[344] Following mediation, the parties settled a suit for specific performance.[345] The seller sought relief from the settlement agreement claiming it contained a $600,000 clerical error.[346] Accordingly, the seller appealed the trial court's decision "that the statutory mediation privilege of confidentiality precluded evidence as to what occurred in mediation, leaving seller without the means to prove that there had been such an error." [347] Acknowledging that confidentiality is necessary to the mediation process, the court of appeal found that once the parties in mediation have signed an agreement, the reasons to retain confidentiality are not as compelling.[348] Addressing the constitutional right to go to court to resolve disputes, the court said,

> We cannot imagine that the legislature intended that a party to a contract reached after mediation should not have the same access to the courts to correct a $600,000 mutual mistake, as a party entering into the same contract outside of mediation. We therefore hold that the privilege does not bar evidence as to what occurred at mediation under the facts in this case.[349]

Within two months of deciding its first case using mutual mistake as a basis for correcting a mediation agreement, the same court decided a second case involving the same issue. In *Feldman v. Kritch*, the parties reached settlement at their second mediation.[350] The agreement provided: "State Farm to pay plaintiff $75,000 by 2:00 p.m. on 7/20/01. Plaintiff to execute full release and file dismissal with prejudice."[351] State Farm filed a motion to set aside the settlement agreement claiming that the $75,000 was to be offset by the $40,000 State Farm had already paid to Feldman; Feldman filed a motion to enforce the settlement.[352] The court of appeal concluded:

344. D.R. Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach, 819 So. 2d. 971, 973 (Fla 4th Dist. Ct. App. 2002).

345. *Id.*

346. *Id.* at 972.

347. *Id.*

348. Interestingly, section 61.183(3) of the *Florida Statutes*, providing the confidentiality privilege for dissolution of marriage matters, reads: "Each party to a mediation proceeding has a privilege during and after the proceeding to refuse to disclose and to prevent another from disclosing communications made during the proceeding, whether or not the contested issues are successfully resolved." FLA. STAT. § 61.183(3) (2002). Perhaps mutual mistake will be differently interpreted in dissolution of marriage cases.

349. *D.R. Lakes, Inc.*, 819 So. 2d at 974.

350. 824 So. 2d 274, 276 (Fla. 4th Dist. Ct. App. 2002).

351. *Id.*

352. *Id.*

"[b]ecause State Farm claimed that there was a mutual mistake, the statutory privilege protecting the confidentiality of all oral and written communications, other than the executed settlement agreement, should not apply."[353] Further, the court determined that the plain language of the agreement was unambiguous and evidence adduced at hearing showed no offset of $40,000 was discussed during the mediation.[354] Therefore, the court found that any mistake was a unilateral mistake made by State Farm.[355] "It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain."[356]

D.R. Lakes and *Feldman* represent a new line of cases which may significantly and negatively impact the future of mediation. Mere allegation of mutual mistake should not be sufficient to eviscerate the mediation privilege. When applicable, scrivener's error should be utilized to allow for limited inquiry focusing exclusively on the alleged error.[357] If both parties agreed there had been mutual mistake, court determination would likely be unnecessary. When only one party claims the mutual mistake, difficulty of proof exists, along with the potential for abuse.[358] Parties to mediation share information with each other to allow for better understanding of their respective positions and goals. They do not share the information with the expectation that an allegation of mutual mistake will eradicate the privilege and allow third parties to subsequently gain access to communications meant to remain between the mediating parties.

> If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players

353. *Id.* at 276 (citing FLA. STAT. § 44.102(3) (2000); *D.R. Lakes, Inc.*, 819 So. 2d at 971)).

354. *Feldman*, 824 So. 2d at 277.

355. *Id.*

356. *Id.* (quoting Barakat v. Broward County Hous. Auth., 771 So. 2d 1193, 1195 (Fla. 4th Dist. Ct. App. 2000)).

357. In *Haffa v. Haffa*, discussed *supra* Section II.D., the court directed the mediator to testify, but limited inquiry to the alleged scrivener's error—the number of shares of stock to be transferred from the husband to the wife. Case No. 93-3422-FL12 (Fla. 11th Cir. Ct. 1994).

358. *See generally* Deason, *supra* note 17. A party may easily destroy the other parties' confidentiality privilege by merely alleging mutual mistake if the court then admits evidence and allows testimony that would otherwise be confidential. Bad faith allegations of mutual mistake to get the court to hear such testimony will undermine parties' faith in the confidentiality of the process.

> in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.[359]

While it is not possible to guarantee that everything will be confidential, it is reasonable and necessary for parties and their attorneys to "know" what will and will not be considered confidential. Increased uncertainty as to the application of the mediation privilege will likely have a chilling effect on communications during the mediation process.

Twelve years prior to the decisions addressing mutual mistake, the Fourth District Court of Appeal used *nudum pactum* (lack of consideration) as a basis for setting aside a mediation agreement.[360] In *Leseke v. Nutaro*, the parties attended court-ordered mediation, and reached an agreement which provided: "If Dr. Kramer indicates the Plaintiff has a herniation of C5-6 and C6-7 the Defendants agree to re-evaluate the case. If Dr. Kramer indicates no problems at C5-6 and C6-7 the Plaintiff will accept $40,000.00."[361] The District Court of Appeal found the trial court erred in enforcing the settlement based on Dr. Kramer's report, as the report did not indicate "no problems" at the specified cervical region.[362] Further, it found the agreement to be wholly lacking in consideration, for while Leseke was obligated to a term of the agreement, Nutaro could take whatever evaluative action it chose.[363] The facts of the *Leseke* decision do not support the finding of *nudum pactum.* Having found that the doctor's report did not indicate what was required to enforce the agreement, the court need not have reached the consideration issue. Here, the parties were involved in litigation, had access to discovery, were represented by counsel, and participated in a mediation session with a neutral, trained mediator. The agreement may have been ill-advised for Leseke, but it was the deal she made with the advice of counsel. Nutaro agreed to reevaluate under specific circumstances. This agreement constituted consideration. If Leseke wanted more than a mere obligation to reevaluate, the agreement needed to be written with greater specificity. Parties and attorneys drafting mediation agreements must remember to dot their "i's" and cross their "t's."[364]

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359. Deason, *supra* note 17, at 36 (quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979)).

360. Leseke v. Nutaro, 567 So. 2d 949, 950 (Fla. 4th Dist. Ct. App. 1990).

361. *Id.* at 949–50.

362. *Id.* at 950.

363. *Id.*

364. In City of Delray Beach v. Keiser, 699 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997) Judge May wrote, "This appeal highlights the necessity of dotting 'i's' and crossing 't's' or, in other words, 'details-details.'" *Id.*

VI. PROCEDURAL AND RELATED MATTERS

A. *Access to the Courts*

A trial court's referral of a case to mediation neither denies parties their constitutional right to be heard in court, nor illegally delegates judicial authority to a nonjudicial entity.[365] In *Kurtz v. Kurtz*, a petition for writ of certiorari, the former husband challenged "a post-dissolution order which, by application of local administrative order, defers judicial consideration of his motion for contempt and a visitation schedule, pending family mediation."[366] The court of appeal found the order withstood the husband's challenge for it merely deferred ruling on his motion until after family mediation, and "[s]urely [did] not rise to the level of a denial of a constitutional right contemplated by article I, section 21 [of the Florida Constitution]."[367]

Similarly, the trial court's order did not violate Article V of the Florida Constitution as an illegal delegation of judicial responsibility, for the issues remain for hearing before the trial court should the parties decide not to reach agreement at mediation.[368] "Mediation is not a binding court proceeding. If it is unsuccessful, the parties return to the court for further proceedings."[369] In determining whether a matter is appropriate for mediation, courts will look to the issues raised by the parties, not the title of the pleading. The former husband's issues involved visitation rights, identified by the *Florida Rules of Civil Procedure* and two applicable administrative orders, as appropriate for referral to mediation.[370]

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365. Kurtz v. Kurtz, 538 So. 2d 892, 894 (Fla. 4th Dist. Ct. App. 1989).

366. *Id.* at 893.

367. *Id.* at 894; *see also* FLA. CONST. Art. I, § 21 (2002).

368. *Kurtz*, 538 So. 2d at 894.

369. *Id.* at 894–95.

370. *Kurtz*, 538 So. 2d at 894.

> Florida Rule of Civil Procedure 1.740 expressly authorizes the trial court to refer parental responsibility issues to family mediators. Mediation under this rule is intended to expedite matters involving issues of parental responsibility. Rule 2.050 of the Florida Rules of Judicial Administration authorizes local rules and administrative orders on matters of court concern. In accordance with these rules, the chief judge of the Broward Circuit Court entered two administrative orders on family mediation which are involved here.

Id. at 894. *Florida Family Law Rules of Procedure* were adopted in 1995 after the Supreme Court of Florida determined that separate procedural rules were appropriate for family court. *See generally In re* Fla. Rules of Family Court Procedure, 607 So. 2d 396 (Fla. 1992). Rule 12.740 of the *Florida Family Law Rules of Procedure* now governs the referral of family law matters to mediation. It is similar to its predecessor, rule 1.740 of the *Florida Rules of Civil Procedure*, which was deleted in 1995. *Id.*

Alternative dispute resolution processes should be crafted "without creating an unreasonable barrier to the traditional court system."[371] In *Jackson v. Jackson*, parties in a dissolution of marriage action entered into a mediation/arbitration agreement.[372] "That agreement provided that the controversy between the parties was to be resolved exclusively by means of mediation or arbitration and that the parties waived any right to litigate their claim."[373] The parties mediated and their matters were ostensibly concluded.[374] Nonetheless, eight months later the wife filed a petition for dissolution of marriage.[375] The husband did not timely respond to the summons and complaint, relying on the parties' agreement and the drafting attorneys' statements that the agreement precluded them from pursuing civil action.[376] Additionally, the husband stated that the wife advised him she intended to withdraw the lawsuit and proceed with arbitration.[377] The court of appeal found excusable neglect on the husband's part, reversed the trial court's denial of the motion to set aside the default, and remanded to the trial court for proceedings consistent with their opinion.[378]

Mediation parties must be given appropriate notice and an opportunity to be heard prior to court approval of mediation agreements. In *Vance v. Thomas*, an incarcerated individual (Vance) participated in mediation by phone.[379] He denied agreeing to a settlement and no settlement papers were executed.[380] Although there was no finding by the judge or representation by Vance's counsel that Vance agreed to the settlement, the only hearing notice sent to him regarded payment of fees and costs to his attorney.[381] The court of appeal found the notice of hearing for attorney's fees inadequate notice for the trial court to have conducted a hearing to enforce the alleged settlement agreement.[382]

Similarly, an insurer was denied due process by not having an opportunity to be heard prior to the court approving a mediation settlement agree-

371. Committee Notes 1994 Amendment, FLA. R. CIV. P. 1.710. ("The Supreme Court Committee on Mediation and Arbitration Rules encourages crafting a combination of dispute resolution processes without creating an unreasonable barrier to the traditional court system.")
372. 542 So. 2d 481 (Fla. 2d Dist. Ct. App. 1989).
373. *Id.*
374. *Id.*
375. *Id.* at 482.
376. *Id.*
377. *Jackson*, 542 So. 2d at 482.
378. *Id.* at 482–83.
379. Vance v. Thomas, 829 So. 2d 319, 320 (Fla. 5th Dist. Ct. App. 2002).
380. *Id.*
381. *Id.*
382. *Id.* at 320.

ment for the benefit of an insured.[383] A health insurance company sought to intervene in a products liability lawsuit, which had been settled by mediation before the court approved the settlement and dismissed the case.[384] The district court of appeal vacated the denial of the motion to intervene and the order approving the settlement, finding: "Humana has demonstrated a right to intervene and to at least be heard before distribution of the judgment or settlement proceeds.[385] Perhaps Humana's intervention will not change the outcome, but at least Humana will have had the opportunity to be heard . . . ."[386] However, an insurance company which was present at mediation and had actual notice of the settlement was not entitled to summary judgment in its favor based on insured's failure to provide written notice of and obtain consent to the proposed settlement.[387] Genuine issues of material fact as to whether State Farm waived the settlement provisions and was prejudiced by the failure to obtain its consent precluded summary judgment.[388]

Appellate courts have been kind to petitioners who request the wrong relief. "[I]f a party seeks an improper remedy 'the cause shall be treated as if the proper remedy had been sought.'"[389] In *Croteau v. Operator Service Company of South Florida,* petitioners sought a writ of common law certiorari from the trial court's order denying their motion to enforce a mediated agreement.[390] The court of appeal concluded that certiorari was not the proper remedy.[391] However, determining that the order denying the motion to enforce the settlement agreement was a partial final judgment, the court found it had jurisdiction to review the judgment.[392]

Parties seeking to appeal enforcement of mediation agreements must provide the appellate court with either a trial transcript or proper substitute to allow the court to evaluate allegations that the trial court erred.[393] In *Bartel v. J & A Balboa Enterprises, Inc.*, Bartel appealed the trial court's order to

383. Humana Health Plans v. Lawton, 675 So. 2d 1382, 1385 (Fla. 5th Dist. Ct. App. 1996).
384. *Id.* at 1383.
385. *Id.* at 1385.
386. *Id.*
387. Gray v. State Farm Mut. Auto. Ins. Co., 734 So. 2d 1102, 1103 (Fla. 2d Dist. Ct. App. 1999).
388. *Id.*
389. Croteau v. Operator Serv. Co. of S. Fla., 721 So. 2d 386, 387 (Fla. 4th Dist. Ct. App. 1998) (citing FLA. R. APP. P. 9.040(c)).
390. *Id.*
391. *Id.*
392. *Id.*
393. Bartel v. J & A Balboa Enters., Inc., 703 So. 2d 1140, 1141 (Fla. 5th Dist. Ct. App. 1998).

enforce a mediation settlement agreement.[394] The court of appeal elected to treat the appeal as a writ of certiorari, and denied the writ.[395] Bartel then filed an appeal alleging that the attorney who represented her in the mediation that led to the settlement agreement was guilty of misconduct and misrepresentation.[396] Since Bartel raised factual allegations, and failed to provide the court with a transcript or an appropriate substitute, she was unable to establish error and her appeal necessarily failed.[397]

B. *Use of and Access to Alternative Dispute Resolution*

Parties must mediate when ordered by the court to do so,[398] and may also mediate on their own initiative prior to, during, or subsequent to litigation.[399] When parties reach a mediation agreement, one may not later claim it was void *ab initio* because the agreement was entered into while litigation was pending in a court that lacked subject matter jurisdiction to enforce terms in the agreement.[400] In *Patel v. Ashco Enterprises, Inc.*, the parties entered into a mediation agreement while the case was pending in county court.[401] The agreement provided that, "if Patel breached the agreement, the case would be transferred to the circuit court and a judgment would be entered against Patel . . . ."[402] Following Patel's failure to make the first payment, the case was transferred to circuit court, and the court enforced the agreement.[403] The court of appeal found that the trial court properly enforced the mediation agreement even though it was executed while litigation was pending in county court and the county court's jurisdiction was subject to challenge.[404] "While a settlement agreement may be the basis upon which a judgment may be entered, it is also a contract between the parties, the en-

394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. FLA. R. CIV. P. 1.700(a) (2003). A judge "may enter an order referring all or any part of a contested civil matter to mediation . . . ." *Id.* A party may move to dispense with or defer mediation. *See* FLA. R. CIV. P. 1.700(b) (c). For matters excluded from mediation, *see* FLA. R. CIV. P. 1.710(b).
399. Parties may file a written stipulation to mediate, FLA. R. CIV. P. 1.700(a), or one party may request the court to refer the case to mediation. FLA. STAT. § 44.102(2)(a) (2002). Parties may also mediate without court orders.
400. *See* Patel v. Ashco Enters., Inc., 711 So. 2d 239, 240 (Fla. 5th Dist. Ct. App. 1998).
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.* at 241.

forceability of which is governed by the laws of contract."[405] Parties seeking to enforce mediation agreements may bring independent enforcement actions.[406]

The laws of contract also govern the parties' obligation to submit to arbitration, and may include the condition precedent that the parties first mediate.[407] In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, the parties' agreement read: "In the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph."[408] The agreement also provided: "[I]n the event that [a] dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party."[409] Under the plain language of the agreement, a party had to request mediation and provide notice of the request to the other party.[410] If the disputes were not resolved in mediation, a party must then provide notice of intent to pursue arbitration to trigger the arbitration clause.[411]

Mediation may be required to move a case forward. It is not meant as a dilatory tactic. In *Paz v. Fidelity National Ins. Co.*, Paz appealed a circuit court's decision entering summary judgment in favor of Fidelity.[412] Paz had submitted medical bills for injuries sustained in an automobile accident to Fidelity, her insurer for personal injury protection benefits, demanding payment pursuant to statute within thirty days.[413] Following Fidelity's decision to question the submitted charges and to demand arbitration or mediation, Paz filed a bad faith action alleging her insurer breached its duty to act fairly and honestly, and sought to delay or avoid payment by demanding mediation and arbitration although neither was available.[414] The court of appeal found the trial court erred as a matter of law, for Fidelity did not pay the damages due within the required time frame.[415] "Additionally, summary judgment was improper where review of the record shows that there are genuine issues of [material] fact remaining as to the allegations that Fidelity routinely de-

405. *Patel*, 711 So. 2d at 240.
406. T.K.M. v. E.H., 844 So. 2d 669, 670 (Fla. 3d Dist. Ct. App. 2003).
407. Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1290–91 (11th Cir. 2002).
408. *Id.*
409. *Id.*
410. *Id.* at 1291
411. *Id.*
412. 712 So. 2d 807 (Fla. 3d Dist. Ct. App. 1998).
413. *Id.* at 807–08.
414. *Id.*
415. *Id.* at 809.

mands mediation and arbitration, as a means of delaying or avoiding payment."[416]

As some parties may seek to misuse mediation to delay legal obligations, some non-parties seek access to mediation proceedings to gain information about governmental entities. In a case involving Lee County, the City of Fort Myers, and the City of Cape Coral, a reporter "filed a motion for limited intervention and to compel the mediation hearings to be open to the public and the media."[417] The trial court granted the motion to intervene, but denied the motion to open the mediation proceedings.[418] Further, the judge amended the mediation order to allow the parties to send representatives to mediation who did not have full authority to settle.[419] The court of appeal did not decide the significant issue of whether the "Sunshine Law"[420] applies to mediation proceedings when public bodies are the parties.[421] The court held "that the narrow scope of the mediation proceedings in this case does not give rise to a substantial delegation affecting the decision-making function of any board, commission, agency, or authority sufficient to require that this mediation proceeding be open to the public."[422]

C. *Obligations of Judges, Attorneys, and Paralegals*

Mediators should do the mediating, and judges the judging.[423] The Fifth District Court of Appeal offered this caveat in a case involving the former baseball player Ted Williams.[424] During a case management conference, the judge offered to mediate the case, "provided . . . all of the parties and their attorneys agreed that they would not use the trial judge's attempt to mediate the case as basis for disqualification."[425] During the mediation, the judge said to the defendant, "there'll always be people like [you] around, but let's face it, there's only one Ted Williams."[426] The defendant believed that the

416. *Id.*
417. News-Press Publ'g Co. v. Lee County, 570 So. 2d 1325, 1326 (Fla. 2d Dist. Ct. App. 1990).
418. *Id.*
419. *Id.*
420. FLA. STAT. § 286.011 (2002).
421. *News-Press Publ'g Co.*, 570 So. 2d. at 1327.
422. *Id.*
423. Evans v. State, 603 So. 2d 15, 17 (Fla. 5th Dist. Ct. App. 1992).
424. *Id.* at 16.
425. *Id.*
426. *Id.* Additionally, when the defendant, Antonucci, presented his settlement figure, the judge advised him to "get real." *Id* at 16 n.3.

judge was prejudiced against him.[427] Consequently, the defendant's attorney filed a motion to disqualify the judge based on statements made by the judge during mediation.[428] Shortly thereafter, the judge adjudicated him guilty of criminal contempt, finding the attorney lied when he agreed not to move to disqualify the judge for mediating the case.[429] Reversing the attorney's conviction of direct criminal contempt, the court of appeal directed that a judgment of not guilty be entered.[430] Additionally, the court advised:

> If a judge decides to mediate a case with the consent of all concerned parties, the judge should act only as a settlement judge for another judge who will hear and try the matter in the event [the] mediation fails, such as in the situation where a retired judge mediates a case but does not try the case.[431]

Knowing a "mediator will not be deciding the case, . . . the parties are free to discuss . . . the ramifications of settling a particular dispute as opposed to litigating it."[432] "In contrast, the judge's role is to decide the controversy fairly and impartially, consistent with the established rule of law. In this regard, to paraphrase Socrates: Four things belong to a judge; to hear courteously; to consider soberly; to decide impartially; and to answer wisely."[433]

Mediation does not displace judges' statutory obligation to rule on claims.[434] In a dissolution of marriage action involving equitable distribution of marital assets and debts, as well as attorney's fees, the judge dissolved the marriage without ruling on the parties' claims.[435] The court order, in relevant part read: "The Husband/Petitioner and Wife/Respondent shall divide all of their marital assets and liabilities equally. If the parties are unable to reach agreement on their own as to a fair division then this matter shall be submitted to mediation which shall be binding."[436] The court of appeal found that the judge failed to carry out the statutory duties imposed on judges hearing

427. *Evans*, 603 So. 2d at 16 n.3.
428. *Id.* at 17.
429. *Id.* at 16.
430. *Id.* at 18. The court found the evidence did not support the judge's finding that appellant had lied. *Id.* "The agreement not to seek recusal was limited to the trial judge acting as mediator and not to the nature of any comments that the trial judge would make during the mediation proceedings." *Evans*, 603 So. 2d at 17.
431. *Id.*, 603 So. 2d at 17–18.
432. *Id.* at 17.
433. *Id.*
434. Chabotte v. Chabotte, 707 So. 2d 923, 924 (Fla. 4th Dist. Ct. App. 1998).
435. *Id.*
436. *Id.*

dissolution of marriage cases.[437] The court was required to distribute both marital and non-marital assets.[438] Furthermore, mediation allows the parties self-determination.[439] If they choose not to reach agreement, there is no mediation agreement to be binding.[440]

The Code of Judicial Conduct limits the mediation functions judges may ethically perform. The Judicial Ethics Advisory Committee, charged with rendering advisory opinions interpreting the Code of Judicial Conduct as applied to specific circumstances facing judges, stated that a judge may not privately mediate the dissolution of his friends' marriage.[441] "Unless there is an expressed law or court rule authorizing the judge's service as a private mediator, a judge may not ethically mediate the dissolution of his/her friends' marriage."[442]

Attorneys must also know their obligations to the court and the parties regarding mediation. Foremost, an attorney should be aware that merely filing a motion for mediation will not defeat case dismissal for lack of prosecution. "[A] motion for mediation conference, standing alone and without any follow-up activity during the subsequent six-month period, is not record activity implemented to advance the case forward to a conclusion on the merits."[443] To avoid having a case dismissed for failure to prosecute, an attorney must proceed with the mediation following a notice, and if a motion to dismiss hearing is set, must show good cause why the case should remain pending.[444]

With virtually every civil case going to mediation prior to trial, mediators and attorneys are increasingly facing conflict of interest issues. Attorney mediators and their law partners confront ethical directives of both professions when making difficult decisions regarding disqualification. A recent case addresses "the standard to be applied in determining disqualification of a law firm when a member of the firm previously acted as a mediator in the pending dissolution proceedings."[445] In *Matluck v. Matluck,* the former wife filed a petition of certiorari to quash the trial court's order denying her mo-

437. *Id.*
438. *Id.*
439. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.230.
440. "Decision-Making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination." FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.310(a).
441. Fla. Judicial Ethics Advisory Comm., Op. 2002-01.
442. *Id.*
443. Heinz v. Watson, 615 So. 2d 750, 753 (Fla. 5th Dist. Ct. App. 1993).
444. *Id.*
445. Matluck v. Matluck, 825 So. 2d 1071, 1072 (Fla. 4th Dist. Ct. App. 2002).

tion to disqualify her former husband's attorney.[446] The parties had mediated during post-dissolution proceedings, and the mediator had received highly confidential information from the former wife and her counsel during the mediation.[447] The mediator, subsequently, formed a law firm with the attorney who was representing the former husband on the same post-dissolution matters.[448]

The former wife urged the court of appeal "to extend Rule 4-1.10(b) to the law firm of a mediator who received confidential information during the mediation process."[449] The court agreed: "Considering the broad scope of information protected by Rule 4-1.10(b), the values inherent in preserving the confidences of parties in mediation, and maintaining the integrity of the mediation process itself, we can see no reason not to apply this rule to a mediator and the mediator's law firm."[450] Other courts and the Florida Mediator Qualifications Panel are in accord.[451] "[I]t is inappropriate for the mediator to represent either party in any dissolution proceeding or in any matter arising out of the subject mediation."[452]Additionally, a law firm will be subject to disqualification from representing a client when following unsuccessful mediation, the firm hired the mediator.[453]

However, attorneys who seek to withdraw as counsel of record due to conflicts of interest, will not necessarily gain court approval to do so. In *Billings, Cunningham, Morgan & Boatwright, P.A v. Isom*, the law firm moved to withdraw from representing a client who sought to set aside the agreement reached during mediation, alleging mis-advice by the firm.[454] The client, Isom, asserted, "that a former associate of the law firm had advised him to sign the settlement and release, but assured Isom the documents were

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446. *Id.*

447. *Id.* at 1073.

448. *Id.*

449. *Id.* at 1073.

> Rule 4-1.10(b) of the Florida Rules of Professional Conduct provides: When a lawyer becomes associated with a firm, [the] firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm of which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

Matluck, 825 So. 2d at 1072.

450. *Id.* at 1073.

451. *See id.*

452. *Id.* (quoting Mediator Qualifications Advisory Panel, Op. 94-003). The Mediator Qualifications Advisory Panel (MQAP) has been renamed the Mediator Ethics Advisory Committee (MEAC).

453. *Id.* at 1073–74.

454. 701 So. 2d 1271, 1272 (Fla. 5th Dist. Ct. App. 1997).

not final and would not bar further settlement discussions."[455] The trial court denied the firm's motion to withdraw, considering the client's allegation of mis-advice, duration of representation, and the client's inability to obtain new counsel.[456] "[A] trial court has the authority to order continued representation, even when potential ethical conflicts are presented.[457] Its decision to deny a motion to withdraw will not be disturbed, absent a clear abuse of discretion."[458]

A trial court also has the authority to award attorney's fees to enforce a mediation agreement reached in a court-ordered mediation.[459] "Rule 1.730(c) [of the *Florida Rules of Civil Procedure*] provides that a court may impose sanctions, including attorney's fees, against a party who fails to perform under a settlement agreement reached in court-ordered mediation."[460] Significantly, even though a written mediation order is customary, Rule 1.730 does not require a written order.[461] "A court's oral order is valid and binds the parties even though a written order has not been entered."[462] The trial court has discretion to determine whether an attorney should be awarded fees under this rule.[463]

Non-attorneys attending mediation sessions may not hold themselves out as attorneys or engage in the unauthorized practice of law.[464] In *Florida Bar v. Neiman*, the Florida Bar alleged that Neiman had "repeatedly engaged in the unauthorized practice of law over a period of approximately seven years."[465] The referee's detailed findings included that Neiman actively participated in presenting clients' cases at mediation sessions. "The referee further found that Neiman engaged in the unlicensed practice of law based upon the referee's finding that no attorney had any meaningful role in the

455. *Id.*
456. *Id.*
457. *Id.*
458. *Id.*
459. Lazy Flamingo, USA, Inc. v. Greenfield, 834 So. 2d 413, 414 (Fla. 2d Dist. Ct. App. 2003). The Court of Appeal upheld the trial court's decision rejecting appellant's claim for attorney's fees based on the original contract that gave rise to the underlying litigation and section 57.105 of the 2001 *Florida Statutes*. *Id.* at 414. It reversed the trial court's decision not to award fees based on rule 1.730(c) of the *Florida Rules of Civil Procedure* and remanded the case to allow consideration of its ruling. *Id.* at 415.
460. *Id.* at 414.
461. *Id.* at 415.
462. *Greenfield*, 834 So. 2d at 415 (citing Knott v. Knott, 395 So. 2d 1196, 1198 (Fla. 3d Dist. Ct. App. 1981)).
463. *Id.* (citing Trowbridge v. Trowbridge, 674 So. 2d 928, 932 (Fla. 4th Dist. Ct. App. 1996)).
464. *See* Florida Bar v. Neiman, 816 So. 2d 587 (Fla. 2002).
465. *Id.* at 588.

development or settlement of several of the cases."[466] Having determined that Neiman engaged in the unlicensed practice of law, the referee recommended, and the court approved, that Neiman be enjoined from numerous activities, including speaking on behalf of third parties at mediation even with an attorney present, and appearing on behalf of third parties at mediation without the attorney present for whom he was employed.[467]

VII. CONCLUSION

Mediation has come of age and taken a place in Florida's legal system. Our extensive body of case law over a relatively brief period of time highlights mediation's significant role in the resolution of disputes. Florida's comprehensive mediation law necessarily includes ethical rules for mediators, rules of procedure, and statutory law. As the law further develops, mediators and lawyers will need to stay abreast of developments in the field. This article is offered as a beginning in the discussion of mediation case law. The Dispute Resolution Center in Tallahassee remains an excellent source of continuing information and education. The Center holds annual conferences, and publishes the Resolution Report to keep interested individuals apprized of developments in the mediation field.[468]

Mediation's incorporation into the legal system should not signal its assimilation. Mediation has more to offer than the mere resolution of disputes. Mediating parties are in the unique position of making their own decisions and structuring their own agreement with the assistance of a trained mediator. They rely on the confidentiality of the process to allow them to share the information they need to understand each other and identify and evaluate settlement options. They are also in the unique position of holding a privilege to maintain the confidentiality of the process. The extent of the confidentiality privileges should be clarified, and the courts should continue their role in maintaining the shield of confidentiality. As we rightfully utilize mediation as a dispute resolution process, we must continue to recognize its uniqueness and seek to preserve its process. After all, it has just come of age. With a nourishing environment and some benign neglect, it may yet flourish and increasingly serve not only the legal system, but society at large.

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466. *Id.*

467. *Id.* at 594, 599.

468. Case and Comment, a regular feature in The Resolution Report written by Perry Itkin, provides information about new significant mediation cases. The Resolution Report is the newsletter published by the Dispute Resolution Center, a joint program of the Supreme Court of Florida and the Florida State University College of Law. Perry Itkin, *The Resolution report, available at* http://www.tfapm.org/Dreldrc_newsletter.shtml (last visited Oct. 11, 2003).

JURY (DIS)SERVICE: WHY PEOPLE AVOID JURY DUTY AND WHAT FLORIDA CAN DO ABOUT IT

PAUL W. REBEIN*
VICTOR E. SCHWARTZ**
CARY SILVERMAN***

A JUROR'S PRAYER

Dear God, please give me an excuse in a hurry,
Something good to keep me off this stupid jury.
My job! My kids! My sick Aunt Bea!
Who could survive even a day without me?
And you should know, by the way, I'm deaf in one ear,
So when a witness testifies, I won't be able to hear.
Here comes the defense lawyer, eyes right on me.
"Just because my client's been charged, do you think he's guilty?"
"Actually, I do," I say, trying hard not to smirk.
"If not of this crime, then because he's a jerk!"
But be warned, Mr. State Attorney, don't think I'll help you,
You see, I hate the police, informants, and prosecutors, too!
Now is the time, the *voir dire est fini*,
Please, God, don't let them pick me.
Did I mention I'm scheduled for brain surgery?

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I. INTRODUCTION

Unfortunately, the sentiments expressed in the *Juror's Prayer* seem prevalent among jurors in Florida. Many citizens do not want to serve on juries and will do almost anything to get out of it. How many times has a friend, family member, or client called you with the question: "I just received a jury summons, what do I need to say to get out of it?"

Others take a different approach: they just blow it off. Take former baseball star Pete Rose, for example. Twice Rose failed to respond to a jury summons in Palm Beach County.[1] Did he think nobody would notice? But before you judge Mr. Rose too harshly, consider this fact: only *one in four* jurors was showing up in Palm Beach County at the time Mr. Rose was a no-show.[2] Given this pitiful response, who can blame Mr. Rose for thinking jury service was optional?[3]

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1. Nicole Sterghos Brochu, *Thinking of Ignoring Jury Duty? Think Again*, FLA. SUN-SENTINEL, Sept. 18, 2000, at 1B.

2. *Id.*

3. *Id.* Juror response rates have reached crisis levels in many courts throughout the nation. According to the American Judicature Society, in some urban jurisdictions, fewer than ten percent of all summoned citizens show up in court. *See* ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS vii (Am. Judicature Soc'y 1998). Others have estimated that as many as two-thirds of the approximately fifteen million Americans summoned annually do not report for jury service. *See* David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36 JUDGES J. 23, 25 (1997). While a portion of this non-response rate is attributable to out-of-date records and summonses that are mailed to the wrong addresses, many citizens simply ignore their civic obligation and opportunity to serve. *See* Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1815 (2001). For example, a recent joint study conducted by the Dallas Morning News and Southern Methodist University found that in Dallas County, Texas, "at least 80% of the people summoned each week for jury duty disregard their summonses and refuse to participate in the system." *Id.*

Why do so many people recoil at the mere mention of juror duty? It is not, as one might expect, that there has been a decline in respect for the jury system. To the contrary, according to an American Bar Association (ABA) opinion poll, seventy-eight percent of the public rate our jury system as the fairest method of determining guilt or innocence; sixty-nine percent consider juries to be the most important part of the justice system.[4] Given this apparent conflict, it is important to consider why so many Floridians seek to avoid jury service, and to find ways to address their concerns.

This article examines some of the reasons behind the problem and offers practical solutions. The bottom line is that Florida's jury service laws need to be made more "user-friendly." Otherwise, Floridians will continue to try to avoid jury service. When this happens, the rights of civil and criminal litigants are thwarted because they are not tried by a jury truly made up of "their peers." Their peers are not on the jury. They are back at work.

II. IMPROVING JURY SERVICE

There are many ways to make jury service a more pleasant experience for Florida's citizens. Some courts have focused on improving jury services and facilities.[5] Other efforts have aimed at making jury service a more interesting and active process.[6] A Jury Innovations Committee convened by the Supreme Court of Florida examined some of these issues.[7] That Committee was composed of appellate and circuit court judges, court administrators, attorneys, and former jurors.[8] In May of 2001, the Committee submitted a final report to the Supreme Court of Florida, recommending forty-eight jury service improvements in Florida.[9]

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4. A.B.A., PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6–7 (1998), *available at* http://www.abanet.org/media/perception/perceptions.pdf (last visited Apr. 12, 2003).

5. *See, e.g.*, James Needham, *A Citizen's Suggestions for Minimum Standards for Jury Facilities and Juror Treatment*, 36 JUDGES J. No. 4, at 32–33 (1997) (suggesting ways to improve treatment of jurors in the courthouse).

6. *See, e.g.*, Rebecca L. Kourlis & John Leopold, *Colorado Jury Reform*, 29 COLO. LAW. 21, 23 (2000); Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard For Reform With Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1011 (1996).

7. *See generally* FLA. JURY INNOVATIONS COMM., FINAL REPORT (2001), *available at* http://www.flcourts.org/pubinfo/documents/JuryInnovationsFinalReport.pdf (last visited Apr. 12, 2003).

8. *Id.* at 2.

9. *See generally id.* The Supreme Court of Florida issued an Administrative Order on October 17, 2003 adopting many of these recommendations and referring them to court committees and the Florida Legislature for action. *See In re* Final Report of Jury Innovations Comm., Administrative Order No.A0SC03-41 (Fla. Oct. 17, 2003), *available at*

Some jury improvements can and should be implemented by courts. But, there are also certain measures that the legislature should take to safeguard the right to a representative jury. Florida should enact jury service improvement legislation modeled after a "Jury Patriotism Act" recently developed by the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization of state legislators, with over 2,400 members nationwide.[10] The Jury Patriotism Act would eliminate certain disqualifications, exemptions, and flimsy hardship excuses that allow many to avoid jury service.[11] The Act also would lessen the burdens placed on citizens that render them unable to serve, or discourage their service on juries.[12]

The Jury Patriotism Act finds support across the political spectrum. Just a few of its supporters include the AFL-CIO, National Black Chamber of Commerce, National Federation of Independent Business, and National Association of Wholesaler-Distributors. Elected officials have responded to this broad-based support. Within months after its development, laws based on the model Jury Patriotism Act were enacted in Arizona, Louisiana, and Utah.[13] In October 2003, legislation based on the Jury Patriotism Act was endorsed by the Council of State Governments, a nonpartisan, nonprofit organization that seeks to foster excellence in state government.

A. *Address the Loss of Income*

One significant reason that people avoid jury duty is the financial burden service may impose. Under current Florida law, people who do not receive compensation from their employers during jury duty receive fifteen dollars per day during the first three days of service from the court.[14] Any-

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http://www.flcourts.org/pubinfo/summaries/briefs/03/03-41/Filed_10-17-2003_AdministrativeOrder.pdf (last visited Oct. 31, 2003).

10. *See* Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, *at* http://www.alec.org/meSWFiles/pdf/0309.pdf (Apr. 2003).

11. AM. LEG. EXCH. COUNCIL, JURY PATRIOTISM ACT § 4(a)–(b), *at* http://www.alec.org/viewpage.cfm?pgname=2.1cc43 (last visited Sept. 4, 2003).

12. *See id.* at § 5–6.

13. *See* H.B. 2520, 46th Leg., 1st Reg. Sess. (Ariz. 2003) (signed by Gov. Janet Napolitano on May 12, 2003); H.B. 324, Gen. Sess. (Utah 2003) (signed by Gov. Michael Leavitt on Mar. 17, 2003); H.B. 2008 (La. 2003) (signed by Gov. Mike Foster on June 27, 2003). In the 2003 session, Representative Christopher Smith (D-Dist. 93) introduced a bill (H.B. 1441) in the Florida Legislature based on the model Jury Patriotism Act.

14. *See* FLA. STAT. § 40.24(3)(b) (2002). Miami-Dade County currently requires employers located or residing in the county, and having over ten full-time employees, to pay their

one who serves for more than three days is paid thirty dollars per day upon the fourth day of jury service and thereafter.[15] These amounts may barely cover the daily cost of transportation, parking, and lunch, let alone support the family of a juror who is not receiving other compensation during jury service. The ABA has recognized that "[f]ew persons making more than minimum wage can afford [the] . . . sudden and involuntary cut in pay imposed by jury service."[16]

The lack of available compensation may be particularly troublesome for jurors selected to serve on lengthy civil trials. Although somewhere between one-half and three-quarters of all trials conclude within three days, and very few cases extend beyond ten days, jurors who find themselves called to serve on the rare, lengthy trial may be subject to extreme financial hardship.[17]

Lack of adequate compensation for jurors has several unfortunate results. Some jurors may opt to simply not show up in court. Those with jobs who will lose their salary during jury service are likely to plead with the court to be excused, particularly when the trial is expected to last several days, weeks, or months. Many Florida courts must excuse from service many laborers, salespersons, parents with childcare expenses, and professionals because of the economic hardship that they may suffer.[18] Those who

employees during the entire period of jury service. *See* MIAMI-DADE COUNTY, FLA., CODE §§ 11-31, 11-32 (1998).

15. *See* FLA. STAT. § 40.24(4). Florida's juror compensation is about average when compared to other states. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 89 (2002), *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Main_Page.html (stating that, in 1999, the average daily juror fee in state courts for less than five days of service was just eighteen dollars and fifty three cents per day, and, after five days, the average amount increased to twenty four dollars and twenty six cents per day). *Id.* at 90. Generally, juror compensation ranges from absolutely nothing on the first day of service to forty dollars per day. *Id.* at 89; *see, e.g.*, CAL. CIV. PROC. CODE § 215 (Supp. 2003) (compensating jurors fifteen dollars per day after the first day of service); N.Y. JUDICIARY LAW §§ 521, 521-a (McKinney 1992 & Supp. 2003) (requiring employers to pay up to forty dollars of an employee's compensation for the first three days of jury service, with the state paying the juror fee only to those jurors not receiving employer compensation, and increasing the fee by six dollars when a trial extends more than thirty days). Federal courts throughout the country pay jurors a forty dollar fee per day for their service. *See* 28 U.S.C. § 1871(b)(1) (1994).

16. A.B.A., STANDARDS RELATING TO JUROR USE & MANAGEMENT 133 (1993).

17. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 165, tbl. C-8 (2002), *available at* http://www.uscourts.gov/judbus2002/contents.html (finding that seventy-five percent of all civil and criminal trials in the federal courts were completed within three days and four percent extended beyond nine days during the twelve month period ending September 30, 2002); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 13 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf (finding that the median number of days in jury trials in the nation's seventy-five largest counties was four days).

18. *See* STANDARDS RELATED TO JUROR USE & MANAGEMENT, *supra* note 16, at 133–34.

remain in the jury pool are primarily those "who are not employed or whose employer[s] will continue to pay their salary,"[19] and may be forced to make an inequitable and unfair personal sacrifice. "Consequently, the basic democratic right to be tried by a jury of one's peers may [be largely illusory in a system whose juries are] . . . disproportionately composed of retired and unemployed individuals, especially in lengthy trials."[20] Such juries may be non-diverse and unrepresentative of the community as a whole.[21] They also may produce arbitrary results for plaintiffs, defendants, and prosecutors.[22] Equally important, many people who would like to serve on a jury, and have both a right and obligation to do so, are not, in practice, able to participate.[23]

Better compensation of jurors may be the key to obtaining more representative juries. As discussed above, loss of income is a primary reason why some jurors do not appear in court or request an excuse from service. It is equally clear that although jury participation is indeed a civic duty, jurors should not bear an extraordinary financial loss for their service, particularly when called to decide disputes between private parties.

"Ideally, [Florida] would be able to provide greater daily compensation for jurors. After all, jury service is a civic obligation. In these times of tight state budgets, however, significantly increasing the juror fee through payments out of the state treasury may not be a realistic option ...."[24] Even as long ago as 1993, the ABA recognized that "raising juror fees to compensate citizens for their time at current wage levels would place a nearly impossible

19. *See id.*

20. Schwartz et al., *supra* note 10, at 4 (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (ruling that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" and striking down the systematic exclusion of women from jury venires)).

21. *Id.*

22. *Id.*

23. *See* FLA. CONST. art. I, § 22 ("The right of trial by jury shall be secure to all and remain inviolate."); *Taylor*, 419 U.S. at 528 (1975) (ruling that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" and striking down the systematic exclusion of women from jury venires); Batson v. Kentucky, 476 U.S. 79, 97 (1986) (ruling that use of peremptory challenges to exclude African American jurors from petit juries unconstitutionally denied a person participation in jury service because of his race under the Sixth and Fourteenth Amendments); Patton v. Mississippi, 332 U.S. 463, 469 (1947) (holding that a state may not deprive a class of citizens the right to serve on a jury, either by statute or by administrative practices).

24. Schwartz et al., *supra* note 10, at 4–5.

burden on many financially hard-pressed jurisdictions."[25] "This observation is no less true today."[26]

In order to ensure that all people have the opportunity to serve on a jury, the Jury Patriotism Act includes an innovative lengthy trial fund that would make it less likely that working Floridians would be excused from jury service when a civil trial is expected to last several days, weeks, or months.[27]

> Although the number of jurors selected to serve on lengthy civil trials is relatively small, those who find themselves in the jury box on a long products liability, commercial litigation, or intellectual property case may suffer severe financial hardship. Absent extreme circumstances warranting the judge's intervention, these jurors are required to serve for the entire trial, which may [be] several weeks or months. While jurors indeed have a civic duty to serve, there is a limit on how much an individual citizen can be asked to sacrifice for the civil justice system, particularly when the case involves a dispute between private parties. Adoption of a Lengthy Trial Fund would lessen the hardship on Floridians who serve on such trials.[28]

The fund, which would be fully financed through a minimal court-filing fee, would provide wage replacement or supplementation to jurors who serve on civil trials lasting longer than three days.[29] These individuals would be eligible to receive supplemental compensation from the fund "if they otherwise would be excused from service due to financial hardship."[30] Any juror who is not fully compensated by his or her employer would be eligible for

25. STANDARDS RELATED TO JUROR USE & MANAGEMENT, *supra* note 16, at 134.

26. Schwartz et al., *supra* note 10, at 5.

27. AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 6.

> The ALEC model act does not provide wage replacement or supplementation for jurors selected for criminal trials. In most states, citizens are generally summoned for petit jury service and may then find themselves serving on either a civil or criminal matter. The authors recognize that jurors selected to serve on lengthy criminal trials are subject to the same financial strain as jurors selected for civil trials. However, the model act recognizes that civil litigants, through their attorneys' appearance fees, should not be required to fund the criminal justice system. That is a state obligation. Nor can criminal defendants or prosecutors be asked to contribute to the lengthy trial fund. For this reason, states might consider providing special compensation to jurors in lengthy criminal trials, but that reform is beyond the scope of ALEC's model act.

Schwartz et al., *supra* note 10, at 17 n. 65.

28. *Id.* at 5.

29. *Id.* Recently, the Michigan legislature adopted its own "Juror Compensation Reimbursement Fund." Like the Jury Patriotism Act, the Michigan Fund relies, in part, on a small increase in court filing fees to increase compensation to jurors serving on lengthy trials. *See* H.B. 4551, 4552 and S.B. 1448, 1452, 2001-2002 Leg. Sess. (Mich. 2002).

30. *Id.* (citing AM. LEG. EXCH. COUNCIL, *supra* note 11 at § 6(C)(2)).

additional wage replacement or supplementation after the tenth day of service on a civil jury.[31] This system would lend considerable support to jurors serving on lengthy trials.[32]

B. *Eliminate Free Passes From Jury Service*

Some people get out of jury duty because Florida law gives them a free pass. For example, Florida disqualifies several government officials, judges, and court clerks from jury service.[33] Law enforcement officers and investigative personnel are excused by the court upon request.[34] Practicing attorneys and physicians are treated slightly differently; they are excused from service at the discretion of the judge.[35]

When some groups of people are regularly dismissed from jury service, others bear more than their fair share of the burden.[36] "The privileged should not be allowed to escape jury duty, as some escaped military service in Vietnam, and leave those with less political or financial clout with the burden of service."[37] Furthermore, the absence of certain individuals from jury pools eliminates many important perspectives.[38] When members of certain occupations do not serve on a jury, the judicial system does not benefit from their life experiences, values, or education.[39]

On the other hand, a jury that lacks professionals, or is disproportionately composed of unemployed or retired individuals, may lack the collective knowledge of a more representative jury.[40] It is also possible that this small slice of our society may not have the background to properly evaluate or weigh complex technical, scientific, or other evidence.[41] Such jurors may even believe that their role is to transfer wealth and not render justice on the

31. *Id.*
32. Schwartz et al., *supra* note 10, at 5.
33. *See* FLA. STAT. § 40.013(2)(a) (2002).
34. *See* § 40.013(2)(b).
35. *See* § 40.013(5). Florida law also excuses expectant mothers, parents who are not employed full time with custody of children under six years of age or upon request, and persons who are responsible for the care of persons with physical or mental disability upon request. *See* §§ 40.013(4), (9).
36. *See* STANDARDS RELATED TO JUROR USE & MANAGEMENT, *supra* note 16, at 51.
37. Schwartz et al., *supra* note 10, at 5.
38. *Id.*
39. *Id.*
40. *Id.* at 6.
41. *Id.* at 5.

merits of the case.[42] Plaintiffs and defendants would all benefit from the diverse experience, values, and education of a truly representative jury.[43]

The first step to a more representative jury is the elimination of unnecessary or antiquated exemptions from service.[44] Approximately two-thirds of the states have recognized that occupational exemptions to jury service are elitist and unnecessary, and have taken the positive step of repealing such privileges.[45]

> Evidence [from these states] suggests that . . . those who [currently] receive special exemptions from jury service [in Florida] do not believe they are too valuable to take time off to sit on a jury, or too biased or influential to serve. For example, when New York doctors were asked whether they should be exempt from jury service following New York's [elimination of all of the state's twenty-six occupational exemptions], only [twelve] percent said that physicians should be exempt from service. New York lawyers had a similar reaction.[46]

For example, according to one study in New York, "only [three] percent and [ten] percent of Manhattan and Brooklyn attorneys, respectively, thought they should be exempt from jury service."[47] Even state executive officers and sitting judges in other states make time for jury service.[48] For example, "Rudolph Giuliani, despite being a sitting mayor, lawyer, and former prosecutor, also made headlines when he was summoned and selected to serve on a jury hearing a [seven] million [dollar] civil suit in 1999."[49] Most recently, summoned Juror No. 142 revealed on an "anonymous" qualification form for federal jury duty in New York that his former occupation was "President of the United States" and that he felt that he could be fair and impartial "despite

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42. Schwartz et al., *supra* note 10, at 5.

43. *Id.* at 1.

44. *Id.*

45. *Id.* at 6.

46. *Id.* (citing Julia Vitullo-Martin et al., *Five Years of Jury Reform: Final Report on Juror Concerns to the Unified Court System* 2, 10–11 (Citizens Jury Project, Vera Inst. Of Justice 2000), *available at* http://www.vera.org/publication_pdf/juryfinal.pdf.

47. Schwartz et al., *supra* note 10, at 6.

48. *See Governor Excused from Jury Duty*, YORK NEWS TIMES, Aug. 30, 2002, *available at* http://yorknewstimes.com/stories/083002/nat_0830020037.shtml (reporting that Texas Governor Rick Perry appeared in court for jury service and was designated "Juror No. 1" on a challenge to a speeding ticket); Linda P. Campbell, *Three Judges Summoned for Duty on Other Side of Bench; One of Them State District Judge Bob McCoy, is on a Jury Hearing a Medical Malpractice Case*, FORT WORTH STAR-TELEGRAM, Apr. 4, 2000, at 3.

49. Schwartz et al., *supra* note 10, at 6.

his 'unusual experience with the O.I.C.,' otherwise known as the Office of Independent Counsel."[50] "If . . . ex-presidents are not beyond jury service, no one should expect that their profession puts them above this civic duty."[51]

Florida's Jury Innovations Committee has also recommended elimination of occupational exemptions.[52] Consistent with the Committee's recommendation, the Jury Patriotism Act would eliminate the current disqualifications from jury service and automatic exemptions that apply to various groups.[53] Rather than grant automatic or discretionary exemptions from jury service, the Act would permit members of these groups to request a hardship excuse.[54] It would more fairly distribute the burden of jury duty and provide for a jury pool that better reflects the experience and values of the entire community.

C. *Limit Excuses to True Hardship*

Those who do not qualify for a complete exemption from service under existing Florida law can request to be excused from jury service upon a showing of "hardship, extreme inconvenience, or public necessity."[55] Some people who are called for jury service, particularly professionals, small business owners, and wage earners, may abuse this provision to avoid their civic responsibility. For this reason, the Jury Patriotism Act would repeal Florida's current vague standard, and provide further guidance to the courts on acceptable grounds for hardship excuses. The Act would permit an excuse from jury service only for "undue or extreme physical or financial hardship," which would arise in three circumstances.

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50. *See* Benjamin Weiser, *Civic Duty, Sure, But Wasn't the White House Enough?*, N.Y. TIMES, Mar. 1, 2003, at B1. Ultimately, the judge excused William Jefferson Clinton due to concern that having the former president sit on the jury might sensationalize the trial. *Id.*

51. Schwartz et al., *supra* note 10, at 6.

52. *See* FLA. JURY INNOVATIONS REPORT, *supra* note 7, at 22 (recommending that Florida's list of statutory exemptions "should be greatly reduced to include only felons who have not completed their entire sentence" and that all others not be excused unless "they show in a particularized manner justification for the inability to serve"). *Id.* For reasons no explained in its administrative order, the Supreme Court of Florida declined to approve this recommendation. *See In re* Final Report of Jury Innovations Comm., *supra* note 9, at 6.

53. *Compare* FLA. STAT § 40.013(5) (2002), *with* AM. LEG. EXCH. COUNCIL, *supra* note 11.

54. *See* FLA. JURY INNOVATIONS COMM., *supra* note 7, at 22. The Jury Innovations Committee recommended that the statutory exemptions from service (other than for "felons who have not completed their entire sentence, including probation, parole, and community control") should be eliminated. *Id.*

55. § 40.013(6).

The Act would permit an excuse from jury service only for "undue or extreme physical or financial hardship," which would arise in three circumstances: (1) when a person who is responsible for the care of a child, or an elderly or disabled person, would be unable to find alternative care or supervision during jury service; (2) when the prospective juror would incur costs or a loss of income that would have a "substantial adverse impact" on his or her ability to pay daily living expenses; or (3) if the prospective juror would suffer physical illness or disease by serving.[56] Under the Act's hardship standard, the loss of income from employment or other activities would not automatically permit one to avoid jury service.[57] These grounds would more closely reflect true hardship and limit the opportunity for abuse.[58]

In addition to limiting the available grounds for a hardship excuse, the legislation would establish a procedure to make it more likely that the excuses will be faithfully applied.[59] Jurors would be required to provide the court with documentation supporting their request for an excuse.[60] This minimal requirement would ensure that jurors are not inventing or exaggerat-

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56. *See* AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 4(b)(3).

57. *Id.* at § 4(b)(4).

58. *Id.* at 8. The ALEC model act is not the first to restrict permissible hardship excuses. A similar provision in Mississippi provides that all qualified persons must serve as jurors unless excused by the court for one of the following causes:

> (a) when the juror is ill, or when on account of serious illness in the juror's family, the presence of the juror is required at home, (b) when the juror's attendance would cause a serious financial loss to the juror or to the juror's business, or (c) when the juror is under an emergency, fairly equivalent to those mentioned in the foregoing clauses (a) and (b).

MISS. CODE ANN. § 13-5-23 (2002). In fact, the Mississippi statute goes even further in defining the standard for granting the above excuses:

> An excuse of illness under clause (a) may be made to the clerk of [the] court outside of open court by providing the clerk with either a certificate of a licensed physician or an affidavit of the juror, stating that the juror is ill or that there is a serious illness in the juror's family. The test of an excuse under clause (b) shall be whether, if the juror were incapacitated by illness or otherwise for a week, some other persons would be available or could reasonably be procured to carry on the business for the week, and the test of an excuse under clause (c) shall be such as to be the fair equivalent, under the circumstances of that prescribed under clause (b). In cases under clauses (b) and (c) the excuse must be made by the juror, in open court, under oath.

Id.

59. *See* STANDARDS RELATED TO JUROR USE & MANAGEMENT, *supra* note 16, at 53–54. Standard 6 of the ABA's *Standards Related to Juror Use and Management* also emphasizes the need for procedural safeguards in the administration of excuses from jury service. *Id.* The standard recommends that courts require individuals to present excuses in writing and that they present their excuses to a judge or senior court official (such as the jury commissioner or a senior court manager), and that courts adopt and apply a strict uniform policy for the granting of excuses. *Id.*

60. *See* MISS. CODE ANN. § 13-5-23 (2002) (text provided *supra* note 58) (requiring documentation of a medical excuse and a statement under oath in open court to support other hardship excuses).

ing claimed hardships. For instance, a person claiming a medical condition could provide a statement from a physician. One who claims financial hardship might submit a copy of his or her tax return or pay stub. Potential jurors who are caring for a young child or other family member might provide the court with a sworn statement providing the reason that he or she cannot obtain alternative care. The model act also places the responsibility for making hardship determinations with a judge, rather than with a clerk of the court or an administrative staff member.[61] This requirement demonstrates the seriousness of the jury service obligation within the judicial system. It also would have an important practical effect. People may think twice about articulating a bogus hardship excuse when in a courtroom, before a judge, and faced with the threat of a sanction.

D. *Protect Employment Rights*

Florida law prohibits employers from discharging or threatening to dismiss employees who are called for jury service.[62] The Jury Patriotism Act provides even more protection for employees.[63] First, it protects employees from any adverse action taken as a result of their responding to a juror summons.[64] The Act also explicitly states that a business may not require its

61. AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 4(b)(1).

62. FLA. STAT. § 40.271(2) (2002).

63. AM. LEG. EXCH. COUNCIL, *supra* note 11.

64. *Id.* at § 95. Several states provide employees with such protection. *See, e.g.*, D.C. CODE ANN. § 11-1913(a) (2001) (prohibiting an employer from depriving an employee of employment, threatening, or otherwise coercing an employee because the employee serves as a juror); IOWA CODE ANN. § 607A.45 (2003) (prohibiting an employer from depriving an employee of employment or threatening or otherwise coercing an employee because he or she is called for jury service); MISS. CODE ANN. § 13-5-23 (2002) (prohibiting an employer or other person from persuading or attempting to persuade any juror to avoid jury service, or intimidating or threatening any juror in that respect); MO. REV. STAT. § 494.460(1) (West 1996) (prohibiting an employer from terminating, disciplining, or threatening to take adverse action against an employee because he or she is called for jury service); TENN. CODE ANN. § 22-4-108(F)(1) (1994) (prohibiting an employer from discharging or otherwise discriminating against an employee because he or she is called for jury service); UTAH CODE ANN. § 78-46-21(1) (1953) (prohibiting an employer from depriving an employee of employment or threatening or otherwise coercing an employee because the employee responds to a juror summons); WASH. REV. CODE ANN. § 2.36.165(2) (West 2003) (prohibiting an employer from depriving an employee of employment or threatening, coercing, harassing, or denying promotional opportunities to an employee who takes time off for jury service); W. VA. CODE ANN. § 52-3-1(d) (Michie 2000) (requiring an employer to excuse an employee from work in order to respond to a juror summons and prohibiting an employer from discriminating against an employee because he or she is summoned to jury service).

employees to use their annual, vacation, or sick leave time for jury service.[65] Employees should not fear that by responding to a juror summons, they might be required to sacrifice their annual vacation. This provision is one reason why the AFL-CIO supports the ALEC model act.

E. *Small Business Protections*

The Jury Patriotism Act also seeks to protect small businesses from problems that may arise when their employees are called to jury service.[66] For example, the Act addresses the potential that a small business may lose two or more employees to jury service at the same time. Such a situation may be particularly hard on small businesses.[67] For this reason, the Act requires courts to postpone and reschedule the jury service of a summoned juror if another employee of his or her business is already serving jury duty.[68] Employer groups, including the National Federation of Independent Business (NFIB), support this provision of the Act.[69]

F. *Provide an Appropriate Penalty for No-Shows*

Research shows that a significant number of those who do not respond to juror summonses fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be a mere "slap on the wrist."[70] In Florida, those who do not respond to a jury summons face a fine of not more than $100 and may be held in contempt of court.[71] When the penalty for not showing up for jury service is comparable to a speeding ticket, it is no wonder that so many people disregard their jury summons with impunity. Furthermore, courts have little resources to follow up and penalize those who do not show. It is no secret that what is already a minimal fine rarely is imposed.

In light of the added flexibility, shorter term, and better protection of compensation during jury service, those who still chose to discard their civic

65. AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 5(b). Colorado is one of the few states that provides similar protection of employee benefits during jury service. *See* COLO. REV. STAT. § 13-71-134 (2002).

66. AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 5(e).

67. *Id.*

68. *Id.*

69. Schwartz et al., *supra* note 10, at 2.

70. *See, e.g.*, BOATRIGHT, *supra* note 3, at 136 (indicating that 56.3% of nonrespondents believed that the penalty for failing to appear for jury service would be light and only 29.2% believed the penalty would be strictly enforced).

71. *See* FLA. STAT § 40.23(3) (2001).

duty should be punished appropriately. Jury service is an important obligation of citizenship. Criminal defendants rely on a representative jury to receive a fair trial. Parties in civil litigation also have a right to a representative jury. A person's failure to appear in court not only damages the judicial system, it may also impair the rights of litigants. Ignoring a jury summons is an offense more serious than driving a few miles over the posted speed limit. It should be dealt with accordingly.

The Jury Patriotism Act would punish a summoned juror's failure to appear in court as a misdemeanor.[72] This penalty would communicate to jurors the importance of jury service and notify them that avoiding one's civic responsibility will be criminally punished. Under this provision, citizens who fail to appear for jury service will have a criminal record, a threat sufficient to cause them to pause before simply ignoring a jury summons.

Alternatively, the Florida Legislature might consider raising the maximum fine for nonrespondents from $100 to $500, while continuing enforcement through contempt of court proceedings. It might also provide judges with the discretion to require no-shows to complete community service, in addition to, or in lieu of, paying a fine. In any case, these penalties should be applied more consistently in order to encourage citizens to appear for jury service.[73]

III. CONCLUSION

Floridians continue to overwhelmingly support the jury system. Yet, many people fail to appear for jury duty when summoned or strive to get out of jury duty once they enter the courthouse. Few of these individuals lack a sense of civil duty. Rather, they are discouraged from jury service by the hardship and headache imposed by a system that does not provide adequate financial compensation, leaves little or no flexibility, and may place a severe inconvenience on their life. Moreover, the current occupational exemptions and standard for an excuse from service provide many people with an easy means of escape from jury service.

Florida should enact legislation based on ALEC's model Jury Patriotism Act to break down the barriers that frustrate jury service in Florida. Floridians, regardless of income or occupation, would then be more willing and better able to fulfill their patriotic duty to serve on a jury.

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72. AM. LEG. EXCH. COUNCIL, *supra* note 11, at § 3(d).

73. "The point is not to punish people, but to encourage people to answer the summons and make arrangements to do their jury service." Troy Anderson, *Show Up or Else; Courts Get Tough: Ignore Another Jury Summons and Get $1,500 Fine*, L.A. DAILY NEWS, Jan. 19, 2003, *available at* 2002 WL 5528920 (quoting Pomona, California Supervising Judge).

POPE'S PROGENY

JAMES D. CAMP, JR.*

In 1988, the United States Supreme Court in *Tulsa Professional Collection Services, Inc., v. Pope,*[1] significantly changed the procedure of how personal representatives must notify creditors in probate proceedings.[2] As all experienced probate lawyers know, as a result of *Pope,* Florida's current notice to creditors section 733.2121 of the *Florida Statutes* requires personal representatives not only to publish a notice to creditors, but also serve a copy on the decedent's creditors who are "reasonably ascertainable,"[3] after making a "diligent search"[4] to determine their names and addresses. The statute goes on to state that "[i]mpracticable and extended searches are not required."[5] Creditors then have the later of three months after the "first publication of the notice to creditors, or as to any creditor required to be served with a copy of the notice to creditors, thirty days after the date of service on the creditor . . . ."[6]

Section 733.2121 of the *Florida Statutes*, effective January 1, 2002, is a spin off of the prior section 733.212, which incorporated a notice to beneficiaries and notice to creditors. The language in section 733.2121 of the *Florida Statutes* is substantially the same as the former section 733.212, except that section 733.212 of the *Florida Statutes* did not contain any reference to creditors whose "[c]laims are unmatured, contingent, or unliquidated . . . ."[7] The abstract and cryptic phrases in the *Florida Statutes*, requiring a "diligent search" to determine creditors "who are reasonably ascertainable,"[8] have spawned many appellate decisions, but none, however, have given the practitioner much guidance in defining those phrases, or for that matter, the phrase "impracticable and extended searches," which the statute says are not re-

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1. 485 U.S. 478 (1988).
2. *Id.* at 491.
3. FLA. STAT. § 733.2121(3)(a) (2002).
4. *Id.*
5. *Id.*
6. § 733.702(1).
7. § 733.2121(3)(a).
8. *Id.*

quired.[9] Nor have the Florida Probate Rules spelled out any express minimum guidelines to satisfy the search requirements.

The case of *In re Estate of Vickery*,[10] one of the early opinions construing the former section 733.212 of the *Florida Statutes*, which required the service of a notice of administration on creditors, involved beneficiaries asserting that the decedent had breached a contract allegedly established under a "joint and mutual will" executed by the decedent's husband prior to the will of the decedent.[11] The will of the decedent's predeceased husband set forth a plan that the survivor of them would, by will, distribute their unconsumed assets available at the survivor's death to the same beneficiaries.[12] The three-month publication period expired on November 11, 1987.[13] Only two claimants were served personally with notice in May of 1988.[14] The various claimants filed identical claims beginning June 7, 1988, and ending on August 1, 1988.[15] Seven months after the first claimant received notice of the decedent's death, the disgruntled would-be beneficiaries filed a motion to extend time to file their claims.[16] The trial court granted the personal representative's motion to strike.[17] The Fourth District affirmed, ruling that the trial court did not abuse its discretion.[18]

The appellate court noted that the personal representative for the wife's estate, an attorney, had represented her husband in real estate matters and had "handled some of his estate work, but had never discussed wills or estate planning with him."[19] There was no explanation of what "some of his estate work" meant.[20] The court further stated that though the attorney, as personal representative, had prepared the surviving wife's will (which made no mention of a mutual will arrangement), "he had no knowledge of any other document disposing of her property."[21] The court explained that the decedent's sisters cleaned her apartment and threw away "many items" (apparently without description), but gave her financial papers to the personal rep-

9. *Id.*
10. 564 So. 2d 555 (Fla. 4th Dist. Ct. App. 1990).
11. *Id.* at 557.
12. *Id.* at 556.
13. *Id.* at 557.
14. *Id.*
15. *Estate of Vickery*, 564 So. 2d at 557.
16. *Id.* at 558.
17. *Id.* at 557.
18. *Id.* at 558.
19. *Id.*
20. *Estate of Vickery*, 564 So. 2d at 558.
21. *Id.*

resentative,[22] and then went on to say that the personal representative "made a cursory search" of the wife's apartment and took possession of the contents of the decedent's safe deposit box.[23]

In *Jones v. Sunbank /Miami, N.A.*,[24] another case decided under the aegis of the *Pope* doctrine,[25] a party who had purchased real property from the decedent several years before the seller's death was not served with actual notice of administration.[26] Almost six months after the claim bar date expired, the buyer filed a claim against the deceased seller's estate based on land contamination.[27] The trial court made exhaustive findings and concluded that the claimant was not a "known or reasonably ascertainable creditor."[28] The Third District affirmed, deciding, as is so often the case in these settings, that the trial court did not abuse its discretion.[29] While the opinion is well written, it does not enlighten the probate bar as to what would equate to a "diligent search" or define "[i]mpracticable and extended searches . . . ."[30]

In *In re Estate of Gleason*,[31] an alleged creditor of Jackie Gleason, not served with a notice of administration, had been litigating with Gleason in New York for over a year prior to his death.[32] The creditor sought to reopen Gleason's estate fourteen months after it had been closed.[33] The Fourth District affirmed the lower court's refusal to reopen the estate.[34] Again, no guidelines were outlined with respect to what steps a personal representative should take to effectuate a "diligent search" for creditors.[35]

The claimant in the case of *In re Estate of Danese*,[36] who had not been served with a notice of administration, sought to reopen the estate several years after it had been closed.[37] The claimant, who had filed a civil action

22. *Id.*
23. *Id.*
24. 609 So. 2d 98 (Fla. 3d Dist. Ct. App. 1992).
25. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).
26. *Jones*, 609 So. 2d at 99–100.
27. *Id.*
28. *Id.* at 101.
29. *Id.* at 103.
30. § 733.2121(3)(a).
31. 631 So. 2d 321 (Fla. 4th Dist. Ct. App. 1994).
32. *Id.* at 322.
33. *Id.* at 323.
34. *Id.*
35. *See* FLA. STAT. § 733.2121(3)(a) (2002).
36. 641 So. 2d 423 (Fla. 1st Dist. Ct. App. 1994).
37. *Id.* at 425.

against the decedent's estate prior to the expiration of the three months creditors' period, argued that the *Pope* requirements were not met.[38]

The trial court entered an order reopening the estate.[39] However, the First District reversed on the ground that the claimant had actual knowledge of the probate proceeding, having filed a civil action against the estate within the three month creditors' period, and thus did not come within the purview of *Pope*.[40] Because of the factual circumstances in *Estate of Danese*, it was not relevant for the court to give any clues as to what constitutes a "diligent search."[41]

Section 733.2121 of the *Florida Statutes* contains a reference to creditors whose "[c]laims are unmatured, contingent or unliquidated," which was not in the predecessor section 733.212 of the *Florida Statutes*, and was apparently added to overcome the Fourth District decision of *U.S. Trust Co. of Florida Savings v. Haig*.[42] There, the buyers of a residence who gave the seller a purchase money mortgage received from the seller a five-year guaranty, allowing the buyers to offset against the mortgage debt the cost of repairs due to "leaks and cracks caused by structural defects."[43] The seller died within the five-year period "and the claims period expired on February 8, 1995."[44] No actual notice was served on the buyers.[45]

However, the personal representative, by a letter to the buyers dated January 30, 1995, sought to verify the existence of the purchase money note as an estate asset.[46] At the same time, the buyers, unaware of the seller's death, tried to reach him by mail.[47] The personal representative did not receive the buyer's letter until eight days after the creditors period expired.[48] Because the claim was filed late, the appellate court overruled the trial court's order granting the buyers' petition to extend time to file a claim, finding that the buyers were not entitled to actual notice since their claim was contingent and not quantified.[49] Furthermore, the Fourth District ruled that there was no showing of fraud or estoppel as required by section 733.702(3)

38. *Id.*
39. *Id.*
40. *Id.* at 424.
41. § 733.2121(3)(a).
42. 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).
43. *Id.* at 770.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Haig*, 694 So. 2d at 770.
48. *Id.*
49. *Id.* at 771.

of the *Florida Statutes*.[50] However, it is not clear from the opinion, though it may be presumed, that the buyers were seeking reimbursement for actual repairs made to the residence under the guaranty. The court made no ruling regarding the buyers' rights under the mortgage set-off provision.[51]

In *In re Estate of Ortolano*,[52] the Fourth District ruled that "the trial court abused its discretion" in granting the personal representatives' motion to strike a claim filed one month after the three month creditor's period expired.[53] The claimant, who was not served with a notice of administration, had a lawsuit pending against the decedent at the time of death.[54] The Fourth District determined that, because the personal representative had actual knowledge of the claim, the claimant should have been served with notice.[55] Furthermore, the personal representative failed to file a suggestion of death in the civil action, as required by the *Florida Rules of Civil Procedure*, until after the creditors period expired.[56] The facts in *Ortolano* made it unnecessary for the appellate court to discuss what steps should or need not be taken to conduct a diligent search.[57]

In *Miller v. Estate of Baer*,[58] the decedent passed away on September 23, 1996, and the personal representative first published a notice of administration on December 4, 1996.[59] The claimant, a bank, was not served with the notice and did not file its claim within the three-month period.[60]

On August 24, 1998, almost two years after the decedent's death, the bank filed a petition for extension of time, which the trial court granted.[61] The Fourth District affirmed, citing the key issue to be whether the lower court abused its discretion *vel non*.[62] The decedent was "a general partner of a partnership" and had signed as a guarantor on loans to the partnership by the bank.[63] By the terms of the debt arrangement with the bank, the death of the decedent triggered a default on the note for which the decedent was a guarantor.[64] The trial court found, and the court of appeal agreed, that the

50. *Id.*
51. *See id.*
52. 766 So. 2d 330 (Fla. 4th Dist. Ct. App. 2000).
53. *Id.* at 332.
54. *Id.* at 331.
55. *Id.* at 332 (citing Davis v. Evans, 132 So. 2d 476, 481 (Fla. 1st Dist. Ct. App. 1961)).
56. *Id.*
57. *See Estate of Ortolano*, 766 So. 2d at 332.
58. 837 So. 2d 448 (Fla. 4th Dist. Ct. App. 2002).
59. *Id.* at 449.
60. *Id.*
61. *Id.*
62. *Id.* at 450.
63. *Miller*, 837 So. 2d at 450.
64. *Id.*

facts were distinguishable from those in *Haig*,[65] thereby requiring actual notice to the claimant.[66] Again, it was unnecessary for the appellate court to recite a litany of steps that should have been taken to accomplish a "diligent search" regarding the existence of the claimant.

The result in that case was disastrous for the personal representative. Distributions had been made to such an extent that there were insufficient assets available to satisfy the claim by the bank, by casting a burden on the personal representative personally.[67]

The latest case as of this writing, *Strulowitz v. Cadle Co., II, Inc.*,[68] seems to raise the bar for personal representatives to comply with the "diligent search" standard. Once again, however, the case turned on what seems to be the fundamental issue in these types of cases: whether the trial court abused its discretion.[69] The Fourth District, in *Strulowitz*, quoting from *Canakaris v. Canakaris*,[70] stated, "discretion is abused only where no reasonable man would take the view adopted by the trial court."[71]

In *Strulowitz*, the decedent died on May 17, 2000, and the statutory claim period ended November 20, 2000.[72] The personal representative first became aware of the debt owed to The Cadle Company II, Inc. ("Cadle") as a result of a telephone call he received on January 18, 2001.[73] The debt arose by virtue of an unrecorded joint stipulation of settlement entered into by the decedent and his wife, who predeceased the decedent in 1994, that resolved a lawsuit filed by Cadle to collect on a promissory note.[74] Under the settlement, the Strulowitzes were to pay quarterly payments over a period of six years, and on June 1, 2000, the balance became due.[75] After the personal representative advised Cadle's agent that he had no record of the debt, he requested documentation and payment history.[76] In early February of 2001, the personal representative's attorney advised Cadle that the claim was time-barred, whereupon Cadle on February 16, 2001, filed a petition for leave to

65. U.S. Trust Co. of Fla. Sav. Bank v. Haig, 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).

66. *Miller*, 837 So. 2d at 450 (citing Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988)).

67. *Id.* at 449.

68. 839 So. 2d 876 (Fla. 4th Dist. Ct. App. 2003).

69. *Id.* at 879.

70. 382 So. 2d 1197, 1203 (Fla. 1980).

71. *Strulowitz*, 839 So. 2d at 881 (quoting *Canakaris*, 382 So. 2d at 1203 (citing Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942))).

72. *Id.* at 877.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Strulowitz*, 839 So. 2d at 877.

file a claim.[77] The personal representative responded with a motion to strike, along with a supporting affidavit which, in summary, related that his "diligent search" included going through all of the decedent's personal and business files and check book for the year 2000, indicating that the checkbooks were handwritten and for the most part illegible.[78]

The trial court in *Strulowitz* declined to rule on the evidence presented.[79] Rather, an attorney ad litem was appointed, who acknowledged that he had difficulty locating the Cadle Company and the debt because Cadle had not sent a payment book to the decedent, even though, as the appellate court noted, the attorney ad litem had the benefit of hindsight and was aware of the creditor at that point in time.[80] Moreover, Cadle failed to send a delinquent notice when the June 2000 payment was not made.[81] The attorney ad litem did find an illegible check dated March 11, 2000 for $1500 to "'The Cadle Co.?? II'" and a December 14, 1999 check in the same amount to "'Cadle II Company,'" along with four legible checks for $1500 made during 1999, each payable to Cadle.[82]

The attorney ad litem, armed with the name of the claimant, was unable to find a listing for that company in the Broward County, Florida phone book, and upon calling information he learned that there was no listing for Cadle in the State of Florida.[83] On inquiring about a Cadle phone number in other states, he was told that he would have to call every state in the union, which he concluded was impractical.[84] The attorney ad litem finally learned from the telephone operator that Cadle did have a toll free number.[85] On reaching the company, the employee could not locate the account.[86] Only after being asked by the Cadle contact to furnish the decedent's social security number was the account located.[87] Even though the statute provides that "[i]mpracticable and extended searches are not required,"[88] the attorney ad litem concluded that the personal representative could have conducted a more "diligent search."[89] A "diligent search" would have recalled Cadle as a

77. *Id.*
78. *Id.* at 878.
79. *See id.*
80. *Id.*
81. *Strulowitz*, 839 So. 2d at 878.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Strulowitz*, 839 So. 2d at 878.
87. *Id.* at 878–89.
88. FLA. STAT. § 733.2121(3)(a) (2002).
89. Strulowitz v. Cadle Co., II, Inc., 839 So. 2d 876, 879 (Fla. 4th Dist. Ct. App. 2003).

creditor, and a more extensive review of the decedent's bank statements or checkbook would have led him to Cadle.[90] The lower court adopted the attorney ad litem's conclusion and denied the motion to strike.[91] The Fourth District, relying on the nebulous doctrine of "abuse of discretion" affirmed, stating that:

> Applying this standard, we cannot say that no reasonable person could take the trial court's view. Reasonable people could differ as to what constitutes a reasonable search and what entails impractical or extraordinary effort. Certainly, as the attorney ad litem acknowledges, his success in locating Cadle and the decedent's account came only after several phone calls. *Moreover, it came in hindsight, after Cadle had filed its claim and its name was known to the attorney ad litem.*[92]

It appears from the Fourth District's decision that had the trial court ruled the other way, which it could have done facilely, the appellate court would have also affirmed, on the basis that the trial court did not abuse its discretion.[93]

After scanning the progeny of *Pope*,[94] and looking through the judicial camera lens, the picture is anything but clear as to what constitutes a "diligent search" or "impracticable searches."[95] We know more about what does *not* satisfy those vague terms than what fulfills the requirements. By way of a footnote in *Strulowitz*, the Fourth District, having recognized the problem, has issued a summons of responsibility to the Probate Rules Committee of the Florida Bar, requesting that the body suggest guidelines for personal representatives to aid them in performing their "diligent searches."[96] Hopefully, the rules committee will not allow a default to be entered against it. To be sure, there will be naysayers who will pontificate to the effect that promulgating guidelines for construing that abstract phrase is fools' play, and that each estate is unique and will have to stand on its own peculiar facts. That, of course, is the easy way out. The rules committee should not, however, turn a blind eye toward the mantle placed on it by the court. Indeed, the rules committee has a moral, if not an ethical, responsibility to assist the personal representatives, probate practitioners, as well as the trial judges, in carrying

90. *Id.*
91. *Id.*
92. *Id.* at 881 (emphasis supplied).
93. *Id.*
94. 485 U.S. 478 (1988).
95. *Strulowitz*, 839 So. 2d at 879.
96. *Id.* at n.3.

out the statutory mandate. This is an opportunity for the Bar to supply the legal yeast that will leaven the definition of "diligent search."

In the meantime, lawyers laboring in the vineyard of probate law would be well advised to review an excellent article by David T. Smith, a University of Florida law professor, and Robert Winick, an experienced probate practitioner,[97] which constructively sets forth numerous cogent steps a personal representative should consider in ferreting out "reasonably ascertainable" creditors.[98] How extensively the list should be followed will of course depend on how knowledgeable the personal representative is with the decedent's personal and financial affairs. As section 733.2121 of the *Florida Statutes* says, "[i]mpracticable and extended searches are not required."[99] The well-written article by Smith and Winick, *inter alia*, recommends that the first step should be to have the postal service direct all of the decedent's mail to the personal representative.[100] Next, after inspecting the decedent's wallet/purse, personal and financial files, letters should be sent to credit card companies and department stores, requesting account balance information.[101] Also, one should review tax returns for three years prior to date of death and bank statements, canceled checks or check stubs for at least one year prior to death.[102] Making inquiries of relatives, friends and business associates is also advised.[103]

Personal representatives and probate practitioners should keep the Smith and Winick article handy for easy reference because it is still timely. The only thing missing—as a result of expanded technology—as suggested by William Platt,[104] a prominent probate lawyer in Tampa, Florida, is that it is also a good idea to search the decedent's personal computer and maybe even the internet—a phenomenon not extant when Smith and Winick authored their article.

Unless the Probate Rules Committee acts upon the charge given to it by the Fourth District, to paraphrase Lewis Carroll's Humpty Dumpty, "diligent search" and "impractical searches" will be what each probate judge says it is!

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97. David T. Smith & Robert M. Winick, *Known or Ascertainable Estate Creditors: The* Pope *Decision*, 62 FLA. B.J. 66 (Oct. 1988).
98. *Id.* at 67.
99. FLA. STAT. § 733.2121(3)(a) (2002).
100. Smith & Winick, *supra* note 97, at 67.
101. *Id.*
102. *Id.*
103. *Id.*
104. Platt is a former chairman of the Florida Probate Rules Committee.

THE VALIDITY OF BINDING ARBITRATION AGREEMENTS AND CHILDREN'S PERSONAL INJURY CLAIMS IN FLORIDA AFTER *SHEA v. GLOBAL TRAVEL MARKETING, INC.*

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I. INTRODUCTION

Courts in Florida and across the nation favor arbitration[1] as a mechanism of resolving disputes,[2] which has made arbitration the most popular

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1. Arbitration is the process of resolving disputes by a neutral third party after the arbitrator hears from both parties. BLACK'S LAW DICTIONARY 100 (7th ed. 1999). The characteristics of arbitration include written agreements to resolve controversies through arbitration, non-formal methods, neutral arbiters, and binding awards that can be enforced in court. Jef-

method of alternative dispute resolution.[3] The rise in the popularity of arbitration has resulted from the view that arbitration allows parties to settle controversies in a time and cost-efficient manner without the formalities of traditional litigation.[4] Commercial enterprises have traditionally chosen to use arbitration to settle the disagreements that arise in an array of commercial settings.[5] A primary reason for the recent popularity of commercial arbitration is because arbitrators often have the same background and working knowledge in the specific area of business as the parties involved in a dispute.[6] Some businesses—including tour operators and recreation-based organizations, for example—are beginning to use arbitration provisions in their agreements not only to resolve any disputes that may arise over the performance of contracts, but to reduce any potential liability from personal injury claims submitted by participants.[7]

The future of commercial arbitration in Florida as it relates to the personal injury claims of children will change[8] in the aftermath of *Shea v. Global Travel Marketing, Inc.*[9] In a case of first impression in Florida,[10] the Fourth District Court of Appeal ruled that parents cannot bind their minor children to arbitrate personal injury claims.[11] The court also certified the

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frey M. Schalley, Article, *Eliminate Violence from Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW. J. 181, 196 (2001).

2. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Martha A. Gottfried, Inc. v. Paulette Koch Real Estate, Inc., 778 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 2001); Info. Tech. & Eng'g Corp. v. Reno, 813 So. 2d 1053, 1055 (Fla. 4th Dist. Ct. App. 2002); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 5:1 (3d ed. 2003); Michael A. Bagot, Jr. & Dana A. Henderson, *Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L.J. 413, 418 (2002).

3. 1 OEHMKE, *supra* note 2.

4. *See* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 473–75 (1987); Schalley, *supra* note 1, at 195.

5. *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997).

6. *See id.*; *see also* 1 OEHMKE, *supra* note 2 (discussing the variety of commercial disputes that are resolved through arbitration).

7. Laurie Cunningham, *Parents Can't Waive Children's Rights*, DAILY BUS. REV., May 22, 2003, at A1.

8. *See id.*; Amicus Brief of the Acad. of Fla. Trial Lawyers at 1, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910). For purposes of this Note, the term child(ren) will be used interchangeably and has the same definition as the word minor. A minor is an "infant or person who is under the age of legal competence." BLACK'S LAW DICTIONARY 997 (6th ed. 1990).

9. 28 Fla. L. Weekly D2004 (4th Dist. Ct. App. Aug. 27, 2003) [hereinafter *Shea I*].

10. *Id.* at D2005.

11. *Id.*; *see* Cunningham, *supra* note 7. The court originally reversed the trial court's arbitration order and remanded the case for further proceedings on the claims brought forth by the decedent's father in a ruling issued on April 23, 2003. Shea v. Global Travel Mktg., Inc.,

issue to the Supreme Court of Florida as a matter of great public importance.[12] This Note will discuss the court's reasoning in *Shea* and assert that the court's primary holding was a proper public policy decision in accord with similar cases in other jurisdictions under *parens patriae*, which is the ability of the state to protect persons of legal disability who cannot adequately protect their legal interests, including children.[13] However, portions of the court's reasoning and analysis were ambiguous. By not clearly articulating significant issues affecting state and federal law, the court does not provide any closure to the issues raised in *Shea*;[14] on the contrary, the court's approach casts doubt on the validity and practicality of the ruling.[15] "In order to eliminate any uncertainty or confusion as to the applicability of the result in this case statewide"[16] as it relates to parental discretion,[17] the state's economy,[18] judicial administration,[19] and other aspects of society in the state, the Supreme Court of Florida needs to resolve the ambiguities of the *Shea* panel's rationale.

Part I will survey similar cases involving arbitration clauses and children's personal injury claims in other jurisdictions to illustrate the novelty of this issue. Although cases like *Shea* are rare, this section will show that there is already a split among and within jurisdictions concerning the validity of binding arbitration provisions and the personal injury claims of minors. Part II will provide the factual and procedural background of *Shea* that begins with the tragic and gruesome death of an eleven-year-old boy. Part III will discuss the court's rationale and its emphasis on the public policy concerns

28 Fla. L. Weekly D1009, D1011 (4th Dist. Ct. App. Apr. 23, 2003) [hereinafter *Shea II*]. The court withdrew its prior opinion and substituted a new opinion on August 27, 2003. *Shea I*, 28 Fla. L. Weekly at D2004.

12. *Shea I*, 28 Fla. L. Weekly at D2006. Article V, section 3(b)(4) of the Florida Constitution gives the Supreme Court of Florida the discretion to review the ruling of a district court of appeal that presents a question certified by the supreme court as being of "great public importance." FLA. CONST. art. V, § 3(b)(4); *e.g.*, FLA. R. APP. P. 9.030(a)(2)(B)(i). The issue the *Shea* panel has certified to the Supreme Court of Florida states: "Whether a parent's agreement in a commercial travel contract to binding arbitration on behalf of a minor child with respect to prospective tort claims arising in the course of such travel is enforceable as to the minor." *Shea I*, 28 Fla. L. Weekly at D2006. No information was available on the status of the certification action at the time of this Note.

13. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); *see* Cunningham, *supra* note 7.

14. *See* Cunningham, *supra* note 7.

15. *See id.*

16. Appellee's Motion for Certification to the Fla. Sup. Ct. of a Question of Great Public Importance at 3, 28 Fla. L. Weekly D2004 (4th Dist. Ct. App. Aug. 27, 2003) (No. 4D02-910).

17. *See* Cunningham, *supra* note 7.

18. *See id.*

19. *See id.*

of parents entering into contracts on behalf of their children in the form of parental waivers and other exculpatory agreements that contain arbitration provisions.

Although some critics believe the *Shea* court has improperly interfered with a parent's ability to raise his or her children,[20] Part IV will assert that the ruling made by the panel was proper under public policy and *parens patriae*, including the decision to validate parental waivers for school-sponsored or community oriented activities for minors. Part V will assess the weaknesses of the court's rationale, specifically the court's silence on whether the Federal Arbitration Act[21] or Florida Arbitration Code[22] should have been applied. Another inadequacy of the *Shea* court's rationale is its ambiguity concerning the activities where parental waivers that include arbitration agreements would be permissible under public policy.

II. AN OVERVIEW OF CASE LAW INVOLVING THE BINDING OF CHILDREN'S PERSONAL INJURY, NEGLIGENCE, OR TORT CLAIMS TO ARBITRATION

With some exceptions,[23] agreements that generally bind minors to arbitration involve insurance contracts[24] or separation agreements that concern child custody, support, and visitation rights.[25] However, cases on point concerning the issue of whether parents can compel their children to resolve personal injury claims through binding arbitration are rare.[26] Despite the

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20. *See id.*

21. 9 U.S.C. §§ 1-16 (2000).

22. FLA. STAT. § 682.01-.22 (2002).

23. 1 MICHAEL DOMKE & GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, § 10:10 (rev. ed. 1999). The exceptions include controversies where the claims of a child are not submitted to arbitration unless there is a court order issued. *Id.* The court order can be issued after a parent or personal representative of the minor files an application with the court, unless the controversy is an insurance claim. *Id.*

24. *Id.*; *see also* Doyle v. Giuliucci, 401 P.2d 1, 2–3 (Cal. 1965) (holding that a child can be bound to arbitrate claims under health care contract because parent has the right and duty to care for child). Although this Note will not focus on the legality of arbitration agreements and medical insurance claims or health care for minors, it should be noted that the Fourth District Court of Appeal in *Shea* found that the trial court erroneously relied on *Doyle* in its analysis. *Shea I*, 28 Fla. L. Weekly at D2006.

25. 1 DOMKE & WILNER, *supra* note 23.

26. *See* Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1076 (5th Cir. 2002); Troshak v. Terminix Int'l Co., L.P., No. CIV.A.98-1727, 1998 WL 401693, at *4 (E.D. Pa. July 2, 1998); Cross v. Carnes, 724 N.E.2d 828, 836 (Ohio 11th Ct. App. 1998); Shannon P. Duffy, *Parents Can't Sign Away Child's Potential Claim*, LEGAL INTELLIGENCER, July 7, 1998, at 1 (discussing *Troshak*). *Cross* was a case of first impression in Ohio, and in *Troshak* and *Fleetwood*, the federal courts had to determine how the supreme courts of Pennsylvania and

infrequency of these cases, there is a split among and within jurisdictions regarding the validity of a child being bound by a parent to settle claims through an arbitrator rather than by a jury.[27]

A. *Children Cannot be Bound to Arbitrate Claims*

In *Troshak v. Terminix International Corp.*,[28] a minor was rendered unconscious by toxic fumes produced by a pesticide treatment of the minor's house.[29] When the minor's parents filed personal injury claims against Terminix,[30] the company removed the case to federal court and moved to stay litigation pending arbitration—including the child's claims—because the child's father had agreed to arbitrate any controversies arising under the company's service agreement.[31] The district court found that the father and mother's claims were bound by the arbitration agreement.[32] Since there were no Pennsylvania cases that directly dealt with binding minors to arbitration clauses,[33] the district court had to determine how the Supreme Court of Pennsylvania would rule on the matter.[34] The court turned to relevant federal cases that held parents could not waive the legal claims of their children simply because of the parental relationship.[35] Based on these cases, the district

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Texas, respectively, would rule on the issue. *See Fleetwood*, 280 F.3d at 1076; *Troshak*, 1998 WL 401963, at *4; *Cross*, 724 N.E.2d at 836.

27. *See Fleetwood*, 280 F.3d at 1077; Costanza v. Allstate Ins. Co., No. Civ. A. 02-1492, 2002 WL 31528447, at *7 (E.D. La. Nov. 12, 2002); *Troshak*, 1998 WL 401693, at *4; Accomazzo v. CEDU Educ. Servs. Inc., 15 P.3d 1153, 1156 (Idaho 2000); *Cross*, 724 N.E.2d at 836.

28. No. CIV.A.98-1727, 1998 WL 401693, at *1 (E.D. Pa. July 2, 1998).

29. *See* Duffy, *supra* note 26. The minor's name was Richard Troshak, III. His father, Richard Troshak, II was not knocked out by the fumes of the termite control treatment, but was found "stumbling in an incoherent state." *Id.*

30. *Troshak*, 1998 WL 401693, at *3. The Troshaks also filed suit for property damages to their house, and Susan Troshak—the mother and wife of the victims, respectively—sought recovery for a loss of consortium. *Id.*

31. *Id.* at *1–2. The father assented to the terms of the contract when he signed the company's "Termite Service Plan" agreement. *Id.* at *2.

32. *Troshak*, 1998 WL 401693, at *2–3; Duffy, *supra* note 26, at 6. Although Susan Troshak did not sign the Terminix contract, the court still found that she was bound to the agreement under Pennsylvania law that presumes that one spouse has the power to act for the other spouse in respect to the properties that are jointly held. *Troshak*, 1998 WL 401693, at *3; Duffy, *supra* note 26, at 6.

33. Troshak v. Terminix Int'l Co., L.P., No. CIV.A.98-1727, 1998 WL 401693, at *3 (E.D. Pa. July 2, 1998); Duffy, *supra* note 26, at 6.

34. *Troshak*, 1998 WL 401693, at *4.

35. *Id.* at *3–4; *see also* Apicella v. Valley Forge Military Acad. & Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985) (stating that Pennsylvania law prevents parents from releasing claims of minors); Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 143

court found that a child could not be bound by his parents to arbitrate personal injury claims when the minor had the right to file claims in court.[36] The court stated:

> If a parent cannot prospectively release the potential [tort] claims of a minor child, then a parent does not have authority to bind a minor child to an arbitration provision that requires the minor to waive their right to have potential claims for personal injury filed in a court of law.[37]

In *Accomazzo v. CEDU Educational Services, Inc.*,[38] a child was enrolled in a private educational program for juveniles with emotional, behavioral, and academic difficulties.[39] The enrollment contract signed by the child's parents included an arbitration provision that required all disputes arising from the agreement to be submitted to binding arbitration.[40] When the child was injured in a physical confrontation with one of the school's counselors during a counseling session,[41] the minor's parents brought claims of battery, negligence, and violation of state laws protecting children.[42] The school moved to stay litigation and bind the child to the arbitration provision signed by his parents, but the motion was denied by the district court.[43] In affirming the district court's ruling, the Supreme Court of Idaho ruled that the minor was not bound to the arbitration provision based on the language in the contract.[44]

In *Fleetwood Enterprises, Inc. v. Gaskamp*,[45] a child living in her family's new mobile home began to suffer from breathing difficulties and had to be hospitalized because of a respiratory disease caused by exposure to for-

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(E.D. Pa. 1987) (stating that a release signed by parent does not protect defendant from minor's cause of action).

36. *Troshak*, 1998 WL 401693, at *4.

37. *Id.*

38. 15 P.3d 1153 (Idaho 2000).

39. *Id.* at 1154.

40. *Id.* at 1155.

41. *Id.* at 1156.

42. *Id.* at 1155. The Accomazzos also brought causes of action for breach of contract, common law fraud, violation of Idaho's Consumer Protection Act, and negligence. *Accomazzo*, 15 P.3d at 1155.

43. *Id.*

44. *Id.* at 1156. Although the court held that the child was not compelled to arbitrate, the Accomazzo parents were bound to arbitrate the battery, negligence, and state children's protection claims because the waiver was considered and consented to by the parents and CEDU Educational Services when the contract was signed. *Id.*

45. 280 F.3d 1069 (5th Cir. 2002).

maldehyde.[46] The parents brought personal injury claims on behalf of their children against the manufacturer of the home, the home seller, the manufacturer of particles in the home, and the financing company.[47] Two defendants responded by moving to compel arbitration against the entire Gaskamp family because the parents had signed a contract containing an arbitration provision that "knowingly and voluntarily" waived the family's right to a jury trial.[48] Although the children did not sign the agreement, and the Gaskamp parents did not expressly agree to submit their children's claims to arbitration,[49] the district court ruled that the children were bound to settle their claims out of court because the children's use of the mobile home derived from the parents' use of the property.[50] The Gaskamps appealed.[51]

Like the federal court in *Troshak*, the appellate court in *Fleetwood* had to determine how the state's supreme court would rule on the issue since the matter had never been heard before in Texas.[52] The court applied Texas contract law relating to third-party beneficiaries and non-signatories.[53] Before *Fleetwood*, Texas case law held that non-signatories were bound to arbitrate when the non-signatory party brings suit on the contract and the non-signatory was a third-party beneficiary.[54] After its analysis, however, the *Fleetwood* panel reversed the district court's ruling and found that the chil-

46. *Id.* at 1071–72. All of the members of the Gaskamp family—including two other Gaskamp children—suffered health problems from the formaldehyde exposure. *Id.* at 1071.

47. *Id.* at 1072. The Gaskamps filed suit in Mississippi state court against, respectively, Fleetwood Enterprises, Inc., Manufactured Bargains, Georgia-Pacific Corporation (Georgia-Pacific), and Bombadier Capital. *Id.*

48. *Fleetwood*, 280 F.3d at 1071–72. Fleetwood and Georgia-Pacific filed their motions in the Southern District of Texas. *Id.* The arbitration agreement was part of a financing agreement for the home. *Id.* at 1071.

49. *Id.* at 1074 n.2.

50. *Id.* at 1072–73. The district court did not cite any authority for its rationale and holding. *Fleetwood*, 280 F.3d at 1072–73.

51. *Id.* at 1071. In addition to arguing that their children were not bound to arbitrate, the Gaskamps also asserted that the arbitration agreement should be declared void because of procedural unconscionability. *Id.*

52. *Id.* at 1076.

53. *Id.* at 1074; Bagot & Henderson, *supra* note 2, at 432. Third-party beneficiaries are not parties to contracts, but still benefit from the promises made in the contracts. BLACK'S LAW DICTIONARY 1480 (6th ed. 1990). A non-signatory is a party who does not personally sign a contract or agree to the document through an agent. *Contra id.* at 1381. Nevertheless, a non-signatory becomes a party to the contract. *Id.*

54. Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1074 (5th Cir. 2002). Under the common law of contracts and agency—which the appellate court considered in its analysis—there are seven general exceptions providing a basis to bind non-signatories to arbitration agreements: agency, assumption/implied conduct, alter ego/veil piercing, assumption, estoppel, incorporation by references, successor in interest, and third-party beneficiaries. *Id.* at 1076; 1 DOMKE & WILNER, *supra* note 23; Bagot & Henderson, *supra* note 2, at 436.

dren were not compelled to arbitrate their causes of action "simply because they are minors and their claims are related to those of their parents."[55] In addition, because the children did not sign and were not bound to the agreement, they were incidental—not third-party—beneficiaries, and their cause of action was based in tort, not on the contract.[56]

B. *Children Can be Bound to Arbitrate Claims*

There is a split within the Fifth Circuit regarding a parent's ability to bind children to arbitration to settle their personal injury claims.[57] The parents in *Costanza v. Allstate Insurance Co.*[58] brought claims against various businesses and organizations for the personal injuries their children suffered when water leaked into their home.[59] In response, two defendants moved to compel arbitration for the family's claims based on the arbitration agreement signed by the parents.[60] Relying on *Fleetwood*, the parents claimed that their children should not have their claims settled by arbitration because the minors were not third party beneficiaries or bringing a cause of action on the contract.[61] The district court held that the children could seek personal injury claims as it related to the homebuilder's contract and the other contracts at bar because the children were not enforcing the provisions of these agreements nor were they third-party beneficiaries.[62] However, the *Costanza* panel held that the children were bound to arbitrate their claims pursuant to the arbitration clause of the limited warranty agreement because the court reasoned that the children were pursuing claims under the contract, not in

55. *Fleetwood*, 280 F.3d at 1076.

56. *Id.* at 1077; *e.g.*, 1 DOMKE, *supra* note 23; 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 12:9 (rev. ed. 2003); *see Children not Bound by Parents' Agreement to Arbitrate*, 13 WORLD ARB. & MEDIATION REP. 207, 208 (2002). The Gaskamp parents, however, were still bound to arbitrate their claims because, as contract signatories, they did not raise any valid defenses against the arbitration provisions. *Fleetwood*, 280 F.3d at 1077.

57. *See* Doug Uloth & Hamilton Rial, *Enforcing Arbitration Against Nonsignatories*, 65 TEX. B.J. 802, 806–07 (2002).

58. No. CIV.A.02-1492, 2002 WL 31528447, at *1 (E.D. La. Nov. 12, 2002).

59. *Id.* The Costanzas filed claims against the manufacturer who designed the exterior insulation and finish system for their house, the homebuilder, the installer of the system, Allstate Insurance, the Residential Warranty Corporation (RWC), the Western Pacific Mutual Insurance Company (WPIC), and the Federal Emergency Management Agency (FEMA). *Id.*

60. *Id.* at *1–2. RWC and WPIC moved to stay the proceedings after the Costanza parents had signed an application for a limited warranty that included a binding arbitration clause. *Id.*

61. *Costanza*, 2002 WL 31528447, at *6 (relying on *Fleetwood*, 280 F.3d at 1073).

62. *Id.* at *7.

tort.[63] In staying the children's proceedings, the court stated that the children "cannot avail themselves of the benefits of the contract and not be bound by its restrictions."[64]

Although a personal injury claim was not involved, the issue of whether a child was bound to an arbitration agreement over other tortious acts was raised in *Cross v. Carnes*.[65] In *Cross*, the minor first brought defamation and fraudulent concealment claims against the "Sally Jessy Raphael" television program.[66] The show moved to stay proceedings pending arbitration based on a release and consent form containing an arbitration provision the mother had signed on her daughter's behalf.[67] The arbitration clause stated that the minor would arbitrate any controversy arising from the show's consent and release form or her appearance on the program.[68] The trial court stayed the proceedings, and Cross appealed.[69] Ohio's Eleventh District Court of Appeals affirmed the ruling, basing its rationale on cases in other jurisdictions where parents could bind their children's claims to arbitration.[70] The court also relied on a ruling made by the Supreme Court of Ohio, which held that

63. *Id.*

64. *Id.*

65. 724 N.E.2d 828 (Ohio 11th Ct. App. 1998).

66. *Id.* at 830. Heather Cross's (Heather) claim was brought in Ohio by and through her mother Karen Cross (Cross) after Heather appeared on an episode entitled "Teen Girl Bullies." *Id.* at 830–31. The Crosses allege that the theme of the program was fraudulently concealed from them. *Id.* As part of the episode, Patti and Corinna Carnes falsely portrayed Heather as a bully on national television. *Id.* at 831. Cross amended the complaint to rescind the release and the arbitration clause for a lack of assent. *Cross*, 724 N.E.2d at 831.

67. *Id.*

68. *See id.* The provision read in part: "Any dispute arising out of this RELEASE, and/or of my appearance on SALLY JESSY RAPHAEL™ will be resolved by binding arbitration . . . in New York City and will be governed by the procedural and substantive law of New York." *Id.* In general, tort claims like the one brought in *Cross* are not subject to arbitration because torts typically do not arise out of contract but occur between parties who are not familiar with each other, e.g., automobile accidents. Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 931 (1996). However, *Cross* appears to be an exception to the rule. *See id.* at 932. It also appears that the producers of "Sally Jesse Raphael" anticipated tortious conduct in *Cross* and included the arbitration agreement in the contract in order to reduce any potential liability. *See id.* Although the language of the arbitration provision in *Cross* was broad, Cross's tort claim was arbitrable because the claim was related to the subject matter of the show contract. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967); 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:31 (4th ed. 2001).

69. Cross v. Carnes, 724 N.E.2d 828, 832 (Ohio 11th Ct. App. 1998).

70. *Id.* at 836; *see also* Doyle v. Giulucci, 401 P.2d 1, 3 (Cal. 1965).

parents could bind their children to exculpatory agreements to participate in nonprofit sports activities.[71] In its holding, the court stated:

> The parent's consent and release to arbitration only specifies the forum for resolution of the child's claim; it does not extinguish the claim. Logically, if a parent has the authority to bring and conduct a lawsuit on behalf of the child, he or she has the same authority to choose arbitration as the litigation forum.[72]

The analyses applied and conclusions reached by the respective courts in the previous cases further illustrate the split involving binding arbitration and children's personal injury claims. In determining if parents can bind children to arbitration provisions, the courts will either apply a strict contract analysis or a public policy analysis based on the parent-child relationship.[73] The courts' rationales in *Accomazzo, Fleetwood*, and *Costanza* predominantly focused on the application of ordinary principles of state contract law, instead of the ability of a parent to waive a minor's right to bring a cause of action when that child suffers a personal injury.[74] Despite applying like analyses, the courts reached different conclusions.[75]

In assessing the validity of the arbitration agreements in their respective cases, the courts in *Troshak* and *Cross* both focused on the authority of parents to release the potential claims of their children.[76] However, the respective holdings in these cases stand in sharp contrast and reveal differing views concerning arbitration agreements. The *Troshak* court viewed the arbitration provision as a substantive release of liability, while the court in *Cross* reasoned that the arbitration agreement was merely a procedural matter.[77] In validating the arbitration provision for possible tortious conduct, the court's holding in *Cross* implies that minors still have an opportunity to seek relief if

71. *Cross*, 724 N.E.2d at 836 (citing Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 205 (Ohio 1998)).

72. *Id.*

73. *See* Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1074 (5th Cir. 2002); Costanza v. Allstate Ins. Co., No. CIV.A.02-1492, 2002 WL 31528447, at *6–7 (E.D. La. Nov. 12, 2002); Troshak v. Terminix Int'l Corp., No. CIV.A.98-1727, 1998 WL 401963, at *4 (E.D. Pa. July 2, 1998); Accomazzo v. CEDU Educ. Servs., 15 P.3d 1153, 1156 (Idaho 2000); *Cross*, 724 N.E.2d at 836.

74. *See Accomazzo*, 15 P.3d at 1156; *Fleetwood*, 280 F.3d at 1074; *Costanza*, 2002 WL 31528447, at *6–7.

75. *See Accomazzo*, 15 P.3d at 1156; *Fleetwood*, 280 F.3d at 1074; *Costanza*, 2002 WL 31528447, at *7.

76. *See Troshak*, 1998 WL 401693, at *4; *Cross*, 724 N.E.2d at 836.

77. *Troshak*, 1998 WL 401963, at *5–6; *Cross*, 724 N.E.2d at 836; Appellee's Answer Brief at 8, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

they are injured.[78] Until additional cases that directly address this issue become commonplace, other forums will have to determine what analyses to apply and conclusions to reach on a case-by-case basis.[79]

III. A FACTUAL AND PROCEDURAL BACKGROUND OF *SHEA*

Before falling asleep on the night of July 19, 2000, Garrit Shea ("Garrit") thanked his mother Molly Bruce Jacobs ("Jacobs") for taking him on an African safari to Botswana and Zimbabwe.[80] The expedition was organized by Global Marketing Travel ("Global"), a Fort Lauderdale-based corporation conducting business and offering tours for more than fifteen years as the Africa Adventure Company.[81] "I can't wait until tomorrow," Garrit said.[82]

Tomorrow would be a day that was supposed to be the highlight of Garrit's twenty-five day safari, which was Garrit's second African expedition.[83] The eleven-year-old boy from the Baltimore suburbs with a keen interest in the animal kingdom was back in the African bush and coming into contact with the wildlife he had grown to know, love, and respect.[84] The straight-A student, aspiring hockey goalie, and "gentle spirit"[85] also grew to appreciate the diverse cultures of the bushmen, who he had traveled with on hunting outings and danced with in their villages.[86]

Tomorrow never came for Garrit. While he slept alone in his tent on the perimeter of the Xakanaxa Campsite in Botswana's Okavango Delta on that fateful night, a pack of hyenas entered Garrit's tent, mauled him, and

78. *See* Schalley, *supra* note 1, at 202.

79. *See Fleetwood Enter., Inc.*, 280 F.3d at 1076.

80. Brucie Jacobs, *My Son Garrit, 'Little Bum' Tribute*, BALT. SUN, Sept. 17, 2000, at 1H, *available at* http://www.sunspot.net.

81. Noah Bierman & Scott Hutchinson, *Broward Firm Faces Suit in Safari Death of Boy, 11*, MIAMI HERALD, Apr. 24, 2003, at 2B; Rafael A. Olmeda, *Court Lets Suit Against Travel Firm Go Ahead*, SUN-SENTINEL, Apr. 24, 2003, at 4B; Cunningham, *supra* note 7.

82. Jacobs, *supra* note 80.

83. *See* Lynn Anderson & Tom Bowman, *Brooklandville Boy Killed in Hyena Attack in Botswana*, BALT. SUN, July 20, 2000, at 24B, *available at* http://www.sunspot.net; Jacobs, *supra* note 80; Bierman & Hutchinson, *supra* note 81. Garrit had made his first safari to Botswana with Jacobs and his older brother in 1999. *Id.* Garrit's father, Mark Shea, who is divorced from Jacobs, did not go on the expeditions in 1999 or 2000. *Id.*

84. *See* Jacobs, *supra* note 80; Ann LoLordo, *Mark Garrity Shea, 11, Loved Science, Sports*, BALT. SUN, July 24, 2000, at 4B, *available at* http://www.sunspot.net. Garrit was from Brooklandville, Maryland, and owned dogs, cats, birds, a rooster, hens, lizards, and emus. *Id.*; Anderson & Bowman, *supra* note 83. He collected an elephant tusk, a whale tooth, and a bear claw during the family's various trips across the United States and to Africa, Australia, the Caribbean, and Mexico. *Id.*

85. LoLordo, *supra* note 84 (quoting Garrit's great aunt Rachel Garrity).

86. *See* Jacobs, *supra* note 80.

dragged him into the bush.[87] Garrit's mother and the tour guides heard his screams, but they were too late to stop the attack and were not able to search out Garrit in the darkness.[88] His mother and the guides did not find Garrit until they discovered his body near the tour campsite the following day.[89] Garrit had been decapitated.[90]

Prior to their departure to Africa, Jacobs agreed to all of the terms of Global's tour contract so she and Garrit could participate in the safari.[91] The tour contract included a waiver that released Global for any liability that may have occurred during the tour.[92] The release stated in part:

> I HEREBY RELEASE, WAIVE, INDEMNIFY, and AGREE NOT TO SUE THE AFRICA ADVENTURE COMPANY . . . for any and all losses, damages, or injuries or any claim or demand on account of injury or emotional trauma . . . or on account of death resulting from any cause...while the undersigned is participating in a tour or any travel or other arrangements by THE AFRICA ADVENTURE COMPANY . . . .[93]

Pursuant to a provision in the contract, Jacobs also assented that any dispute arising from the agreement would be settled in the following manner:

> Any controversy or claim arising out of or relating to this Agreement, or the making, performance or interpretation thereof, shall be settled by binding arbitration in Fort Lauderdale, FL, in accordance with the rules of the American Arbitration Association then existing, and judgment on the arbitration award may be entered in any court having jurisdiction over the subject matter of the controversy.[94]

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87. *Id.*; Cunningham, *supra* note 7; Bierman & Hutchinson, *supra* note 81.

88. Cunningham, *supra* note 7. Jacobs was in a nearby tent recapping the day's events into a tape recorder when the attack occurred. *Id.*

89. *Id.*

90. *Id.* The legal counsel for Global Travel Marketing/The African Adventure Company said that Garrit's death marked the first time that there had been a fatality on one of the company's tours. Bierman & Hutchinson, *supra* note 81.

91. *Shea I*, 28 Fla. L. Weekly at D2004. The applicable provision of the contract reads: "I, as parent or legal guardian of the below named minor, hereby give my permission for this child or legal ward to participate in the trip and further agree, individually and on behalf of my child or ward, to the terms of the above." *Id.* at D2005.

92. *Id.* at D2004.

93. *Id.*

94. Appellant's Brief at 5, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

In 2001, Mark Shea ("Shea")—Garrit's father—brought suit against Global as the personal representative of Garrit's estate, alleging that the company's negligence led to his son's death.[95] He attempted to recover damages for pain and suffering under the Florida Wrongful Death Act,[96] which is intended to shift the losses resulting from an individual's untimely demise from the decedent's survivors to the liable party.[97] Global moved to stay proceedings pending arbitration pursuant to the tour contract.[98] Shea countered Global's motion on grounds that Jacobs did not have the legal authority to waive her son's right to a jury trial via the arbitration provision, and that Garrit and Shea were not parties to the agreement.[99] The trial court ruled that Garrit could be bound to the arbitration clause because parents have the right to choose the forum for their children's claims, and Florida and federal law favor arbitration.[100] Since Shea brought suit on behalf of Garrit's estate, he was also bound to the provision.[101] Shea appealed.[102]

95. Cunningham, *supra* note 7; Bierman & Hutchinson, *supra* note 81. Shea alleged that Garrit should not have been allowed to sleep alone in the tent, the tent was not properly secured, the tour guides did not check to see if the tent was made safe by the tent's dual zipper mechanism, and that a buildup of garbage on the perimeter of the camp attracted the hyenas. *See id.*; Cunningham, *supra* note 7. Shea argued that the failure to take these precautions led to Garrit's death. *E.g.*, *Shea I*, 28 Fla. L. Weekly at D2004.

96. *Shea I*, 28 Fla. L. Weekly at D2004; FLA. STAT. § 768.16-.27 (2002). A parent or parents of a deceased child can recover for mental pain and suffering when the minor's injury occurs. § 768.21(4). Jacobs also attempted to file a wrongful death suit against Global, but the Fourth District Court of Appeal affirmed the trial court's ruling holding that Jacobs had to arbitrate her claims against Global. *See Shea I*, 28 Fla. L. Weekly at D2004; Jacobs v. Global Travel Mktg., Inc., 796 So. 2d 1183 (Fla. 4th Dist. Ct. App. 2001); Cunningham, *supra* note 7. Jacobs is currently in arbitration with Global. Bierman & Hutchinson, *supra* note 81.

97. § 768.17.

98. Shea v. Global Travel Mktg., Inc., No. 01-10128, 2002 WL 215330, at *1 (Fla. 17th Cir. Ct. Feb. 5, 2002) [hereinafter *Shea III*]. Global made an alternative motion to dismiss the case pursuant to the arbitration agreement. *Id.*

99. *Id.*

100. *See id.* at *4.

101. *Id.* at *5. Shea argued that he should not have been bound to the agreement because he did not sign the release. *Shea III*, 2002 WL 215330, at *5. The trial court agreed. *See id.* However, the court reasoned that since Shea did not bring a cause of action in an individual capacity, the trial court found that Shea "stood" in Garrit's shoes by bringing suit on behalf of Garrit's estate. *Id.* Therefore, since Garrit was bound to the arbitration provision, the estate's personal representative was also bound. *Id.*

102. *Shea I*, 28 Fla. L. Weekly at D2004.

IV. THE FOURTH DISTRICT COURT OF APPEAL'S ANALYSIS IN *SHEA*: PUBLIC POLICY AND *PARENS PATRIAE*

Since arbitration is strictly a creature of contract,[103] the *Shea* court applied Florida contract law to assess the arbitration agreement.[104] The court addressed the validity of the provision in *Shea* by focusing its analysis on the public policy concerns of parents contracting for their children.[105] Under Florida law, a contract that violates public policy runs counter to the "public right or the public welfare"[106] or an established societal interest.[107] The court believed that the ability of parents to contract away the potential legal claims of their children under circumstances not supported by public policy—including commercial travel—was not acceptable under Florida law.[108] Per-

103. 1 OEHMKE, *supra* note 2, at § 5:2; McLaughlin, *supra* note 68, at 931; *see also* Accomazzo v. CEDU Educ. Servs., Inc., 15 P.3d 1153, 1155 (Idaho 2000) ("The question of arbitrability is a question of law properly decided by the court.").

104. *Shea I*, 28 Fla. L. Weekly at D2005. Global attempted to persuade the court that Maryland contract law should have been used in the case under the doctrine of *lex loci contractus*. *See* Appellee's Answer Brief at 19–21, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910). *Lex loci contractus* denotes the law of the jurisdiction where the contract was made and also signifies what law governs the contract. BLACK'S LAW DICTIONARY 911 (6th ed. 1990). Global asserted that since Jacobs and Shea were residents of Maryland and all of the material events concerning the tour contract took place in Maryland, that state's law should govern the agreement. *See* Appellee's Answer Brief at 20–21, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910). The appellate court rejected Global's claims because Global never made the argument at trial. *Shea I*, 28 Fla. L. Weekly at D2004; *see* Appellant's Reply Brief at 1, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910).

105. *Shea I*, 28 Fla. L. Weekly at D2005. The substantive definition of public policy was first outlined in *City of Leesburg v. Ware*, 153 So. 87, 89 (Fla. 1934) (adopting the opinion of Wannamaker, J., in Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney, 115 N.E. 505, 506–07 (Ohio 1916)). Under Florida law, public policy is the common sensibility and conscience of communities across the state as it pertains to matters of health, safety, welfare, and morals. *Ware*, 153 So. at 89 (adopting *Kinney*, 115 N.E. at 507).

106. Atl. Coast Line R.R. Co. v. Beazley, 45 So. 761, 774 (Fla. 1907). Ironically, the court in *Atlantic Coast Line Railroad Co.* held that contracts that are violative of public policy "encourages negligence . . . it would have a tendency to induce the employment of men less prudent and careful, which would tend to endanger the lives of travelers." *Id.*

107. *Ware*, 153 So. at 89 (adopting *Kinney*, 115 N.E. at 507).

108. *Shea I*, 28 Fla. L. Weekly at D2006. The court recognized that health care, health insurance, and "commonplace" or "school supported" activities as the types of functions where parental waivers would be supported by public policy. *Id.* The court ruled that "[w]e need not decide, here, what additional circumstances would support such a waiver." *Id.* However, the *Shea* panel, basing its reasoning on *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998), also found that "non-profit entities, their employees and volunteers do not fall within the ambit of this opinion" because of the benefits those organizations and individuals provide to children. *Shea I*, 28 Fla. L. Weekly at D2004. In *Zivich*, the Supreme Court of Ohio validated the use of exculpatory agreements for "community recreational activi-

mitting parental waivers in these circumstances, the court reasoned, would defy public policy because minors would not have an opportunity to seek legal relief.[109]

In reaching its conclusion, the *Shea* court's public policy analysis of the arbitration provision and application of *parens patriae* relied on holdings from other jurisdictions assessing the validity of parental waivers binding children to exculpatory agreements.[110] The panel followed the reasoning of *Cooper v. Aspen Skiing Co.*,[111] where the Supreme Court of Colorado held that the state's public policy prevented parents from releasing their children's potential claims either before or after suffering a personal injury via an exculpatory agreement.[112] The court in *Cooper* stated: "children still must be protected against parental actions—perhaps rash and imprudent ones—that foreclose all of the minor's potential claims for injuries caused by another's negligence."[113] The Fourth District Court of Appeal was persuaded by the Supreme Court of Colorado's "overarching policy"[114] that protected minors regardless of the actions of their parents.[115]

Adopting the reasoning in *Cooper*, the panel then relied on Florida statutory law and state case law.[116] The statutory basis for the court's ruling focused on state law that prohibited parents, as the natural guardians of their children,[117] from binding their children to settle claims over $15,000.[118] The

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ties" since they "serve an important function" for children and the community. *Zivich*, 696 N.E.2d at 205.

109. *See* Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 12 (Wash. 1992) (stating that "the child would have no recourse against a negligent party to acquire resources needed for care and this is true regardless of when relinquishment of the child's rights might occur."); *Shea I*, 28 Fla. L. Weekly at D2005.

110. *See id.* at D2005–06.

111. 48 P.3d 1229 (Colo. 2002).

112. *Id.*; *accord Scott*, 48 P.3d at 11–12; Hawkins v. Peart, 37 P.3d 1062, 1066 (Utah 2001). In *Cooper*, a minor lost vision in both eyes when he was injured in a skiing accident. *Cooper*, 48 P.3d at 1232. Before the Supreme Court of Colorado's ruling in the case, the trial and appellate courts both held that the teenager could not bring action against his coach and the Aspen Ski club for his injuries because of a release signed by the child's mother. *Id.* at 1231–32.

113. *Cooper*, 48 P.3d at 1234.

114. *Id.*

115. *See Shea I*, 28 Fla. L. Weekly at D2005.

116. *Id.*

117. *Id.* Section 744.301(1) of the 2002 *Florida Statutes* states, "[t]he mother and father jointly are natural guardians of their own children and of their natural guardians of their own children and of their adopted children, during minority." FLA. STAT. § 744.301(1) (2002).

118. *Shea I*, 28 Fla. L. Weekly at D2004. Section 744.387(2) of the *Florida Statutes* requires the court to appoint a legal guardian to a minor when the child's settlement claim will

panel also based their rationale on Florida cases holding that parents could not release their child's ability to file compulsory counterclaims,[119] waive their child's privilege concerning patient-psychotherapist confidentiality,[120] and enter into private agreements for child support and custody absent court approval.[121] Interestingly, the panel did not provide great explanation or analysis on another Florida case that it relied upon that shared similarities with *Shea*.[122] In *Dilallo v. Riding Safely, Inc.*,[123] the court held that a child who had been injured while horseback riding could file a cause of action against the defendant for its negligence although the minor had signed a release of liability.[124] Public policy, the *Dilallo* court reasoned, prevented children from being bound to contractual pre-injury waivers signed by minors and also allowed children to pursue legal claims.[125]

V. THE *SHEA* COURT'S RULING WAS PROPER UNDER PUBLIC POLICY AND *PARENS PATRIAE*

The ruling in *Shea* has drawn criticism on some fronts as being inappropriate, impractical—and unconstitutional[126]—intermeddling into parents' decision-making and authority.[127] Detractors may assert that the verdict reflects the court's distrust for parental discretion.[128] However, "[p]ublic pol-

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exceed $15,000. § 744.301(2)-(3). If the settlement amount is less than $15,000, then the child is bound to the settlement amount negotiated by the child's parents. *Id.*

119. *See* Romish v. Albo, 291 So. 2d 24, 25 (Fla. 3d Dist. Ct. App. 1974).

120. *See* Attorney ad Litem for D.K. v. Parents of D.K., 780 So. 2d 301, 308 (Fla. 4th Dist. Ct. App. 2001) (holding that a seventeen-year-old girl had patient-psychotherapist privilege that could not be waived or asserted by parents).

121. *Shea I*, 28 Fla. L. Weekly at D2005; *see also* Gammon v. Cobb, 335 So. 2d 261, 267 (Fla. 1976) (holding that an illegitimate minor's right to child support cannot be released by mother's contract because the child's rights and benefits are affected).

122. Like *Shea*, the case of *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353, 356 (Fla. 4th Dist. Ct. App. 1997) was also a case of first impression in Florida and was heard by the Fourth District Court of Appeal. *Id.*

123. *Id.*

124. *Id.* at 357.

125. *See id.*

126. Appellee's Answer Brief at 24, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910). On appeal, Global argued that the "fundamental due process rights to raise and control their children" were at issue in *Shea*. *Id.* Global asserted that a parent's right included the ability to choose the activities for their children, "whether it be participating on a soccer team or traveling on an African safari." *Id.* at 26. Agreeing to arbitrate or release a minor's claims, Global claimed, were the rights parents "*must* have" to raise their children. *See id.*

127. Cunningham, *supra* note 7.

128. *See* Brian A. Dominic, Note, *The Children [and the Timorous May] Stay At Home:* Hawkins v. Peart, 2002 UTAH L. REV. 601, 618.

icy is the cornerstone—the foundation—of all constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them."[129] The primary principle of public policy is justice.[130]

When a parent agrees to arbitrate the personal injury claims suffered by their children and deprive the minor of the right to a jury trial—or in *Shea*, the estate of a child to seek legal relief—when the child is injured as a result of another party's tortious act or negligence, there is an injustice.[131] The parents are allowing a liable party to escape any harsh repercussions from their tortious or negligent actions.[132] Regardless of their intentions and motivations,[133] when a parent forecloses his or her child's right to recover[134] "carte blanche,"[135] the need for commercial enterprises to adhere to the reasonable standard of care loses its significance.[136] After the court's ruling in *Shea*, however, businesses in Florida will not be able to use arbitration agreements to prevent juries from hearing the personal injury claims brought by minors.[137] Commercial enterprises will also be more vigilant to prevent children from being injured as a result of the company's negligence.[138]

Parents often have to decide whether to release their child's claims against potential tortfeasors and other negligent parties.[139] However, parents may not fully understand the significance or the legal repercussions for their children when parents—including parents who are also attorneys[140]—bind minors to arbitrate potential causes of action.[141] Parents must address the

129. City of Leesburg v. Ware, 153 So. 87, 89–90 (Fla. 1934) (adopting and quoting opinion from Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney, 115 N.E. 505, 506–07 (Ohio 1916)).

130. *See Ware*, 153 So. 87 at 89.

131. *See* Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1237 (Colo. 2002); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 9 (Wash. 1992).

132. *See Cooper*, 48 P.3d at 1237.

133. Angeline Purdy, Note, Scott v. Pacific West Mountain Resort: *Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 WASH. L. REV. 457, 474 (1993) (criticizing the Supreme Court of Washington's ruling in Scott v. Pac. W. Mountain Resort, 834 P.2d 6 (Wash. 1992)).

134. Hawkins v. Peart, 37 P.3d 1062, 1066 (Utah 2001).

135. *Shea I*, 28 Fla. L. Weekly at D2006.

136. *Hawkins*, 37 P.3d at 1066.

137. *See* Olmeda, *supra* note 81.

138. *See* Stephanie Francis Cahill, *No Signing Safety Away*, A.B.A. J. E-REPORT, July 12, 2002, *available at* 2002 WL 1 No. 26 ABAJEREP 3.

139. *See Cooper*, 48 P.3d at 1234; Cahill, *supra* note 138.

140. *See* Bierman & Hutchinson, *supra* note 81. Garrit's mother Molly Bruce Jacobs is an attorney. *Id.*

141. *See* Cahill, *supra* note 138; Andrew Murr, *Sports Waivers: An Exercise in Futility?*, 31 J.L. & EDUC. 114, 120 (2002).

repercussions of signing parental agreements, conferring arbitration provisions on a daily basis.[142] A parent's decision to release the tortfeasor of liability undermines the parent's responsibility to protect the welfare of his or her child.[143] Children need to be shielded from the sometimes unsophisticated and naive decisions made by their parents.[144] The state has an obligation to care and protect the interests of minors,[145] and the courts zealously have to assert their role under *parens patriae* to ensure the welfare of children.[146] As illustrated by its reliance on statutory and case law favoring the protection of children,[147] the *Shea* panel properly recognized and invoked its paramount rights under *parens patriae*.[148]

Before their children can participate in athletic activities, school clubs, and community organizations, parents are generally required to waive their child's legal right to seek relief.[149] A majority of jurisdictions hold that parental waivers for these activities are not valid without prior judicial or statutory approval[150] and are violative of public policy.[151] However, when the detriments of parental waivers containing arbitration provisions for commonplace children's activities are balanced with the social benefits of participation in these functions, "[p]ublic policy does not forbid such an agreement. In fact, public policy supports it."[152] The courts and legislatures may prohibit exculpatory agreements in common children's activities, but parental waivers for child-oriented activities promote public policy.[153] There is a

142. Stephanie Levy, *Parent Cannot Contract Away Child's Right to Sue*, TRIAL, Feb. 2002, at 97 (discussing Hawkins v. Peart, 37 P.3d 1062, 1062 (Utah 2001).

143. Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1237 (Colo. 2002); *Hawkins*, 37 P.3d at 1067.

144. *Contra* Robert S. Nelson, Comment, *The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive Their Children's Tort Liability Claims*, 36 U.S.F. L. REV. 535, 568 (2002).

145. *See* Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992); *Cooper*, 48 P.3d at 1234.

146. *See* McLaughlin, *supra* note 68, at 930.

147. *See Shea I*, 28 Fla. L. Weekly at D2005.

148. *See* Appellant's Brief at 15, *Shea II*, 28 Fla. L. Weekly at D1009 (No. 4D02-910) (citing Hancock v. Dupree, 129 So. 822, 823 (Fla. 1930) (holding that "[t]he court, when asked to restore an infant, is not bound by any mere legal right of parent or guardian, but is to give it due weight as a claim founded on human nature, and generally equitable and just")).

149. *See* Schalley, *supra* note 1, at 200; Nelson, *supra* note 144, at 560; Melinda Smith, Note, *Tort Immunity for Volunteers in Ohio:* Zivich v. Mentor Soccer Club, Inc., 32 AKRON L. REV. 699, 714 (1999).

150. *Id.* at 714–15.

151. Murr, *supra* note 141, at 114.

152. Nelson, *supra* note 144, at 560 (quoting Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 207 (Ohio 1998)).

153. *See* Murr, *supra* note 141, at 117.

need for recreational activities for children[154] because minors benefit from participating in organizations and functions that are conducted by schools, volunteers, and parents.[155] Although minors voluntarily give up their right to seek legal relief, community and school oriented activities provide children with the opportunity to learn life skills and team building skills.[156] In turn, the community at large benefits because community organizations, athletic associations, and school-sponsored clubs can continue to operate and provide opportunities for children.[157]

However, there are possible concerns relating to the *Shea* court's validation of parental waivers with arbitration provisions for children's community activities. Validating parental waivers for school-related functions and organized sports leagues could cause youth organizations to lower the standard of care that ensures the safety of minors because these entities can escape potential liability.[158] Allowing these organizations to avoid possible liability contravenes public policy because children could be subjected to unnecessary hazards produced by negligent actions and a lack of accountability.[159] The issue of parental waivers with arbitration clauses for children's activities and the potential drop in the standard of care by youth organizations is a topic that will have to be monitored by the courts. Until then, however, "[e]very learning experience involves risk."[160]

VI. INADEQUACIES OF THE COURT'S RULING IN *SHEA*

Like the panel in *Shea*, courts routinely apply public policy as the foundation for their holdings when there is not a statutory or constitutional basis for their decisions.[161] Since *Shea* was a case of first impression, the Fourth

154. Purdy, *supra* note 133, at 475.

155. Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (4th Ct. App. 1990); *Zivich*, 696 N.E.2d at 205. In *Hohe*, a fifteen-year-old girl was injured when she volunteered to participate in a hypnotism show sponsored by her school's parent-teacher-student association. *Hohe*, 274 Cal. Rptr. at 648. Although the minor and her father had signed a waiver form as a condition to her participation in the show, the father still attempted to hold the school, the association, and the school district liable for her injuries. *Id.* However, the appellate court ruled that the release was not void against public policy. *Id.* at 649. For a summary of *Zivich*, *see* 696 N.E.2d at 205.

156. *See Hohe*, 274 Cal. Rptr. at 649; *Zivich*, 696 N.E.2d at 205.

157. *Hohe*, 274 Cal. Rptr. at 649; *Zivich*, 696 N.E.2d at 205.

158. Mark Seiberling, Note, *Icing on the Cake: Allowing Amateur Athletic Promoters to Escape Liability in* Mohney v. USA Hockey, Inc., 9 VILL. SPORTS & ENT. L.J. 417, 418 (2002). *Contra* Purdy, *supra* note 133, at 475–76.

159. *See* Seiberling, *supra* note 158, at 417–18, 448.

160. *Hohe*, 274 Cal. Rptr. at 649.

161. Purdy, *supra* note 133, at 464.

District Court of Appeal's public policy decision will now serve as the source for other similar rulings in the state unless the Supreme Court of Florida decides to hear the case as a matter of great public importance and render an opinion.[162] Since the value of public policy is a variable concept,[163] a court has a duty to clearly assert the principles that underlie its decision to ensure that future rulings will remain consistent.[164] Verdicts that lack conviction or are vague make it difficult to apply and gauge legal standards.[165]

The *Shea* panel articulated its public policy rationale as it related to parents contracting on behalf of their children.[166] However, in applying its public policy rationale, the court was ambiguous in some portions of its legal analysis. Specifically, the court was silent—or was not clear—on the standard used to gauge the arbitration provision in *Shea*.[167] If the Federal Arbitration Act ("FAA")[168] did not apply to the provision, then the Florida Arbitration Code[169] should have governed the agreement.[170] However, the district court did not provide a governing standard of arbitration.

The court was also correct in its validation of parental waivers for "commonplace child oriented . . . or school supported activities."[171] However, the Fourth District Court of Appeal did not specify what activities would fall under the ambit of the panel's opinion.[172] The lack of clarity used by the *Shea* panel in its rationale has created uncertainty[173] and casts doubt on the legality of the court's verdict.[174] For the sake of legal consistency, the court should have engaged and fully articulated the basis for its ruling.[175]

A. *The Court's Silence on an Arbitration Standard*

The irony of the district court's silence on applying an arbitration standard in *Shea* is that both the Florida Arbitration Code and the FAA were

162. *See id.*
163. City of Leesburg v. Ware, 153 So. 87, 89 (Fla. 1934).
164. Purdy, *supra* note 133, at 465.
165. *See id.*
166. *Shea I*, 28 Fla. L. Weekly at D2006.
167. *See* Cunningham, *supra* note 7.
168. 9 U.S.C. §§ 1-16 (2000).
169. FLA. STAT. § 682.01-.22 (2002).
170. *See* Bagot & Henderson, *supra* note 2, at 427.
171. *Shea I*, 28 Fla. L. Weekly at D2006.
172. *See* Cunningham, *supra* note 7.
173. *Id.*
174. *See* Purdy, *supra* note 133, at 465.
175. *See id.*

applicable.[176] The *Shea* panel stated that Florida law would determine which parties had entered into a valid binding arbitration agreement.[177] Based on the court's language, it would appear that the district court was applying the Florida Arbitration Code[178] to govern the controversy. The Florida Arbitration Code applies to any written agreement or contractual provision between two or more parties where the parties agree to arbitrate any dispute that may arise during their transaction.[179] Agreements under the state's arbitration laws are "valid, enforceable, and irrevocable"[180] unless the parties stipulate that the Florida Arbitration Code will not apply to the dispute,[181] or if the agreement states that arbitration will take place in another jurisdiction.[182]

Jacobs and Global agreed to arbitrate any controversy that arose from the tour contract; the arbitration provision did not expressly state that the Florida Arbitration Code would not apply to the controversy.[183] The provision also stated that arbitration would be held in Fort Lauderdale,[184] which gave the district court jurisdiction under the Florida Arbitration Code.[185] All of these elements allowed the district court to utilize the Florida Arbitration Code in its analysis. However, the court refused or was reluctant to do so.[186] The *Shea* panel's silence on the Florida Arbitration Code indicates that the court did not believe it was necessary to factor in the state's arbitration laws into its analysis or to be clear on its application of relevant state law.

The Florida Arbitration Code was not applied in *Shea* because, *arguendo*, a court's analysis of an arbitration provision and a motion to compel arbitration are the same under Florida law and federal law.[187] In addition,

176. *See also* Cross v. Carnes, 724 N.E.2d 828, 833 (Ohio 11th Ct. App. 1998) (stating that the Ohio arbitration statute and FAA were referable to arbitration action).

177. *Shea I*, 28 Fla. L. Weekly at D2005.

178. FLA. STAT. § 682.01-.22 (2002).

179. § 682.02.

180. *Id.*

181. *Id.*; *see also* Wickes Corp. v. Indus. Fin. Corp., 493 F.2d 1173, 1175 (5th Cir. 1974) (ruling that the Florida Arbitration Code does not apply to contract when parties expressly agree that statute will not be applied).

182. *See* Damora v. Stresscon Int'l, Inc., 324 So. 2d 80, 81–82 (Fla. 1975) (holding that the provision to arbitrate future controversies in New York City did not apply to and was outside the authority of the Florida Arbitration Code).

183. *See* Appellant's Brief at 5, *Shea I*, 28 Fla. L. Weekly at D2006 (No. 4D02-910).

184. *Id.*

185. *See Damora*, 324 So. 2d at 81–82.

186. *Shea I*, 28 Fla. L. Weekly at D2004.

187. Benedict v. Pensacola Motor Sales, Inc., 846 So. 2d 1238, 1241–42 (Fla. 1st Dist. Ct. App. 2003) (citing the Supreme Court of Florida's analysis in Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)). The existence of a valid written arbitration agreement, the existence of arbitrable issues, and the possible waiver of the right to arbitrate are the three factors

since section two of the FAA is applicable in state and federal courts,[188] the FAA preempts Florida law because of the national policy favoring arbitration.[189] The preemptive power of the FAA is limited to maritime transactions and contracts involving interstate commerce.[190] The transaction in *Shea* did involve interstate commerce—Maryland residents entered into the arbitration agreement with a Florida corporation[191] as part of a contract for a safari in two African countries.[192] The elements at bar allowed the district court to utilize the FAA to govern the dispute in *Shea*.[193] However, the *Shea* panel never addressed nor articulated the issue of the applicability of the FAA.[194]

The court's silence or lack of clarity on an arbitration standard carries legal significance because it involves the "severability" of *Shea*'s arbitration provision.[195] When arbitration clauses are governed by the FAA, state courts are allowed to sever the arbitration provision "from the contracts in which they are embedded."[196] However, state courts are only permitted to determine the validity of the arbitration clause but cannot consider the validity of the entire contract.[197] If the district court first decided that the arbitration

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Florida courts use in their analyses of a motion to compel arbitration under the Florida Arbitration Code or the FAA. *Seifert*, 750 So. 2d at 636.

188. *See* Southland Corp. v. Keating, 465 U.S. 1, 14–15 (1984); Bagot & Henderson, *supra* note 2, at 427.

189. *See Keating*, 465 U.S. at 10; Bagot & Henderson, *supra* note 2, at 427.

190. 9 U.S.C. § 2 (2000); Bagot & Henderson, *supra* note 2, at 419–20. Under the FAA, commerce is defined in part as:

> Commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

9 U.S.C. § 1.

191. *Shea III*, 2002 WL 215330, at *2. The tour contract was signed by Jacobs, who also signed the agreement on Garrit's behalf. *Shea I*, 28 Fla. L. Weekly at D2005. Global is a Fort Lauderdale-based corporation. *See id.*

192. Appellee's Answer Brief at 12, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910).

193. *See Shea III*, 2002 WL 215330, at *2. Aside from *Accomazzo v. CEDU Educ. Servs.*, 15 P.3d 1153 (Idaho 2000), all of the other cases involving binding arbitration and the personal injury/tort claims of minors previously discussed in this Note did utilize the FAA. *See* Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002); Costanza v. Allstate Ins. Co., No. CIV.A.02-1492, 2002 WL 31528447, at *1 (E.D. La. Nov. 12, 2002); Troshak v. Terminix Int'l Corp., L.P., No. CIV.A.98-1727, 1998 WL 401963, at *1 (E.D. Pa. July 2, 1998); Cross v. Carnes, 724 N.E.2d 828, 832 (Ohio 11th Ct. App. 1998).

194. *See* Cunningham, *supra* note 7.

195. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–03 (1967). "[T]he question of 'severability' is one of state law . . . ." *Id.* at 403. The Florida Arbitration Code does allow issues subject to arbitration to be severed. FLA. STAT. § 682.03(3) (2002).

196. *Prima Paint Corp.*, 388 U.S. at 402.

197. *Cross*, 724 N.E.2d at 833; *see Prima Paint Corp.*, 388 U.S. at 404.

clause in the tour contract was not valid, it would have been proper for the court to then determine the validity of the entire agreement.[198] The *Shea* panel did not clearly articulate if it was severing the arbitration provision from the rest of the tour contract to determine its validity.[199] Nevertheless, the district court concluded that the arbitration provision was not valid because the contract—i.e., the parental waiver—lacked validity.[200] If the court did apply the FAA to the dispute, did sever the arbitration provision from the tour contract, and found that the arbitration clause was not valid because of the contract's invalidity, then the *Shea* panel contravened precedent.[201]

B. *The Court's Ambiguity Concerning Children's "Commonplace Child Oriented or School Supported Activities"*[202]

The ruling in *Shea* delivers a clear statement that the courts will be vigilant to safeguard the well-being of children.[203] However, aside from parental waivers for medical services and insurance coverage, the district court did not clearly specify other circumstances where judicial vigilance will be present.[204] The panel did allow for waivers for school sponsored and community activities, but it stopped short of articulating what particular functions would be permitted under the court's ruling.[205] The ambiguity of the decision adds to the "confusion and inconsistency that currently plagues"[206] parental waivers and arbitration agreements.[207] The ruling does not provide any guidelines for parental discretion for certain activities,[208] and the legality of parental consent forms containing arbitration provisions for various activities—field trips, scuba diving, camping, horseback riding, and theme parks,[209] for example—will consistently be called into question.[210] This un-

198. *See Cross*, 724 N.E.2d at 835.

199. *See Shea I*, 28 Fla. L. Weekly at D2004. The district court's only detectable analysis of the severability issue concerns its acknowledgement of the trial court's decision to sever the arbitration clause from the parental release. *See id.* at D2005.

200. *See id.* at D2004–05.

201. *See Prima Paint Corp.*, 388 U.S. at 403; *Cross*, 724 N.E.2d at 833.

202. *Shea I*, 28 Fla. L. Weekly at D2006.

203. *See* Sara Hoffman Jurand, *Parent Cannot Sign Away Child's Rights, Colorado Court Rules,* TRIAL, Sept. 2002, at 82 (quoting Howard Davidson, director of the ABA Center on Children and the Law, after the Supreme Court of Colorado's ruling in Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002)).

204. *See* Cunningham, *supra* note 7.

205. *Id.*

206. Nelson, *supra* note 144, at 556.

207. *See id.*

208. Cunningham, *supra* note 7 (quoting family law attorney Richard Milstein).

209. *Id.*; Olmeda, *supra* note 81.

certainty will cause other courts to determine what is a commonplace activity for children,[211] which will create a backlog in the court system.[212]

The lack of clarity concerning children's community oriented and school supported functions also places an undue burden on businesses.[213] Service providers will not be aware or sure of the validity of the waivers and arbitration provisions they require parents to sign in order to avoid any liability.[214] It is fundamentally unfair for businesses not to know if their parental waivers will protect them from potential lawsuits.[215] Some businesses who are unsure about the legality of their exculpatory agreements and arbitration clauses may not allow minors to partake in their activities to avoid the risk of potential litigation.[216] As a result, children will be deprived of "recreational and adventuresome activities"[217] and various industries that cater to minors will suffer.[218]

VII. CONCLUSION

As long as commercial arbitration continues to be a preferred method of settling disputes, cases like *Shea* will undoubtedly become commonplace in Florida and in other jurisdictions. However, the feasibility and appeal of arbitration in Florida will have to be reconsidered in light of the Fourth District Court of Appeal's groundbreaking ruling in *Shea*.[219] Regardless of the enterprise or activity, contracts entered into by parents on behalf of their children that have arbitration provisions now lack validity if *Shea*'s holding remains unscathed.[220] The willingness of the Florida Legislature and judiciary to safeguard the legal interests of the state's children[221] will override the benefits arbitration offers litigants. Public policy and *parens patriae* should be paramount when minors are deprived of their procedural and substantive legal rights—often unknowingly—by their parents.

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210. *Id.*; *see* Cunningham, *supra* note 7.
211. *Id.* (quoting Family Law Attorney Richard Milstein).
212. *Id.* (quoting Rodney Gould, attorney for Global).
213. *See* Nelson, *supra* note 144, at 556.
214. *Id.*
215. *Id.*
216. *See id.*; Purdy, *supra* note 133, at 475; Dominic, *supra* note 128, at 618.
217. Dominic, *supra* note 128, at 619.
218. *See id.*; Cunningham, *supra* note 7.
219. Olmeda, *supra* note 81.
220. *See* discussion *supra* note 12 (discussing *Shea*'s possible legal future).
221. *See* Legal Aid Society of Palm Beach County Inc.'s Brief as *Amicus Curiae* at 4, *Shea I*, 28 Fla. L. Weekly at D2004 (No. 4D02-910) ("Florida state courts have been strong proponents in establishing and protecting children's rights").

Until there is legislative action to amend Florida's existing arbitration laws, public policy and *parens patriae* should be inherent elements of a court's legal analysis when a child's potential causes of action are in question. However, in conducting their analyses, Florida courts, unlike the *Shea* panel, should clearly articulate and assess both the public policy and legal concerns involved.[222] Failing to do so will provide little guidance for courts that will have to address this emerging legal issue. The Supreme Court of Florida will see the need to resolve the issues raised in *Shea*, and in doing so, the court will find that public policy and judicial vigilance for the protection of the state's children will be the overriding factors in affirming the district court's ruling.

222. *See Shea I*, 28 Fla. L. Weekly at D2004.

MAKING THE CASE FOR EFFECTIVE ASSISTANCE OF COUNSEL IN INVOLUNTARY TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

MICHELE R. FORTE*

I. INTRODUCTION

"Termination of parental rights is the 'death penalty' of juvenile law."[1] Terminating a parent's rights effectively severs completely and irrevocably the rights of a parent in his or her natural child.[2] The permanency and completeness of an action to terminate parental rights make it the most severe

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1. Appellant's Initial Brief on the Merits at 3, N.S.H. v. Dep't of Children & Family Servs., 843 So. 2d 898 (Fla. 2003) (No. SC02-261).

2. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

legal intrusion into the sanctity of the family.[3] It constitutes a direct interference by the state into a parent's "essential" right to conceive and raise one's child.[4] Moreover, permanently severing the parent-child relationship has a profound influence on the sociological and psychological well-being of the child involved.[5]

Yet, despite the severe consequences of a termination of parental rights suit, a termination of parental rights proceeding is not a criminal proceeding.[6] For this reason, the absolute constitutional guarantee to court-appointed counsel for indigent criminal defendants[7] is not afforded to indigent parents in termination of parental rights proceedings.[8] Nevertheless, many state courts have broadened the right to counsel on state law grounds, construing similar due process clauses requiring the appointment of counsel in their state constitutions.[9]

In Florida, parents have a statutory right to be represented by counsel in a proceeding dedicated to the termination of parental rights.[10] Given that this right exists, it would naturally follow that a remedy must exist to right violations of this statutory entitlement.[11] Yet, Florida courts have just recently begun to address the specific question of whether the statutory right to appointed counsel in a termination of parental rights proceeding carries an implicit requirement that counsel's assistance be competent and effective. Florida's First District Court of Appeal addressed this precise issue in *L.W. v. Department of Children & Families,*[12] in which it held parents entitled to court-appointed counsel in dependency proceedings are also entitled to com-

3. *See id.* at 759.

4. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This case was the first in which the United States Supreme Court recognized the constitutional right to family relations. *See id.* at 390. In this case the Court struck down a Nebraska law that forbade the teaching of a foreign language to children under the age of fourteen. *See id.* The Court held that the law violated a parent's Fourteenth Amendment right to raise their children. *Id.*

5. *See generally* Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397 (1996).

6. S.B. v. Dep't of Children & Families, 825 So. 2d 1057, 1060 (Fla. 4th Dist. Ct. App. 2002).

7. Gideon v. Wainwright, 372 U.S. 335, 335 (1963).

8. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981).

9. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247, 251 (1997).

10. FLA. STAT. § 39.013(1) (2002).

11. *In re* Isaac Oghenekevebe, 473 S.E.2d 393, 396 (N.C. Ct. App. 1996) (stating that if section 7A-289.23 of the *North Carolina General Statutes*, guarantees a parent right to counsel in termination of parental rights suit there should be a remedy to cure violations of the statute).

12. 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).

petent assistance of counsel.[13] The Fourth District Court of Appeal addressed the same issue in *S.B. v Department of Children & Families*,[14] in which it rejected the courts holding in *L.W.*.[15] The issue of competent counsel in dependency proceedings remained in an indeterminate state until July 10, 2003, when the Supreme Court of Florida reviewed the decision in *S.B.*.

This article will discuss the decisions in *L.W.* and *S.B,* as well as the final ruling on the issue by the Supreme Court of Florida. Furthermore, this article will conclude contrary to the Supreme Court of Florida's conclusion in *S.B.*, as it seeks to substantiate the right of indigent parents to effective assistance of counsel in termination of parental rights proceedings in Florida. In order to do that, this paper will begin by briefly discussing the interests at stake in a termination hearing and the rights that are imperiled as a result of those hearings. Next, there will be a brief discussion of the *Florida Statutes* relating to termination of parental rights proceedings. Subsequently, this article will address the evolution of the right to counsel in Florida. Following, there will be a discussion of the holdings and implications of the appellate courts' decisions in *L.W.* and *S.B.* and the Supreme Court of Florida's recent decision pertaining to the issue. Finally, this article will make a case for competent counsel by addressing the United States Supreme Court's decision in *Lassiter v. Department of Social Services*,[16] the implications and shortcomings of that decision, and the Supreme Court of Florida's decision in *S.B.*.

II. THE INTERESTS AT STAKE IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

A parent's interest in his or her child is a basic right of man,[17] more precious than a property right,[18] warranting deference and protection.[19] Traditionally, the United States Supreme Court has treated issues pertaining to the family with deep respect and integrity, holding the privacy of the family unit sacred.[20] A family has an intrinsic human right to be free from unnecessary

13. *Id.* at 555.
14. 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
15. *Id.* at 1061.
16. 452 U.S. 18 (1981).
17. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
18. May v. Anderson, 345 U.S. 528, 533 (1953).
19. Stanley v. Illinois, 405 U.S. 645, 651 (1972).
20. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (constitutional guarantees of personal privacy extend to family relationships); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (parent's role in child bearing is "basic in the structure of our society"); Moore v. City

state intrusion.[21] A parent's interest in the care and custody of his or her child is superior to that of the state.[22] Yet, a parent's right to raise his or her child freely is not absolute, as it is subject to limitation by the state.[23]

Even though the institution of family is constitutionally protected, the state has the power, under the "*parens patriae*" doctrine,[24] to interfere in the parent-child relationship.[25] *Parens patriae* is founded on the idea that every child's welfare is the concern of the state.[26] Based on this doctrine, the state cannot only infringe upon a parent's fundamental liberty interest, but can destroy a family's structure by terminating a parent's rights completely and irrevocably.[27]

There is often conflict between the constitutional protection of parental decisions regarding families and the state's legitimate interest in protecting their citizens, especially children. In light of this conflict, and because a fundamental right is involved, state termination statutes should be construed in a light most favorable to the parent.[28] However, parental rights are "sub-

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of East Cleveland, 431 U.S. 494, 503 (1977) (family is "deeply rooted in this Nation's history and tradition").

21. *Moore*, 431 U.S. at 498–500 (finding that unlike the property interests that are also protected by the Fourteenth Amendment, liberty interests in family privacy has its source in intrinsic human rights as they have been understood in American tradition).

22. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the right of Amish parents to provide private education oriented to their religious beliefs in spite of a Wisconsin law that required minors to attend high school); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that a law that prohibits instruction of foreign language to children is unconstitutional).

23. *See* Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 216 (1979) [hereinafter *Right to Family Integrity*].

24. "*Parens Patriae*" is Latin for "'parent of his or her country'" and refers traditionally to:

> 1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves. . . . 2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit. . . . The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit. -- Also termed *doctrine of parens patriae.*

BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

25. *Id.*

26. *Right to Family Integrity*, *supra* note 23.

27. Santosky v. Kramer, 455 U.S. 745, 759 (1982).

28. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). Under the strict scrutiny test, a state law impinging on a fundamental right must be justified by a compelling state interest and must be drawn narrowly to limit state intrusion to situations where a compelling state interest exists. *Id*; *see also* Roe v. Wade, 410 U.S. 113, 162–64 (1973) (woman's right to have abortion limited only at point during pregnancy where state interest became compelling); *Yoder*, 406 U.S. at 205 (finding the state interest in compulsory education insuf-

ject to an overriding principle that it is the ultimate welfare or best interest of the child that must prevail."[29] Thus, a termination of parental rights statute should be interpreted so that it affords adequate protection to a parent's constitutional rights while allowing severance of parental rights when the child's interest in stability is paramount.[30]

III. TERMINATION OF PARENTAL RIGHTS IN FLORIDA

Termination of parental rights is the modern statutory legal construct that stems from the common law test that balanced a parent's rights and the role of the state as *parens patriae*.[31] In Florida, termination of parental rights is governed by Chapter 39 of the *Florida Statutes*.[32] Terminating a parent's right involves a two-step process.[33] First, the court must find by clear and convincing evidence that one of the grounds enumerated under section 39.806 of the *Florida Statutes* has been met,[34] and the second step requires a court determination that termination of parental rights would be in the best interest of the child.[35]

Termination of parental rights cases fall under two categories: those in which the court has made a finding of dependency but the parents were provided an opportunity to regain custody through substantial compliance[36] with a case plan,[37] and those situations in which there is no case plan or prospect

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ficiently compelling to justify statute limiting the right to exercise religion and to raise children in a chosen manner). A termination statute was struck down on the ground of vagueness and substantive due process grounds in *Alsager v. District Court of Polk County*, 545 F.2d 1137 (8th Cir. 1976). Again strict scrutiny was applied to a termination statute one year later in *Roe v. Connecticut*, 417 F. Supp. 769 (M.D. Ala. 1976). Again the statute was found to be violative of due process because it did not promote a compelling state interest. *See id.*

29. *In re* J. L. P., 416 So. 2d 1250, 1252 (Fla. 4th Dist. Ct. App. 1982).

30. *See Right to Family Integrity*, *supra* note 23.

31. GILBERT PEREZ, FLORIDA JUVENILE LAW AND PRACTICE § 16.1, at 16-4 (7th ed. 2001).

32. *Id.*

33. *Id.*

34. *Id.* (citing § 39.802(4)(a)).

35. FLA. STAT. §§ 39.810, 39.802(4)(C) (2002); *See* Santosky v. Kramer, 455 U.S. 745 (1982).

36. PEREZ, *supra* note 31, at 16-5. A parent is in "substantial compliance" with a case plan when "the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's . . . being returned to the child's parent." § 39.01(68).

37. A case plan is an agreement between all parties involved in the dependency proceeding that sets forth the actions to be taken by the parents, the Florida Department of Children and Families and other professionals with the objective of rehabilitating the family unit. H. Lila Hubert, *In the Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings*, 49 U. MIAMI L. REV. 531, 546 (1994).

of family reunification.[38] A petition for termination of parental rights is filed without a case plan for reunification if: a parent has voluntarily surrendered the child for adoption, the parents have abandoned the child,[39] a parent's conduct threatens the life, well-being, safety, or physical, mental, or emotional health of the child, the parent is incarcerated;[40] or the parent has engaged in egregious conduct,[41] or had the ability and knowledge to prevent the egregious conduct done to the child.[42] To effectuate a petition for termination of parental rights on this basis, Florida's Department of Children and Families must show that there are no less restrictive means to protect the child.[43]

However, most cases arrive at the termination of parental rights stage following an adjudication of dependency, where "a case plan has been filed, and the child continues to be abused, neglected, or abandoned by the parents."[44] A parent has twelve months from the date that the child was placed into shelter to substantially comply with the case plan.[45] If at the twelve-month judicial review hearing the parents are found not to be within the requisite compliance of the case plan, their parental rights are terminated.[46]

Because of this consequence, which involves the deprivation of certain liberties, the United States Supreme Court has held that due process requires

38. PEREZ, *supra* note 31, at 16-5.

39. Section 39.01(1) of the *Florida Statutes* defines abandonment as "a situation in which the parent . . . while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations." § 39.01(1). A finding of abandonment may be made upon a determination by the court that the parents have only made "marginal efforts that do not evince a settled purpose to assume all parental duties." *Id.*

40. *See* § 39.806(1)(d); L.E. v. Dep't of Children & Family Servs., 783 So. 2d 346 (Fla. 3d Dist. Ct. App. 2001).

41. § 39.806(1)(f). Egregious conduct is defined as "abuse, abandonment, neglect, or any other conduct of the parent: that is deplorable, flagrant, or outrageous by a normal standard of conduct." § 39.806(1)(f)(2).

42. PEREZ, *supra* note 31, at 16-6–16-7. Other circumstances for termination of parental rights without a case plan are: "the parent has subjected the child to aggravated child abuse, sexual battery, or sexual abuse, or chronic abuse; [t]he parent has committed murder, voluntary manslaughter, or felony assault resulting in serious bodily injury to the child or another child, or has aided abetted, attempted, or conspired or solicited to commit any of these acts; [t]he parent has had parental rights to a sibling of the child involuntarily terminated." *Id.*

43. *In re* D.W., 793 So. 2d 39, 40 (Fla. 2d Dist. Ct. App. 2001).

44. PEREZ, *supra* note 31, at 16-7.

45. *Id.* The court can extend the case plan on a finding that the child's situation is "extraordinary" and that the child's best interest will be served in doing so. § 39.703(2). The Department of Children and Families can also terminate parental rights before the expiration of the twelve-month period, if they determine that the parent, while able to do so, has not substantially complied with the case plan. § 39.703(1).

46. PEREZ, *supra* note 31, at 16-7.

states to support their allegations by clear and convincing evidence.[47] The United States Supreme Court arrived at this intermediate burden of proof after finding that the preponderance of evidence standard that is usually required in a civil proceeding, fell short of the demands required to meet due process.[48] This is because a termination of parental rights proceeding does not fit within the usual parameters of either a civil or a criminal case.[49] For this reason, a parental severance proceeding is "best characterized as 'quasi-prosecutorial.'"[50] The adversarial nature of a termination of parental rights proceeding, and the due process rights involved, warrant an absolute right to counsel in Florida.[51]

IV. THE EVOLUTION OF THE RIGHT TO COUNSEL IN FLORIDA

According to chapter thirty-nine of Florida law pertaining to termination of parental rights, parents have an absolute right to counsel in termination of parental rights proceedings.[52] However, according to the United States Constitution, parents do not have an absolute right to counsel in these suits.[53] Though courts have long recognized a natural parent's due process right of notice and an opportunity to be heard in a proceeding severing a parents rights to custody of their child, the United States Supreme Court has traditionally confined the constitutional right to counsel for indigent litigants to defendants in criminal proceedings.[54] In the case of *In re* Gault, [55] the

47. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

48. *Id.*

49. *Id.* The reason why termination of parental rights proceedings do not fall comfortably within the understood parameters of a civil or criminal proceeding is explained through:

> The United States Supreme Court, in Santosky v. Kramer, 455 U.S. 745, 762 (1982), [in which they] stated that 'the fact- finding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial' because of the following factors:
> The Commissioner of Social Services *charges* the parents with permanent neglect. They are served by *summons*. The factfinding hearing is conducted pursuant to *formal rules of evidence*. The State, the parents, and the child are all represented by counsel . . . the attorneys *submit documentary evidence*, and *call witnesses who are subject to cross-examination* . . .. [T]he judge then determines whether the State has proved the statutory elements [by the proper *burden of proof*]. *Id.* (citations omitted) (emphasis added).

Hubert, *supra* note 37, at 554 n.126.

50. *Id.* at 554.

51. N.S.H. v. Dep't of Children & Families, 843 So. 2d 898, 904 (Fla. 2003) (stating that "the right to counsel [in dependency proceedings] may flow from, and have its origins in, the Sixth Amendment in the criminal context . . . [as well as] concepts of due process under the United States and Florida Constitutions. . . .").

52. § 39.013(1).

53. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

54. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

United States Supreme Court looked as if it was "paving the way for an expanded right to counsel based on the Fourteenth Amendment guarantee of 'procedural due process through a fair hearing.'"[56] However, the United States Supreme Court decided contrary to what both state and federal courts had anticipated,[57] holding in *Lassiter v. Department of Social Services*,[58] that the Due Process Clause of the Fourteenth Amendment does not per se require that counsel be appointed for an indigent parent in a termination of parental rights proceeding.[59] Instead, the decision as to whether the Due Process Clause requires appointed counsel for an indigent parent is left to the trial court and subject to appellate review, in light of the private and government interests at stake, "and the risk that the procedures used will lead to erroneous decisions."[60]

Prior to the *Lassiter* court's holding, that indigent parents did not have an absolute entitlement to court-appointed counsel, Florida case law recognized the right to counsel for indigent parents in parental severance proceedings.[61] In Florida, an indigent parent has an absolute right to be represented by counsel, including the right to a state appointed attorney.[62] The Supreme Court of Florida "has held 'that counsel is necessarily required under the due process clause of the . . . Florida Constitution[], in [dependency] proceedings involving the permanent termination of parental rights to a child, or when the proceedings, because of their nature, may lead to criminal child abuse charges.'"[63] Since October 1, 1998, the legislature has acknowledged that the interests at stake in all dependency proceedings require representation by counsel.[64] The court must advise a parent at every stage of a dependency or

55. 387 U.S. 1 (1967) (holding that a juvenile in a civil proceeding that had a possibility of involuntary commitment was constitutionally entitled to state appointed counsel).

56. Young, *supra* note 9, at 249 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1144 (1977)).

57. *Id.* at 251.

58. 452 U.S. 18 (1981).

59. *See id.* at 32.

60. *Id.* at 27.

61. *See* Davis v. Page, 442 F. Supp. 258, 260 (S.D. Fla. 1977); *In re* D.B., 385 So. 2d 83 (Fla. 1980) (holding that the criminal due process requirement of court-appointed counsel at the critical stages of arraignment, preliminary hearing, or custodial interrogation extends as well to all stages of dependency procedure).

62. MICHAEL J. DALE, FLORIDA JUVENILE LAW AND PRACTICE § 10.2, § 10.3, at 10-4 (7th ed. 2001) (citing FLA. STAT § 39.807(1)(a) (1998); FLA. R. JUV. P. 8.515 (1998)) [hereinafter Dale I].

63. L.W. v. Dep't of Children & Family Servs., 812 So. 2d 551, 554 (Fla. 1st Dist. Ct. App. 2002) (citing *D.B.*, 385 So. 2d at 90).

64. § 39.013(1), (9)(a).

parental termination proceeding of his or her right to counsel, and upon a determination of indigence, he or she is entitled to state appointed counsel.[65] If a parent waives the right to counsel in one stage of the dependency proceeding, the offer must be renewed at each subsequent stage of the case.[66]

When parents request an attorney and state that they do not understand the proceedings, the trial court must appoint an attorney to represent the parents.[67] Parents are initially advised of their right to counsel at the shelter hearing and are given reasonable time for which to obtain counsel.[68] The importance of counsel at a dependency hearing is evidenced by Florida law stating that if parents or legal guardians appear at the shelter hearing without counsel, the hearing may be continued for up to seventy-two hours, allowing these parents to consult with their attorney.[69] Furthermore, before parents are permitted to waive their right to counsel, the court must determine that the parent understands the right to counsel and the parent is knowingly waiving that right, intelligently, and of their own volition.[70] The court makes the determination based on "the age, education, and experience of the party [involved], the nature or complexity of the case, and other factors."[71]

Though the right to assistance of counsel is imperative and cannot be relinquished without judicial acknowledgement, Florida, until July of 2003, was irresolute as to whether parents are entitled to competent assistance of counsel in dependency cases.[72]

V. STATEMENT OF THE CASES

A. L.W. v. Department of Children & Families

On March 28, 2002, Florida's First District Court of Appeal decided *L.W. v. Department of Children & Families.*[73] In this case, the Department of Children and Families filed a dependency petition alleging that a father had sexually abused his stepdaughter and that the mother neglected to protect

65. § 39.013 (9)(a).
66. J.B. v. Fla. Dep't of Children & Family Servs., 768 So. 2d 1060, 1068 (Fla. 2000).
67. McKenzie v. Dep't of Health Rehabilitative Servs., 663 So. 2d 682, 683 (Fla. 5th Dist. Ct. App. 1995).
68. FLA. STAT. § 39.402(3) (2002).
69. § 39.402(3).
70. § 39.013(9)(c)(1).
71. Dale I, *supra* note 62 § 10.3, at 10-4.
72. *See L.W.*, 812 So. 2d at 552; S.B. v. Dep't of Children & Families, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
73. 812 So. 2d at 551.

her daughter from the abuse.[74] The petition further alleged that the parents' two sons were at risk of prospective abuse because of the father's behavior with his stepdaughter.[75] The parents denied the allegations and were appointed an attorney by the trial court.[76] After a hearing on the matter, the court determined that the allegations were proven by the greater weight of evidence.[77] Subsequently, the trial court held a disposition hearing at which the same attorney represented the parents.[78] The court decided to adhere to the disposition and the children were removed from the parents' home.[79] Thereafter, the mother obtained the services of a different attorney, while the father continued to be represented by the same attorney.[80] After a period of over a year, the mother was still unable to have any contact with her daughter and the father could have no contact with any of his children.[81] In November 2000, both parents retained new counsel and filed writs of habeas corpus to set aside the orders of adjudication and disposition based on ineffective assistance of counsel.[82] The trial court denied the petitions on the basis that, as a matter of law, the remedies requested were not available.[83]

On appeal, the First District Court of Appeal acknowledged that this was the first time a Florida court had addressed the issue of competent counsel as it relates to a dependency proceedings.[84] In this case, the First District Court of Appeal held consistent with the position taken by an overwhelming amount of jurisdictions,[85] that an indigent parent, who has a constitutional right to court-appointed counsel in dependency proceedings, also has a right to competent counsel.[86] The court also determined as a matter of first impression, that the criminal standard announced in *Strickland v. Washington*,[87] applies to juvenile dependency proceedings.[88] This standard would be utilized in determining whether court-appointed counsel was effective, as is necessary to protect the parent's constitutional right to court-appointed counsel

74. *Id.* at 552.
75. *Id.*
76. *Id.*
77. *Id.*
78. *L.W.*, 812 So. 2d at 552.
79. *Id.*
80. *Id.*
81. *Id.* at 553.
82. *Id.*
83. *L.W.*, 812 So. 2d at 554.
84. *Id.*
85. *Id.*
86. *Id.* at 556.
87. 466 U.S. 668 (1984).
88. *L.W.*, 812 So. 2d at 556.

in dependency proceedings.[89] The district court also determined that the appropriate method for challenging the effectiveness of court-appointed counsel is by a petition for writ of habeas corpus.[90] Understanding that their decision held extensive implications, the First District certified to the Supreme Court of Florida the questions as to whether parents who are constitutionally entitled to court-appointed counsel in dependency proceedings are also entitled to competent assistance of counsel; and if so, is the proper procedure by which to raise a claim of incompetent assistance of counsel a petition for habeas corpus.[91]

B. S.B. v. Department of Children & Families

In the meantime, the Fourth District Court of Appeal in Florida was presented with a similar issue in *S.B. v. Department of Children & Families*.[92] In *S.B.*, a mother sought to set aside an order adjudicating her two children dependent.[93] In 1998, the court held an arraignment hearing on the issue of dependency but the mother ("S.B."), who was personally served and had notice of the hearing, failed to appear.[94] At trial the children's fathers, who had completed their case plan and been awarded custody, appeared and gave their consent to the adjudication of dependency.[95] "The court proceeded as if S.B. had consented as well, pursuant to section 39.506(3) of the *Florida Statutes*."[96] S.B. and her appointed counsel were present at the disposition hearing, at which time S.B.'s children were adjudicated dependent.[97] Thereafter, S.B.'s attorney filed a motion to vacate and set aside the finding of consent by default, declaring in the motion that she had sent the judge a letter in lieu of attending to which the judge responded, indicating he could not accept *ex parte* communications.[98] There was no subsequent ruling on S.B.'s motion and she did not appeal her children's adjudication of depend-

89. *Id.*
90. *Id.* at 557.
91. *Id.* at 558.
92. 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
93. *Id.* at 1058.
94. *Id.*
95. *Id.*
96. *Id.* (citing that section 39.506(3) of the *Florida Statutes* states, "[f]ailure of a person served with notice to personally appear at the arraignment hearing constitutes the person's consent to a dependency adjudication.").
97. *S.B.*, 825 So. 2d at 1058.
98. *Id.*

ency.[99] S.B. then filed a motion to dismiss and remedy the decision of the trial court based on ineffective assistance of counsel.[100]

The Fourth District held that although S.B. had a right to appointed counsel, her right was not a constitutional right but a statutory one, and that she has no right to challenge her counsel's performance other than filing a malpractice action.[101] The court stated that the Supreme Court of Florida has indicated only two situations in which a parent's right to counsel is a constitutional right.[102] The first circumstance in which a parent has a constitutional right to counsel, under the Due Process Clause of the United States and Florida Constitutions, is in proceedings involving permanent termination of parental rights, and the second is when the proceeding, because of its nature, may lead to criminal charges.[103] In its analysis, the court rejects the First District's holding that a constitutional right to counsel necessarily implies a right to competent counsel.[104] In doing so, the court asserts a dependency proceeding is not a criminal proceeding, and therefore, a criminal defendant's right to counsel and an indigent parent's right to counsel in a termination proceeding are different.[105] That is, competent counsel is not a protection afforded indigent parents under due process considerations.[106]

In addition, the Fourth District Court of Appeal declined to extend the right to counsel, to include the assistance of competent counsel, because if the same relief recognized in post conviction criminal cases were afforded parents, it would serve to further disrupt the lives of the children years after a dependency decision was made.[107] In concluding, the court stated that it does not recognize a right to competent counsel in a dependency proceeding whether the right to counsel is constitutional or statutory and that S.B.'s petition is insufficient and will not be treated as a writ of habeas corpus.[108] Subsequently, the decision was appealed to the Supreme Court of Florida for review.[109]

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99. *Id.*
100. *Id.*
101. *Id.* at 1058.
102. *S.B.*, 825 So. 2d at 1059.
103. *In re* D.B., 385 So. 2d 83, 90 (Fla. 1980).
104. *S.B.*, 825 So. 2d at 1060.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1061.
109. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *1 (Fla. July 10, 2003).

C. *The Supreme Court of Florida Decides*

On July 10, 2003 the Supreme Court of Florida affirmed the Fourth District Court of Appeal's holding in *S.B. v. Department of Children and Families*,[110] which directly conflicts with the First District Court of Appeal's holding in *L.W.*[111] That is that the right to court appointed counsel does not include a conclusive right to "collaterally challenge the effectiveness of counsel."[112] The Supreme Court of Florida contends that dependency proceedings are civil in nature and it reiterates its decision. In the case of *In re* D.B.,[113] the court found that there is only a definitive constitutional right to counsel in dependency proceedings under two circumstances: when the proceedings may result in the permanent termination of parental rights, or when a parent may be charged with criminal child abuse.[114] In all other circumstances the right to counsel is not conclusive, rather the case-by-case approach established in *Potvin v. Keller*[115] must be applied to determine if the right to counsel in that particular dependency case is constitutional, and if not, it is merely a statutory entitlement.[116]

Furthermore, the court distinguishes the litigants in *L.W.* from the litigant in *S.B.*, finding that in *L.W.* the parents faced criminal charges, thus they had a constitutional right to counsel, unlike in *S.B.* where the defendant was not criminally charged, thereby rendering her entitlement to counsel a statutory right.[117] In its holding, the Supreme Court of Florida made the inference that only when there is a constitutional right to counsel[118] in a dependency proceeding is there a right to pursue a collateral proceeding questioning the competence of court-appointed counsel.[119] The Supreme Court of Florida ultimately disapproved of the First District Court of Appeal holding in *L.W.*, to the extent that it conflicts with its holding in *S.B.*.[120]

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110. *Id.*
111. L.W. v. Dep't of Children & Families, 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).
112. *Id.*; *S.B.*, 2003 WL 21543565, at *1.
113. 385 So. 2d 83 (Fla. 1980).
114. *S.B.*, 2003 WL 21543565, at *2 (citing *In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980)).
115. 313 So. 2d 703 (Fla. 1975) (citing Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) which suggested, that the right to counsel in dependency proceedings would be dependent on the potential length of the parent-child separation, the extent of restriction on parental visitation, the presence or absence of parental consent, the presence or absence of disputed facts, and the complexity of the proceeding).
116. *S.B.*, 2003 WL 21543565, at *3.
117. *Id.* at *3–4.
118. *See D.B.*, 385 So. 2d at 90; *Potvin*, 313 So. 2d at 703.
119. *S.B.*, 2003 WL 21543565, at *5.
120. *Id.* at *5.

VI. THE ERROR OF THEIR WAYS

In Florida, an indigent defendant in a dependency suit is entitled to competent assistance of counsel only if he qualifies for a constitutional right to counsel under either the *Mathews v. Eldridge*[121] or the *Potvin v. Keller* balancing test. For this reason, the Supreme Court of Florida's handling of *S.B.* is reminiscent of the United States Supreme Court's treatment of *Lassiter*.[122] These two decisions make a parent's right in his or her child determinant on the loss of personal liberty or a judicial prophecy that a proceeding will not end in the severance of the parent-child relationship.[123] These cases are both inconsistent and symbolic of a giant step back in the effort to ensure indigent parents receive fair access to and just results in court proceedings.[124]

The scales of justice in *Lassiter* and *S.B.* appear to have been unbalanced before the first fact was spoken before a judge. In both of the cases the courts began with a presumption that criminal defendants have more of a right to physical liberty then a parent has to his or her "flesh and blood."[125] Moreover, the two cases require the indigent defendants to overcome a haphazard cases-by-case analysis, which has been criticized as an improper method by which to protect fundamental rights.[126] In *Lassiter* v. *Department of Social Services*, the Court left the constitutional appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.[127] Furthermore, the Supreme Court of Florida in *S.B.* determined that only parents who have a constitutional right to counsel have the right to

121. 424 U.S. 319 (1976); *see infra* Section V.A.

122. *Compare S.B.*, 2003 WL 21543565, at *1, *with* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

123. *Id.*

124. *Id.*

125. *See Lassiter*, 452 U.S. at 18; S.B., v. Dep't of Children & Families, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002); *S.B.*, 2003 WL 21543565, at *1.

126. *Lassiter*, 452 U.S. at 35–36 (Blackmun, J., dissenting) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). A flexible case-by-case analysis was overruled in *Gideon v. Wainwright. Id.* Additionally, in 1998 the Florida Legislature passed section 39.013 of the *Florida Statutes*, because of numerous appeals and inconsistent rulings resulting from the case-by-case analysis. Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 145 (1994) [hereinafter Dale II].

127. *Lassiter*, 452 U.S. at 31–32.

competent assistance of counsel and with two exceptions,[128] a constitutional right to counsel in Florida is determined on a case-by-case analysis.[129]

A. *The Problems with the* Lassiter *Case-By-Case Method of Review*

In *Lassiter* v. *Department of Social Services*, a North Carolina Court of Appeal sought to terminate the parental rights of an indigent mother without providing her counsel.[130] In 1975, a North Carolina district court found Abby Gail Lassiter's son to be neglected and removed him from her home, placing him in the state's custody.[131] One year later, Ms. Lassiter was convicted of second-degree murder and sentenced to serve twenty-five to forty years in prison.[132] In 1978, the Department of Social Services initiated a proceeding to terminate Ms. Lassiter's parental rights in her son.[133]

Ms. Lassiter appeared at the termination hearing but was not accompanied by counsel nor was she offered counsel by the court.[134] Without the assistance of counsel, Ms. Lassiter failed to object to hearsay testimony, argued with the state's witness instead of cross examining her, and did not utilize avenues of defense available to her.[135] At the conclusion of the hearing, the court ordered that Ms. Lassiter's parental rights be severed.[136]

On appeal, Ms. Lassiter's counsel argued that the court's failure to appoint counsel at the termination hearing deprived her of the due process rights guaranteed by the Fourteenth Amendment.[137] The North Carolina Court of Appeal denied the claim stating that the invasion of Ms. Lassiter's individual privacy was not sufficient to warrant the appointment of counsel.[138] Subsequently, the Supreme Court of North Carolina denied Ms.

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128. The two exceptions are when the proceedings may result in permanent termination of parental rights, or when a parent may be charged with criminal child abuse. *In re* D.B., 385 So. 2d 83, 90 (Fla. 1980).

129. *S.B.*, 2003 WL 21543565, at *5 n.1. The case-by-case analysis that garners a parent a constitutional right to counsel in Florida is governed by the test adopted in *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), in which the court stated, "[T]he right to counsel in dependency proceedings would depend on the potential length of parent-child separation, the degree of parental restrictions on visitation, the presence or absence of parental consent, the presence or absence of disputed facts, and the complexity of the proceedings." *Id.*

130. *Lassiter*, 452 U.S. at 22.

131. *Id.* at 20.

132. *Id.* at 40.

133. *Id.* at 20–21.

134. *Id.* at 22.

135. *Lassiter*, 452 U.S. at 53–56.

136. *Id.* at 24.

137. *Id.*

138. *Id.*

Lassiter's petition for review, and the United States Supreme Court granted certiorari.[139]

The United States Supreme Court affirmed the decision of North Carolina Court of Appeal.[140] In this case the Court did not decide the scope of the due process right to counsel, but rather left the decision for a case-by-case determination.[141] Justice Stewart, writing for the majority pursued a two-step analysis of the issue. First, he concluded that the precedents of both criminal and civil due process decisions have established a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[142] The Court balanced this presumption against the factors established in *Mathews v. Eldridge*,[143] the private interest, the state interest, and the risk of error in existing procedures.[144] In weighing those factors against the presumption the majority rejected a per se rule, in favor of a case-by-case analysis stating:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risk of errors were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel .... But since the *Eldridge* factors will not always be so distributed, and since 'due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,' (citation omitted), neither can we say that the Constitution requires the appointment of counsel in every termination of parental rights proceeding.[145]

The case-by-case method of review suffers from several defects. A judicious analysis of this issue is found in Justice Blackmun's dissent in *Lassiter*. In his dissent Justice Blackmun austerely criticizes the majority for resorting to an "ad hoc," "thoroughly discredited," case-by-case analysis.[146] He also points out that the majority uses the same analysis as he does in weighing the three factors listed in *Mathews v. Eldridge*, with both finding

139. *Id.*
140. *Lassiter*, 452 U.S. at 34.
141. *Id.* at 31–32.
142. *Id.* at 26–27.
143. 424 U.S. 319 (1976).
144. *Id.* at 321.
145. *Lassiter*, 452 U.S at 31–32 (1981) (Blackmun, J., dissenting) (quoting Gagnon v. Scarpelli, 411 U.S. 778 (1973)).
146. *Id.* at 35 (Blackmun, J., dissenting). The dissent pointed out that the "ad hoc" case-by-case approach was "thoroughly discredited nearly 20 years [prior] in *Gideon v. Wainwright*." *Id.*

"the private interest weighty, the procedure devised by the state fraught with risk of error, and the countervailing governmental interest insubstantial."[147] Yet, he states the Court refuses to

> follow this balancing process test to its logical conclusion . . . and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. Because the three factors 'will not *always* be so distributed,' . . . the Constitution should not be read to 'requir[e] the appointment of counsel in *every* parental termination proceeding.'[148]

Justice Blackmun further points out that *Mathews* itself rejected such an approach, stating that in the case the Court reasoned that "'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'"[149] He further argues that a case-by-case analysis is inconsistent, cumbersome, intrusive, and ultimately inadequate to protect parents' rights.[150]

In addition, the rationale for a case-by-case analysis is less than influential and rests on dubious precedent.[151] Justice Blackmun points out in his dissent, that the majority ignored precedent by neglecting to note that prior due process analysis had focused on "different decision making *contexts*, not different *litigants* within a given context."[152] The court also neglects to discuss the precedent set forth in *Gideon v. Wainwright,*[153] wherein the Court overturned *Betts v. Brady*,[154] rejecting the flexible case-by-case analysis in favor of an absolute right to counsel in criminal proceedings.[155] The reason behind the rejected "totality of the circumstances" test in *Gideon* is equally applicable to parents in termination of parental rights proceedings: an un-

147. *Id.* at 48–49.
148. *Id.* at 49.
149. *Lassiter*, 452 U.S. at 50 (citing *Mathews*, 424 U.S. at 344).
150. *Id.* at 51.
151. *Id.* at 40.
152. *Id.* at 49; *see Mathews*, 424 U.S. at 344. The *Lassiter* majority's reliance on *Gagnon* to justify case-by-case inquiry is misplaced. *Gagnon's* adoption of a case-by-case analysis for probation revocation proceedings is based on the non-adversarial nature of the proceedings, the rehabilitative focus of the probative system, and the attenuated liberty interest of a convicted probationer. *See Gagnon*, 411 U.S. at 786–89. These rationales do not apply to a parent seeking to preserve their undiminished parental rights in a fully adversarial parental severance proceeding. *See Lassiter,* 452 U.S. at 50 n.18 (Blackmun, J., dissenting); Jeffery M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM. 554, 558 n.29 (1976).
153. 372 U.S. 335 (1963).
154. 316 U.S. 455 (1942).
155. *Lassiter,* 452 U.S. at 35 (Blackmun, J., dissenting).

skilled, indigent defendant confronted with the formidable legal wherewithal of the state in an adversarial proceeding unable to produce an adequate defense, especially, under indigent circumstances.[156] A case-by-case analysis also requires that the court prior to a hearing, examine the state's evidence to determine what, if any, difference legal representation would make.[157] These are complex questions of fairness that cannot be adequately answered until after trial, if ever.

B. *Similar Problems with* S.B.

S.B. is fraught with similar inconsistencies and misleading notions. In *S.B.* the court draws a distinction between a constitutional right to counsel and a statutory right to counsel.[158] In Florida, a constitutional right to counsel is warranted if a parent is at risk of criminal child abuse charges or in a situation in which a proceeding will permanently terminate a parent's rights in his/her child.[159] All other situations are put to the test, adopted in *Potvin*, which looks at the length of the parent-child separation, the degree of parental restrictions on visitation, the presence or absence of parental consent, the presence of disputed facts, and the complexity of the proceeding.[160]

The case-by-case approach advanced by the Court imperils the interests at stake in the case and the general administration of justice.[161] The Court's holding essentially implies that unless a parent has a constitutional right to counsel, he or she is not entitled to effective counsel.[162] Here again, the court makes a distinction between litigants within the given context and does not look at the decision-making context as a whole.[163] At the inception of a dependency proceeding, the trial judge cannot be assured that, upon the conclusion of the case, the circumstances will not be such that a parent will not have permanently lost his or her rights in the child. Whenever a dependency petition includes a ground for termination according to statute there is ultimately the potential for the permanent termination of parental rights.[164] Furthermore, trial court judges cannot foretell whether criminal charges will result from the facts and evidence brought forth at trial.

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156. *Gideon*, 372 U.S. at 344–45; Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
157. *Lassiter*, 452 U.S. at 50–51 (Blackmun, J., dissenting).
158. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *1 (Fla. July 10, 2003).
159. *Id.* at *3.
160. *Id; see* Potvin v. Keller, 313 So. 2d 703, 706 (Fla. 1975).
161. *Lassiter*, 425 U.S. at 50 (Blackmun, J., dissenting).
162. *S.B.*, 2003 WL 21543565, at *1.
163. *Compare S.B.*, 2003 WL 21543565, at *1, *with Lassiter*, 452 U.S. at 49.
164. Wofford v. Eid, 671 So. 2d 859 (Fla. 4th Dist. Ct. App. 1996).

Therefore, to determine at the beginning of the case whether a parent has a statutory right to counsel in Florida or a constitutional right is implausible.[165] Moreover, the case-by-case approach adopted in *Potvin*, and promulgated by the Supreme Court's decision in *S.B.*, is impracticable because it requires that a trial judge determine the complexity of a proceeding that has yet to occur. If the court recognizes that the circumstances in each case are different for each litigant it should also recognize that the circumstances, implications, and the nature of the proceedings involved in a termination of parental rights suit will also be varied and cannot be predetermined. Moreover, the process advanced by the Supreme Court of Florida produces inconsistent results and "invites both confusion and appeal."[166]

The court states that *S.B.* had a statutory right to appointed counsel because there was "nothing to suggest [that] the Department was planning to pursue termination of parental rights."[167] However, the end result was that *S.B.*'s stature as parent was terminated. Thus, the court leads one to believe that if the petitioner does not express, at the commencement of the proceeding, that its ultimate goal is to terminate a parent's rights, a parent is not constitutionally entitled to counsel. Even though the consequence might be that a parent's rights in his or her child are completely and irrevocably lost.[168]

Florida's Legislature recognized that providing counsel would be effective and economic, as well as necessary to the protection of a parent's rights in his or her child [169] The legislature also recognized that reliance on a case-by-case approach was both cumbersome and costly.[170] Therefore it recently passed legislation requiring that indigent parents in dependency proceedings be appointed counsel by the state.[171] Prior to the passing of this legislation the appellate courts in Florida were confronted with numerous post verdict challenges to the fairness of particular proceedings, and expended much energy in effect, evaluating the performance of trial court judges.[172] Yet, the

165. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 50 (1981). This can be likened to Justice Blackmun's statement in his dissenting opinion wherein he criticizes the Court for expecting a review of the record to determine whether a defendant proceeding without counsel has suffered an unfair disadvantage. *Id.*

166. Dale II, *supra* note 126, at 145.

167. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *4 (Fla. July 10, 2003).

168. *Id.*

169. FLA. STAT. §§ 39.408(2), 39.465(1)(a)(4) (1997).

170. *Id.*

171. FLA. STAT. § 39.013(1) (2002).

172. Michael J. Dale, *Juvenile Law Issues in Florida in 1998,* 23 NOVA L. REV. 819, 828–89 (1999) (finding that the legislature provides parents with counsel as a practical matter which should also help ease the appellate docket which had been rife with appeals because

Supreme Court of Florida has rendered the statutory right to counsel ineffective, because a statutory right to counsel does not warrant that a parents' liberty interests be adequately represented by competent or effective assistance of counsel.[173]

VII. THE NATURE OF A TERMINATION OF PARENTAL PROCEEDING

The Supreme Court in *S.B.* undermines the authority of a statutory right to counsel in Florida by denying an indigent parent competent counsel, because the parent's entitlement does not stem from a constitutional right. Competent counsel is reserved for persons who warrant a constitutional right.[174] This is based on the court's perspective that termination of parental rights proceedings is civil in nature.[175] Because a termination proceeding is civil in nature, a state is not constitutionally required to appoint counsel.[176] The United States Supreme Court has established, and the Supreme Court of Florida has adopted, a presumption that counsel need not be provided in civil cases in which a loss of physical liberty is not at stake.[177] The constitutional appointment of counsel is justified only when the indigent parent can satisfy the *Mathews* or *Potvin* analysis to rebut the presumption that counsel is not ordinarily provided.[178]

Yet, to obtain a constitutional right to counsel is an insurmountable feat. As the court illustrated in *Lassiter*, a fundamental interest in keeping one's child, coupled with the extraordinarily high risk of error in a hearing conducted without counsel, does not necessarily outweigh the government's pecuniary interest in not providing counsel for indigent parents in parental severance suits.[179] Moreover, Florida provides all indigent parents with counsel in dependency proceedings, either through a constitutional or statutory entitlement, but will not guarantee that a parent will not lose his or her child as a result of the incompetence of appointed counsel, if the parent is not a criminal, or if the state had not initially setout to take the children.[180] Yet,

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under the old law, lack of counsel at the dependency stage rendered a termination adjudication invalid).

173. *S.B.*, 2003 WL 21543565 at *1.

174. *See* Gideon v. Wainwright, 372 U.S. 335, 335 (1963); Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 18 (1981).

175. *S.B.*, 2003 WL 21543565, at *4.

176. *See Lassiter*, 452 U.S. at 18; *S.B.*, 2003 WL 21543565, at *1.

177. *See Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); *S.B.*, 2003 WL 21543565, at *4.

178. *See Lassiter*, 452 U.S. at 31; *S.B.*, 2003 WL 21543565, at *3.

179. *Lassiter*, 452 U.S. at 31.

180. *S.B.*, 2003 WL 21543565, at *4.

the loss of liberty, or the perceived loss of liberty, mandates an absolute right to the appointment of competent counsel for those who could not otherwise afford it.[181]

The analyses of appointment of counsel in *Lassiter* and *Gideon* are irreconcilable. *Gideon* fundamentally implies that the appointment of counsel is essential to a fair trial.[182] Though the holding in that case addresses the right to counsel for indigent criminal litigants, it has little to do with the difference between a loss of liberty and the loss of any other fundamental liberty interest.[183] The Court in *Gideon* focuses not on the final result of litigation, but instead the process of litigation involved.[184] *Gideon* analogizes the fundamental right to freedom accorded by the Sixth Amendment's right to counsel, applied to the states through the Fourteenth Amendment with other provisions in the Bill of Rights such as the Fifth Amendment's Takings Clause.[185] This undermines the dubious precedent upon which *Lassiter* lies, namely that the inherent nature of the loss of liberty is the premise behind *Gideon*.[186]

Instead, the premise behind *Gideon* is the notion that a fair trial is not possible without competent counsel on both sides.[187] Because, "reason and reflection require us to recognize that in our adversary system, . . . any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[188] The Court in *Lassiter* fails to delineate a reason why a parent in a termination of parental rights suit is guaranteed a fair trial without counsel, but an indigent criminal defendant does not have the same guarantee.

The majority of the decision in *Gideon* espouses the right to counsel for litigants in all cases.[189] Justice Black buttresses this position by referencing Justice Powell's decision in *Powell v. Alabama*,[190] in which he states:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, gener-

181. *Gideon*, 372 U.S. at 345.
182. *Id.* at 340.
183. *See* Gideon v. Wainright, 372 U.S. 335 (1963).
184. *Id.*; *Lassiter*, 452 U.S. at 18.
185. *Id.* at 341–42.
186. *Lassiter*, 452 U.S at 18.
187. *Gideon*, 372 U.S. at 335.
188. *Id.* at 344.
189. *Id.* at 335.
190. 287 U.S. 45 (1932).

> ally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put upon trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[191]

The concerns of the Court in *Gideon* and *Powell* seem to be: the inability of a defendant to determine if charges against them are legitimate; the inability or difficulty in understanding the law; the lack of knowledge of rules of evidence and procedure; and the inability to put forth a good quality defense.[192] If this is so, then why does the United States Supreme Court preclude indigent parents in termination suits from their constitutional entitlement of appointed counsel according to these same concerns? Does a case, in which the state is prosecuting a parent, where the parent stands to lose his or her child, not involve the same complexities or the potential of confronting the same difficulties?

Besides, it has been said that a criminal trial may be easier to try then a civil trial.[193] There are certain aspects of a criminal trial that are slanted in favor of criminal defendants but are not in favor of litigants in termination of parental rights proceedings.[194] The accused criminal is presumed to be innocent until the state stockpiles evidence in an effort to overcome that innocence beyond a reasonable doubt.[195] Yet, a parent in a termination of parental rights proceeding holds an eviscerated presumption of innocence because the state attorney, with an adept knowledge of the law, is required to establish a lesser burden of proof[196] against an indigent litigant with virtually no

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191. *Id.* at 68–69.

192. *Id.*

193. Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOY. L.A. L. REV. 249, 265 (1978).

194. *Id.* In *S.B. v. Dep't of Children & Families*, No. SC02-2262, 2003 WL 21543565, at *4 (Fla. July 10, 2003), the court states that though the procedures and goals of a parental severance proceeding are different then a criminal proceeding, the issues addressed in criminal post conviction hearings are part and parcel of dependency proceeding. However they fail to clarify which procedure these are. *Id.*

195. Johnson & Schwartz, *supra* note 193, at 265.

196. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

legal propensity.[197] Furthermore, personnel of the court have a responsibility to screen the stages of criminal proceedings in order to make sure the innocent go free and the guilty are prosecuted.[198] The prosecutor in a criminal case also has an affirmative duty to reveal any favorable information pertaining to the accused.[199] These same safeguards are not available to litigants in civil proceedings.

The Court in *Lassiter* neglects to take notice of the court's rational in *Gideon*.[200] If the Court had examined the logic behind *Gideon,* it could not assert the presumption that the right to counsel is only necessary when a person's physical liberty interest is at stake. *Gideon* clearly stands for the proposition that under the constitution, there is no difference in the quality of the process based merely on the difference in the sanctions involved.[201] Moreover, the cases relied on in *Lassiter* do not support the presumption that "physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause."[202] The *Lassiter* court blindly applies this presumption, never considering the origin of the presumption or why criminal defendants warrant more due process protection then indigent parents.

VIII. MAKING THE CASE FOR COMPETENT ASSISTANCE OF COUNSEL

Indigent parents have a right to counsel under Florida's Constitution; therefore a right to competent counsel should naturally follow. Both the United States Supreme Court and the Supreme Court of Florida have declared the right to effective assistance of counsel to be a basic extension of the right to counsel.[203] "While the right to counsel may flow from, and have its origins in, the Sixth Amendment in the criminal context and concepts of due process under the United States and Florida Constitutions in the dependency arena, the goal to be achieved is the participation of counsel acting as competent counsel."[204]

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197. Johnson & Schwartz, *supra* note 193, at 265.
198. *Id.*
199. *Id.*
200. *See* Gideon v. Wainright, 372 U.S. 335, 335 (1963); Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 18 (1981).
201. *Gideon*, 372 U.S. at 335.
202. *Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); *see* Gagnon v. Scarpelli, 411 U.S. 778, 785–89 (1973); Vitek v. Jones, 445 U.S. 480, 492–94 (1980).
203. *See* Powell v. Alabama, 287 U.S. 45 (1932); N.S.H. v. Dep't of Children & Family Servs., 843 So. 2d 898, 904 (2003).
204. *N.S.H.*, 843 So. 2d at 904.

The state has no interest in providing incompetent advocates or denying parents relief. At first blush, money appears paramount; but society's paramount interest should be in the just determination of a person's rights and privileges. Protecting an indigent parent's right to counsel and competent assistance of counsel is crucial to preserving faith in America's justice system. In a system in which a large percentage of Americans feel as though the legal system is biased against the poor and minorities, and the majority feel that the affluent and corporations have the upper hand, faith in the system is rapidly eroding.[205] In the courts, trust is essential because there "society and institution come together in ways that really define who we would like to think we are as a society—fair, open, and protective of the rights of every individual."[206]

Furthermore, the money required to finance post-trial hearings for ineffective assistance of counsel is slight when compared with the costs of long-term foster care. There are over 500,000 children in foster care in the United States and approximately 34,292 in Florida.[207] Therefore, states have an economic interest in making certain that children are not needlessly separated from their families, since years of foster care will likely be more costly then appellate review of issues regarding incompetent counsel.

Aside from the economic advantage of leaving children in the custody of their parents, when possible, Florida's disposition favors protecting children and their relationship with their natural parents.[208] If a parents' incompetent counsel has an affect on the court's adjudication, the state has a compelling interest in reviewing the case so as not to remove a child needlessly from his or her family. Thus far, the state has yet to be required to prove that there is a safer and healthier environment available for children alleged to be abused and neglected. Especially recently, in light of the crisis the Department of Children and Family Services has faced.[209] Permanently severing parental rights is no guarantee that the child will be placed in more loving or

205. *See* National Conference on Public Trust and Confidence in the Justice System, *National Action Plan: A Guide for State and National Organizations*, *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf (last visited July 26, 2003).

206. *Id.* at 9 (quoting Frank A. Bennack, President and Chief Executive Officer of the Hearst Corporation).

207. U.S. Dep't of Health & Human Servs., *Safety, Permanency, Well-being: Child Welfare Outcomes 1999: Annual Report* (2002), *at* http://www.acf.dhhs.gov/programs/cb/publications/cwo99/index.html.

208. *In re* E.H., 609 So. 2d 1289, 1290 (Fla. 1992) (citing Burk v. Dep't of Health & Rehab. Servs., 476 So. 2d 1275 (Fla. 1985)).

209. *See* Timothy Arcaro, *Florida's Foster Care System Fails Its Children*, 25 NOVA L. REV. 641 (2001).

safe surroundings. Therefore, it makes social and economic sense to provide parents with review of their claims of ineffective assistance of counsel.

Furthermore, there is a due process question in permitting the state to appoint counsel without providing a judicial remedy for the counsel's ineffective assistance. If parents are not permitted to appeal adjudication based on the incompetence of court-appointed counsel, they will not be afforded a remedy that befits their loss. An indigent parent in a termination of parental rights suit stands to lose rights in his or her child as a result of an attorney's incompetence. Because a termination of parental rights suit is defined as civil in nature, the usual remedy for one dissatisfied by counsel's performance is to bring a malpractice suit against the attorney.[210] A civil malpractice suit will not accomplish the goal of regaining custody; the only relief a parent may seek is monetary damages.[211]

IX. CONCLUSION

The extent to which one is deprived is of critical importance in the due process computation, the process to which an individual is entitled is in part determined "by the extent to which he may be 'condemned to suffer grievous loss.'"[212] Is there a loss more grievous then the removal of a child from its parents? According to the Supreme Court of Florida and the United States Supreme Court, the answer is yes. Based on their Constitutional interpretations, a parent losing his or her child is not a significant enough deprivation to warrant the standard of due process protection.

Neither the language of the Constitution of the United States, Florida's State Constitution, nor the society they fashion require that the Constitution be interpreted to deny the poor an entitlement to governmental assistance in exercising their basic rights. A parent, whether indigent or affluent, has a fundamental right to conceive and raise his or her child.[213] The United States Supreme Court has recognized this right in upholding "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child."[214] There is a compelling public interest in encouraging the maintenance and protection of the intact family. Constitutional interpretations should not conclude with the provision of protections for family integrity, but must further compel the government to provide the necessary fortifi-

210. *In re* Ak. V., 747 A.2d 570 (D.C. 2000).
211. *See In re* Azia B., 626 N.W.2d 602, 612 (Neb. Ct. App. 2001).
212. Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 40 (1981) (Blackmun, J., dissenting).
213. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
214. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

cations to parents in preserving their constitutionally protected liberty interest.

While state courts have acknowledged the precedents of the United States Supreme Court, most courts have chosen to operate independently by "interpreting rights more broadly then the United States Supreme Court."[215] For example, contrary to the Court's holding in *Lassiter*, most state courts and legislatures have determined that an indigent parent's right to assistance of counsel in a termination of parental right suit is part and parcel of the fundamental right to family integrity protected by the Constitution.[216] In furtherance of the states' advanced perception of due process standards and fundamental fairness, logic and common sense should compel states to conclude that, "if a parent's constitutional right to court-appointed counsel in appropriate dependency proceedings is to consist of something more than a meaningless formality, that right must include the right to effective assistance by the attorney who is appointed."[217]

215. Young, *supra* note 9, at 249.

216. *See id.*

217. L.W. v. Dep't of Children & Families, 812 So. 2d 551, 555 (Fla. 1st Dist. Ct. App. 2002).