

# *Nova Law Review*

---

*Volume 8, Issue 2*

1984

*Article 4*

---

## Florida's Dependent Child: The Continuing Search for Realistic Standards

Christina A. Zawisza\*

Mary K. Williams†

\*

†

Copyright ©1984 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

# Florida's Dependent Child: The Continuing Search for Realistic Standards

Christina A. Zawisza and Mary K. Williams

## **Abstract**

The Florida Legislature in 1984 will once again revisit the state's juvenile dependency laws in their entirety.

**KEYWORDS:** child, standards, dependent

# Florida's Dependent Child: The Continuing Search for Realistic Standards

**Christina A. Zawisza\* and Mary K. Williams\*\***

---

## I. Introduction

The Florida Legislature in 1984 will once again revisit the state's juvenile dependency laws in their entirety. These are the laws which deal in the civil context with abused, neglected, abandoned, truant, runaway and ungovernable children and are contained in Chapter 39 and section 409.168, Florida Statutes.<sup>1</sup> The Health and Rehabilitative Services (HRS) Subcommittee on Health, Economic and Social Services of the Florida House of Representatives has drafted and passed Proposed Committee Bill 2<sup>2</sup> which extensively revises the present dependency provisions of these two statutes.

Such major effort gives pause to look back at Florida's previous efforts to forge realistic dependency standards, to look at the previous efforts of other states and Congress, and to look forward to the informed legislative decisionmaking Florida must now make. Observers and participators in Florida's dependency process approach the search for standards from different perspectives: children's rights; parents' rights; state interests; fiscal constraints; religious implications; and political considerations. When issues concern children, particularly children at risk, the debate is often filled with emotion and fraught with legal and social dilemmas. This article discusses the state of Florida's role in the lives of dependent children from the perspective of family autonomy, preservation and reunification. It looks first at previous quests for realistic standards in dependency law by summarizing the

---

\* B.A., State University of New York at Albany; M.A., University of Wisconsin; J.D., University of Virginia; Staff Attorney and Head of Family/Education Impact Unit, Jacksonville Area Legal Aid, Jacksonville, Florida.

\*\* B.A., Smith College; J.D., Northeastern University School of Law, Staff attorney and member of Family/Education Impact Unit, Jacksonville Area Legal Aid, Jacksonville, Florida.

1. Other Florida laws related to the dependency process but not discussed in this article are: FLA. STAT. §§ 409.145-409.166; 415.101-415.513 (1983).

2. The Subcommittee passed this on October 31, 1983. The bill has been filed as H.B. 399. Its Senate companion bill is S.B. 273.

work of certain legal and social work commentators and analyzing the constitutional basis for family preservation standards. Part III examines both Congressional efforts to develop federal family preservation standards and Florida's previous reform efforts. The article concludes with a discussion of those crucial family preservation issues which Florida currently faces and how these can be resolved.

## II. The Past Search for Realistic Standards

The origin of the present dependency system which mandates state intervention in family life whenever a child is abused, neglected, abandoned, or in need of supervision lies in the state's historical role of *parens patriae*,<sup>3</sup> and in its police powers.<sup>4</sup> This intervention system historically was managed through juvenile courts and public social welfare agencies. The original statutory dependency framework was established to provide work or training for poor children and to minimize welfare costs and fraud. Much later, the development of Aid to Dependent Children and new awareness of the special needs of children resulted in a statutory dependency process that became much less a financial assistance program and much more a system in which the state served as the arbiter of acceptable parental behavior.<sup>5</sup> The patchwork nature of old dependency laws and their intent to serve these divergent purposes led to increasing concern in the mid-1970s, a concern which continues to the present. The dilemma centers around the limits of state intervention in family life and the search for realistic standards that provide certainty to decision-makers, and at the same time produce more good than harm to children and families.

### A. Legal and Social Work Commentary

The leading proponent of the need for workable standards in the dependency process is Michael Wald, an attorney, who in a pair of articles written in the 1970s set forth both his proposed standards and

---

3. Literally "parent of the country," *parens patriae* refers to the sovereign power of guardianship over persons under disability. BLACK'S LAW DICTIONARY 1269 (4th ed. 1951).

4. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEORGETOWN L.J. 887 (1975) and R. DE LONE, *SMALL FUTURES* (1979).

5. Areen, *supra* note 4, at 917.

his rationale for their viability.<sup>6</sup> Wald articulated the need for the narrowing of child neglect laws, arguing that in a society which values individual and family autonomy and privacy, it is preferable to solve family problems through noncoercive intervention. The remedy of coercive intervention, Wald emphasized, will do more harm than good to children and families.<sup>7</sup> In a second article, Wald developed a model rule-oriented dependency law and argued that specific value judgments about family intervention should be made at the legislative level, rather than in the courts.<sup>8</sup> The key problems Wald saw in the dependency process in 1976 were: 1) lack of adequate funding for noncoercive intervention services and reunification services; and 2) laws and administrative processes that did not reflect and facilitate a set of consistent goals for intervention.<sup>9</sup> The result, Wald felt, was an existing statutory system that focused on parental behaviors rather than harm to the children.<sup>10</sup>

In elaborating on the weaknesses of the child welfare system, Wald pointed to substantial evidence that state intervention is harmful, not beneficial, to children and parents.<sup>11</sup> Most children are strongly attached to their parents whether "fit" or "unfit." Another problem discussed by Wald was the application of neglect standards in an arbitrary, discriminatory way, with neglect standards being applied more stringently to poor families than to middle class families. Wald feared the massive reallocation of children to new parents under the 1970s standards.<sup>12</sup> As a more realistic approach, Wald suggested an intervention system in which standards for final termination of parental rights are related to standards for initial removal of children from their homes and to standards for return of children to their homes. He summarized his proposals as follows:

---

6. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) [hereinafter cited as Wald I]; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1975) [hereinafter cited as Wald II].

7. Wald I, *supra* note 6, at 987-1005.

8. Wald II, *supra* note 6, at 649-52.

9. *Id.* at 627-28.

10. *Id.* at 629.

11. *Id.* at 644-45.

12. *Id.* at 651.

I propose that neglect statutes be revised to allow intervention only when a child has suffered or is likely to suffer certain serious harms. When intervention is needed to protect a child, the child should be left in her home unless she cannot be protected from the specific harm justifying intervention without removal. If a child must be removed, intensive services should be provided to reunite the family and the child should be returned when she will no longer be endangered in her home, not when it is in her 'best interest' to return. However, to prevent children from remaining in impermanent foster care, parental rights should be terminated and a permanent placement provided for most children under age three at the time of removal after six months of placement if the child cannot be returned home at that time. For children over three termination would occur<sup>13</sup> if they cannot be returned home after one year in placement.<sup>13</sup>

A formulation similar to the Wald proposals was offered even earlier by commentator Robert Mnookin.<sup>14</sup> He maintains that three principles should govern state intervention in family life and the removal of children from their homes: 1) removal should be a last resort, used only when the child cannot be protected within the home; 2) the decision to require foster care placement should be based on legal standards that can be applied in a consistent and even-handed way, and not be profoundly influenced by the values of the particular deciding judge; 3) if removal is necessary, the state should actively seek, when possible, to help the child's parents overcome the problems that led to removal so that the child can be returned home as soon as possible. In cases where the child cannot be returned home in a reasonable time, despite efforts by the state, the state should find a stable alternative arrangement such as adoption for the child. A child should not be left in foster care for an indefinite period of time.<sup>15</sup> Mnookin was troubled by the use of only the vague best interests standard when making decisions as to state intervention in family life. Society's knowledge of human behavior provides no reliable predictors of future abuse and neglect, and thus courts lack substantial predictive information. Our pluralistic society, Mnookin argues, lacks consensus about child-rearing strategies and values, and

---

13. *Id.* at 637-38. These proposals are explained in detail, *id.* at 700-06.

14. Mnookin, *Foster Care: In Whose Best Interests?*, 43 HARV. ED. REV. 599 (1973).

15. *Id.* at 602.

thus courts are left to rely on personal values.<sup>16</sup> The lack of consistent standards makes it too easy to ignore detriments to removing children and children separated from natural parents suffer "separation trauma".<sup>17</sup> Finally the best interests standard ignores parental interests.<sup>18</sup>

Judith Areen has proposed several principles which balance the interests of child, parent, and state:<sup>19</sup> 1) standards for court intervention in a family should focus on the emotional and physical needs of the children rather than on parental fault; 2) decisions on whether and how to intervene in a family situation should serve to enhance the social and emotional bonds of that family, 3) courts should require a permanent placement for any child who has been removed from his family and who cannot be returned safely within a period of time that is reasonable in view of the age and needs of the child.<sup>20</sup> The reasons for the Areen principles are similar to those of Wald and Mnookin: history has indicated that the enhancement of family ties is normally the best way to protect the best interests of children;<sup>21</sup> separation of children and parents can be harmful to a child's emotional development whatever the fault of the parent;<sup>22</sup> and the most prevalent characteristic of families charged with neglect is poverty.<sup>23</sup>

The need for narrower and more specific statutory standards in the dependency process has been urged from a social worker viewpoint as well as the legal viewpoint. Douglas Besharov very recently referred to the problem of increasing liability, both civil and criminal, because of the failure of social workers to properly investigate and treat child abuse and neglect cases.<sup>24</sup> Inadequate funding of social services has meant that the number of child welfare staff required to serve abused

---

16. *Id.* at 615-22.

17. *Id.* at 623.

18. *Id.* at 614-15.

19. Areen, *supra* note 4, at 918.

20. *Id.*

21. *Id.* at 919.

22. *Id.*

23. *Id.* at 888. See also Gartison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423 (1983).

24. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?* 9 FAMILY LAW REP. 4029 (1983). See *G.L. v. Zumwalt*, 564 F. Supp. 1030 (W.D. Mo. 1983) (consent decree) for an example of such a liability suit. See also *National Center for Youth Law, Sweeping Consent Decree Protects Rights of Foster Children*, 17 CLEARINGHOUSE REVIEW 555 (1983).

and neglected children has not kept pace with the reports of suspected incidences of dependency.<sup>25</sup> Besharov maintains that existing dependency laws are too broad to set the ground rules for appropriate decisionmaking by social service agencies charged with the duties of investigation and treatment. Existing laws place too much responsibility for decisionmaking on social workers, charging them with the burden of making sophisticated predictions of parental failure, when the predictive capacity of the social sciences makes it impossible to show with any degree of certainty whether a particular parent will abuse or neglect a child.<sup>26</sup> Besharov suggests that existing laws be redrafted to deal only with past abusive and neglectful behavior with only very narrow exceptions. He recommends that dependency laws legislate on serious harm to children, but avoid dealing with minor assaults or marginally inadequate care.<sup>27</sup>

Anne Selinske, a social worker, agrees that the increased demand for services has overloaded the child welfare system and the increase has not been matched with additional resources.<sup>28</sup> Her solution to this critical problem is the passage of legislation delineating the children who need help the most and determining how services are to be provided to them. Existing dependency laws, Selinske maintains, have not sufficiently limited the situations justifying intervention.<sup>29</sup>

The basic weaknesses in state care of children was even recognized by the United States Supreme Court in 1977 in *Smith v. Organization of Foster Families (OFFER)*.<sup>30</sup> The Court found a disproportionate resort to foster care by the poor and victims of discrimination, due partly to the disruptive effect of poverty on family stability but partly to the fact that middle and upper income families purchase private care for their children.<sup>31</sup> "The poor have little choice but to submit to state-supervised care when family crises strike."<sup>32</sup> The Court also noted the "hostility of agencies to the efforts of natural parents to obtain the re-

---

25. Besharov, *supra* note 24, at 4031.

26. *Id.* at 4032 (citing the U.S. National Center on Child Abuse and Neglect, *Review of Child Abuse Research: 1979-81*).

27. *Id.* at 4034.

28. Selinske, *Protecting CPS Clients and Workers*, 41 *PUBLIC WELFARE* 31 (1983).

29. *Id.* at 32-3.

30. 431 U.S. 816 (1977).

31. *Id.* at 834.

32. *Id.*



turn of their children” and gave various explanations for this hostility.<sup>33</sup> Studies show that social workers of middle class backgrounds tend to favor placement with generally higher status families, thus reflecting a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child.<sup>34</sup> Other problems discussed by the Court include lack of staff to provide social work services to enable natural parents to resolve their problems and prepare for return of the child, and agency policies which discourage involvement of the natural parent in the care of the child.<sup>35</sup>

All these comments have in common the recognition of the fallibility of human services, the limitations of funding, the lack of predictive capacity, and the disruptive effect of poverty. They give cause for caution in the drafting of dependency statutes, and urge the need for clarity, specificity and narrowness.

## B. The Constitutional Basis for Family Preservation Standards

Not only have legal and social work commentators and the United States Supreme Court in *Smith v. OFFER* recognized the importance of family autonomy and preservation as a paramount value in American society, but the principle has also been firmly established as a mandate of constitutional law. The Supreme Court’s decisions in the field of family law show three distinct lines of analysis that are relevant to proposed legislation on dependency: 1) family autonomy 2) family privacy and 3) the requirements of family preservation. While these lines overlap, a separate discussion of each will assist in the later analysis of the Proposed Committee Bill 2.

### 1. *Family Autonomy.*

The state’s interest in promoting family autonomy derives from its *parens patriae* objective of ensuring the welfare of children and its police power goal of promoting the strength and stability of society. There are, however, definite constitutional limits on the state’s power to control the substantive values and beliefs of its citizens.<sup>36</sup> The United States Constitution strictly limits the state’s power to impose on its citi-

---

33. *Id.*

34. *Id.*

35. *Id.* n.35.

36. Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1213 (1980).

zens any particular moral, religious, or ethical values although any individual is free to hold such views. In that sense, families are constitutionally autonomous. Thus in *Pierce v. Society of Sisters* the Supreme Court held that the state may not standardize its children by forcing them to accept instruction from public school teachers only.<sup>37</sup> The Court pointed out that “[t]he child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>38</sup> In *Meyers v. Nebraska*, the Court held that the state may not foster a homogeneous people with American ideals by forbidding the teaching of foreign languages to young children.<sup>39</sup> *Wisconsin v. Yoder*,<sup>40</sup> stands out as a particularly poignant reminder of the weight of family autonomy. In this case the Court acknowledged that the interest of the state in providing a system of compulsory public education is a “paramount” concern.<sup>41</sup> It might even be said that the best interests of Amish children required their participation in the American educational mainstream.<sup>42</sup> But the Court firmly emphasized that the state interest in protecting children must still be balanced against the fundamental rights of parents, and thus the Court refused to enforce the law requiring compulsory school attendance until the age of sixteen.<sup>43</sup>

A compelling recent decision is *Bellotti v. Baird*, in which the Supreme Court discussed parental ability to regulate a child’s abortion.<sup>44</sup> The Court stated that “affirmative sponsorship of particular ethical, religious or political beliefs is something we expect the State not to attempt in a society constitutionally committed to individual liberty and freedom of choice.”<sup>45</sup> In short, the limits placed on the state’s police power by the Constitution and the mandates of family autonomy prevent the state from imposing social norms and moral values on families and accord parents the dominant role in childrearing and childbearing decisions.<sup>46</sup> Any standards of parental fitness, therefore, must remain

---

37. 268 U.S. 510 (1925).

38. *Id.* at 535.

39. 262 U.S. 390 (1923).

40. 406 U.S. 205 (1972).

41. *Id.* at 213.

42. *Id.* at 229.

43. *Id.* at 213.

44. 443 U.S. 622 (1979).

45. *Id.* at 638.

46. Note, *supra* note 36, at 1216.

sensitive to the principle of family autonomy.

## 2. *Family Privacy*

A second line of constitutional cases deals with the right to family privacy concerning intimate family activities. *Prince v. Massachusetts* mentioned a private realm of family life which the state cannot enter.<sup>47</sup> *Skinner v. Oklahoma* invalidated a state statute providing for mandatory sterilization of persons convicted of three or more selected felonies.<sup>48</sup> *Griswold v. Connecticut* struck down a state statute forbidding the use of contraceptives.<sup>49</sup> *Roe v. Wade* overturned a state statute prohibiting non-therapeutic abortions.<sup>50</sup> *Eisenstadt v. Baird*<sup>51</sup> struck down a state statute prohibiting the sale of contraceptives to unmarried persons. In *Eisenstadt*, the Court said: "if the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."<sup>52</sup>

The right of privacy has been expanded to the right of extended families to live together. In *Moore v. City of East Cleveland*<sup>53</sup> the Supreme Court invalidated a local ordinance which defined "family", so as to exclude Moore's grandchildren from living with her in subsidized housing. The Court explained, "[b]ut when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."<sup>54</sup> Thus the Supreme Court has clearly established that individuals have a group of rights related to intimate family decisions. The state can not advance a countervailing interest that is compelling enough to interfere with these rights.

## 3. *State Intervention and Family Preservation*

The final area of constitutional concern deals with the state's ability to intervene in family life to affect a decision about the person with

---

47. 321 U.S. 158, 166 (1944).

48. 316 U.S. 535 (1942).

49. 381 U.S. 479 (1965).

50. 410 U.S. 113 (1973).

51. 405 U.S. 438 (1972).

52. *Id.* at 453.

53. 431 U.S. 494 (1977).

54. *Id.* at 499.

whom a child shall live. This line of cases has occasionally dealt with private party custody disputes but has more often focused on disputes between the state and private parties. Because of the fundamental right to family integrity and family privacy, the Supreme Court has recognized that the right to care, custody and control by a parent is a reciprocal right of the parent and the child. The Court stated, in *Stanley v. Illinois*,<sup>55</sup> that the issues of competency and care are important issues for both parent and child,<sup>56</sup> and, in *Ford v. Ford*,<sup>57</sup> that the question of with whom the child resides is "vital to a child's happiness and well-being."<sup>58</sup>

The Supreme Court has recognized the differing constitutional rights of parents who reside with their children and those who do not. Parental rights are at their pinnacle when parent and child live together in an intact domestic unit. Thus in *Stanley v. Illinois*,<sup>59</sup> the Court held that a single, widowed father who lives with his children has a due process right to a hearing before a child can be removed from the home.<sup>60</sup> In contrast, the Court held in *Quilloin v. Walcott*<sup>61</sup> that an unwed father who did not reside with his children did not have a constitutional right to withhold consent to their adoption by the stepfather with whom they lived.<sup>62</sup>

In *Smith v. OFFER*<sup>63</sup> the Supreme Court faced for the first time the issue of the right of natural parents to family integrity, contrasted with the interests of the foster parents in continued custody of the foster children and the state's interest in protecting the child. Even after the family has been separated, the liberty interest of natural parents in family privacy rests on a higher plane than the rights of any other individual, because:

its contours are ordinarily to be sought, not in state law, but in intrinsic human rights. Any emotional ties that may develop between a foster parent and a child—or arguably between a legal custodian and a child—are of less constitutional significance than

---

55. 405 U.S. 645 (1972).

56. *Id.* at 657.

57. 371 U.S. 187 (1962).

58. *Id.* at 193.

59. 405 U.S. 645 (1972).

60. 405 U.S. at 658.

61. 434 U.S. 246 (1977).

62. 434 U.S. at 256.

63. 431 U.S. 816 (1977).

the ties between natural parents and children because the former are relationships created by the State and in which the State has been a partner from the outset.<sup>64</sup>

The *Smith* decision recognizes for the first time the inchoate substantive due process rights to future custody of natural parents whose children have been removed from their homes.<sup>65</sup> It also reinforces the constitutional distinction between family rights when the state is an intervenor as opposed to family rights when only private parties are involved.

Although a parent may lose temporary custody of a child, the parent does not lose the right to family integrity. The Supreme Court noted in *Santosky v. Kramer*<sup>66</sup> that “[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>67</sup> While parents retain their fundamental family rights even after removal of the child, the state’s interest is distinct.<sup>68</sup> When the state has reason to believe that a positive nurturing parent-child relationship still exists the state has an interest in preservation of the family unit.<sup>69</sup> But when it is clear that the natural parent cannot or will not provide a normal family home then the state’s interest is in finding the child an alternative permanent home.<sup>70</sup> The limitations on state intervention through its *parens patriae* powers lie in the lack of constitutional permission to separate children from fit parents and in the recognition that even parents who are separated from their children have a right to future custody. Because these are fundamental rights, the state may pursue its protective powers only when a compelling state interest has been demonstrated and only when the least drastic alternatives are used.<sup>71</sup>

---

64. 431 U.S. at 845.

65. Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication*, 44 BROOKLYN L. REV. 63, 64 (1977).

66. 455 U.S. 745, 102 S. Ct. 1388 (1982).

67. 455 U.S. at 753.

68. 455 U.S. at 766, 102 S. Ct. at 1401.

69. *Id.*

70. *Id.*

71. *Roe v. Wade*, 410 U.S. 113 (1973).

### III. Statutory Responses to the Search for Realistic Standards

Progress has been made to ameliorate the patchwork nature of this country's dependency system and to implement constitutional law. These efforts have come from both federal legislation and through reform efforts in the Florida legislature.

#### A. The Federal Response: The Adoption Assistance and Child Welfare Act of 1980

In the late 1970s Congress studied problems related to foster care, and the public welfare systems which served children. Child welfare advocates articulated many of the weaknesses identified by Wald, Mnookin, Areen, which were discussed in Part II of this article. Until 1980, federal government participation in public child welfare systems serving dependent children was largely limited to funding provided through the Aid to Families with Dependent Children (AFDC) foster care program under Title IV-A of the Social Security Act.<sup>72</sup> This program provided federal funds to reimburse some of the costs of foster care for "eligible" children, primarily those from poor families. This form of federal financial assistance encouraged court-ordered placement in foster care, even though other federal monies were available for foster care related services and general child welfare services.<sup>73</sup> However, no uniform federal standard existed to encourage states to provide services to *prevent* removal of children and to aid in reunifying families with their children placed in foster care. In response, the Adoption Assistance and Child Welfare Act of 1980 (hereinafter referred to as the Adoption Assistance Act) was enacted by Congress on June 17, 1980.<sup>74</sup> This is the first major federal effort to reform the foster care system and to provide fiscal incentives to states to emphasize the goals of prevention and reunification. This law imposes numerous legal requirements on states to ensure that preventive efforts are made to avoid separation of dependent children from their families, that states are accountable for the status of children in foster care, and that stays in foster care are as short as possible.

---

72. 42 U.S.C. §§ 601-10 (1976).

73. Title XX, 42 U.S.C. §§ 1396-1400 (1976) and Title IV-B, 42 U.S.C. §§ 620-626 (1976).

74. 42 U.S.C. §§ 627-28 (Supp. V 1981) and 42 U.S.C. §§ 671-76 (Supp. V 1981). A detailed analysis of the Act is contained in A. ENGLISH, FOSTER CARE REFORM (1981).

The Act has several components. It creates a new Title IV-E<sup>75</sup> governing foster care maintenance payments and adoption assistance payments. It amends the child welfare services program under Title IV-B.<sup>76</sup> Title IV-E (Federal Payments for Foster Care and Adoption Assistance) requires each state participating in the AFDC program to develop a plan for meeting the new requirements of the Act as a condition for federal foster care funding.<sup>77</sup> Each state's plan must include the following components: 1) a judicial determination that continuation in the home would be "contrary to the welfare of the child" prior to placement in foster care;<sup>78</sup> 2) effective October 1, 1983, a judicial determination that "reasonable efforts" have been made to prevent or eliminate the need for removal of the child from the home, prior to placement in foster care;<sup>79</sup> 3) case plans for each child discussing the appropriateness of the particular placement, the services which will be provided to facilitate the child's return home or other permanent placement, and the services which will be provided to the child;<sup>80</sup> 4) a case review system to assure that the status of each child is reviewed at least every six months "to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned home or placed for adoption. . . .";<sup>81</sup> 5) a dispositional hearing within eighteen months of placement in foster care to determine the future status of the child;<sup>82</sup> 6) procedural safeguards as to parental rights pertaining to removal of the child from the home, changes in placements, and decisions affecting visitation rights;<sup>83</sup> 7) for voluntary placements in foster care, a voluntary placement agreement which provides for return of the child to the parents upon request, and limits the duration of voluntary placements to six months, absent a judicial determination that the child should not be returned home;<sup>84</sup> 8) a fair hearing procedure before the

---

75. 42 U.S.C. §§ 670-76 (Supp. V 1981).

76. 42 U.S.C. §§ 627-28 (Supp. V 1981).

77. 42 U.S.C. § 673 (Supp. V 1981).

78. 42 U.S.C. § 672(a)(1) (Supp. V 1981).

79. *Id.*

80. 42 U.S.C. § 671(16) (Supp. V 1981); 42 U.S.C. § 675(1) (Supp. V 1981).

81. 42 U.S.C. § 675(5)(b) (Supp. V 1981).

82. 42 U.S.C. § 675(5)(c) (Supp. V 1981).

83. *Id.*

84. 42 U.S.C. §672(g) (Supp. V 1981).

state agency, for anyone denied benefits under the Act.<sup>85</sup>

The requirement that reasonable efforts be made to prevent the need for placement in foster care is a requirement which must be met, not only by the state plan, but also in each individual case in which federal funding is sought. This provision furthers the goal of preventing removal from the home and gives the state a fiscal incentive to provide preventive services. The requirements for case plans and case reviews emphasize the goal of family reunification. By focusing on "alleviation or mitigation" of the problems causing the placement in foster care, the Act departs from the more subjective standard of "the best interests of the child", and adds certainty and enforceability to legal standards for returning the child home.

The amendments to Title IV-B (Child Welfare Services) contained in the Act also further the goals of removal prevention, accountability for children in the state foster care system, and reunification of natural families. Before its enactment, actual appropriations for child welfare services never exceeded \$56.5 million.<sup>86</sup> Although a broad array of services were authorized under the program, services to prevent removal and reunify families were not required. In fact, foster care was defined as a service under Title IV-B and many states used the bulk of their IV-B funds to subsidize foster care maintenance payments. The Adoption Assistance Act made a number of important changes in this Title IV-B program. First, states are precluded from increasing the amount of their child welfare services grant expended for foster care maintenance above 1979 levels.<sup>87</sup> Thus, additional appropriations (which as of 1982 have reached \$163 million)<sup>88</sup> must be used for other service programs. The specific guidelines for the use of additional funds consist of a two-step process. The first set of requirements comes into play when appropriations under Title IV-B exceed \$141 million.<sup>89</sup> For any year in which appropriations are at least that high, a state can only receive its share of amounts over \$141 million by meeting the following guidelines: 1) conducting an inventory of all children who have been in foster care for over six months to determine whether the child needs to

---

85. 42 U.S.C. §671(a)(12) (Supp. V 1981).

86. A. ENGLISH, *supra* note 74, at 38.

87. 42 U.S.C. § 623(c) (Supp. V 1981).

88. Interview with Abigail English, author of FOSTER CARE REFORM, in Orlando, Fla. (April 28, 1983).

89. 42 U.S.C. § 627(a) (Supp. V 1981). Florida self-certified that it met these requirements as of Sept. 30, 1982.



remain in care and what services are needed to allow the child to go home or to be adopted,<sup>90</sup>) implementing a statewide information system documenting demographic data, location, and goals for each child in foster care or who has been in care within the past 12 months,<sup>91</sup>) implementing the case review system required by Title IV-E, for all children in state-supervised care,<sup>92</sup> and 4) establishing a program to provide services designed to reunite children in foster care with their natural families if possible, or to facilitate placement for adoption.<sup>93</sup>

The second stage of the Title IV-B requirements becomes operative when appropriations for the program reach the level of \$266 million for two consecutive years. At that point, in addition to meeting all of the first stage requirements, states must have a preplacement preventive service program in place geared toward preventing placements in foster care and preserving the natural family unit. Any state not meeting these requirements will only be eligible to receive its share of \$56 million, the 1979 child welfare program appropriation.<sup>94</sup>

While the Act clearly imposes affirmative duties upon states to implement the law's protections as a condition for receipt of federal funds and to oversee compliance, it is still too early to determine the extent to which courts will allow individuals to enforce the requirements through litigation. Questions such as whether the law creates a private right of action, whether the law creates substantive rights, whether individuals may assert those rights, and whether an administrative, state, or federal judicial forum is appropriate for asserting them have yet to be resolved.<sup>95</sup>

The first judicial decision interpreting the requirements of the Adoption Assistance Act came in the case of *Lynch v. King*,<sup>96</sup> in which a federal district court issued a preliminary injunction directed to the Massachusetts Department of Social Services. The case involved alleged violations of the federal constitutional and statutory rights of children who were subject to the agency's protective intervention.<sup>97</sup> Specific allegations included the failure to investigate suspected abuse

90. 42 U.S.C. § 627(a)(1) (Supp. V 1981).

91. 42 U.S.C. § 627(a)(2)(A) (Supp. V 1981).

92. 42 U.S.C. § 627(a)(2)(B) (Supp. V 1981).

93. 42 U.S.C. § 627(a)(2)(C) (Supp. V 1981).

94. 42 U.S.C. § 627(b) (Supp. V 1981).

95. English, *Litigating Under the Adoption Assistance and Child Welfare Act in FOSTER CHILDREN IN THE COURTS* (M. Hardin ed. 1983).

96. 550 F. Supp. 325 (D. Mass. 1982).

97. 550 F. Supp. at 329.

and neglect, the failure to provide appropriate services to prevent the need for foster care placement or to reunify foster children with their natural families, and the failure to establish and review case plans for children and their families.<sup>98</sup> Although *Lynch v. King* was filed before the requirements of the Adoption Assistance Act became effective, and although the injunction was entered based on violations of the old law, the court based its prospective injunctive relief upon the new Act's conditions for continued federal funds, and required the Massachusetts agency to implement the case plan and case review system contained in Title IV-E.<sup>99</sup> The court also placed limitations on social worker caseloads, and required, as of October 1, 1983, that reunification services be provided.<sup>100</sup> Although the defendants have appealed the decision, it stands as authority for the existence of a cause of action to enforce both Title IV-B and Title IV-E of the Adoption Assistance Act.

## B. Florida's Response: Reform Efforts

At the same time that Wald, Mnookin and Areen were requesting more realistic dependency laws and Congress was studying foster care reform, various state efforts were also underway to deal with the placement of children in foster care and the regular review of their status. In the 1970s and 1980s, before the case review requirements of the Adoption Assistance Act were enacted, foster care review statutes had already been legislated in many states because of the belief that regular judicial review of children in foster care would address some systemic weaknesses and facilitate more rapid return of children to their own homes. One of the first states to pass such legislation was New York.<sup>101</sup> A research project which investigated the effects of New York foster care review hearings on the rate of return home confirmed that such reviews had accomplished the desired result. The study found a positive correlation between agency caseworker services provided to the natural family and the child's eventual return home.<sup>102</sup>

Through section 409.168, Florida Statutes, Florida enacted its first judicial review statute in 1977, requiring regular judicial review hear-

---

98. 550 F. Supp. at 331-36.

99. 550 F. Supp. at 335-36.

100. *Id.*

101. N.Y. SOCIAL SERVICES LAW § 392 (McKinney 1983).

102. See Festinger, *The New York Court Review of Children in Foster Care*, 54 CHILD WELFARE 211 (1975) and Festinger, *The Impact of New York Court Review of Children in Foster Care: A Follow-up Report*, 55 CHILD WELFARE 515 (1976).

ings, reports to the court and mandatory dispositional alternatives. This initial statute was passed because:

The Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year and that permanent homes could be found for many of these children if their status were reviewed periodically and they were found eligible for adoption. It is the intent of the Legislature, therefore, to help ensure a permanent home for children in foster care by requiring a periodic review and report on their status.<sup>103</sup>

In 1980, a legislative study by the House Health and Rehabilitative Services Committee of children in foster care found that, despite this noble intent, Florida still had 7,800 children who would remain in foster care over thirty months, an increase of two months over the 1979 figures.<sup>104</sup> The same study found that adequate foster care case plans were essential to the judicial review process. The study commented, "[t]he need for foster care case plans within a tight time frame is necessary if foster care is, in fact, ever to become truly a 'temporary' placement for children. The utilization of a contract approach to foster care has proven to be very workable in some states."<sup>105</sup>

The legislature subsequently revised section 409.168, Florida Statutes, and added section 39.41(6)(b) in 1980. Section 409.168 requires written performance agreements as well as judicial reviews. A performance agreement is a court-ordered document that is prepared by the social service agency in conference with the natural parents. The agreement delineates what is expected of all parties and what must be accomplished before a child can be returned to the parent. Performance agreements are required for all children who remain in foster care longer than thirty days. Section 39.41(6)(b) provides that substantial compliance with the terms of a performance agreement must result in the return of a child to the custody of the natural parent. The hoped for effect of this new legislation, according to the Committee Report, was the following:

---

103. FLA. STAT. § 409.168(1) (1977). The Florida First District Court of Appeal has held that the requirements of § 409.168(1) are mandatory. *Williamson v. State*, 369 So. 2d 660 (Fla. 1st Dist. Ct. App. 1979); *Pingrel v. Quaintance*, 394 So. 2d 161 (Fla. 1st Dist. Ct. App. 1981).

104. COMM. ON HEALTH & REHAB. SERV., FLA. HOUSE OF REP., H.R. 1648, FOSTER CARE: IDENTIFIED PROBLEMS (1980).

105. *Id.* at 22.

The proposed changes in both the permanent commitment section of Chapter 39 and the report and judicial review section of Chapter 409 attempt to bring greater focus on the timeliness of preparing performance agreements to plan for the child entering foster care and the need to have the agency, the natural parents, and other involved parties to work together to help the family reunite if at all possible or to move toward terminating parental rights if feasible and moving toward placement of the child in a permanent, stable family setting.

The changes also attempted to stress the importance of the judicial review proceedings to the courts by removing the ability to waive the hearing and by also requiring the agreements to be submitted to the court.<sup>106</sup> Florida's Juvenile Justice Act, Chapter 39, Florida Statutes (1980), provides the statutory authority for the state to initially intervene in family relationships and to place dependent children in the homes of relatives or in foster care. In enacting this legislation, the legislature expressly stated the purpose of the Chapter, indicating a clear preference for maintaining and restoring the natural family.<sup>107</sup> In addition to Florida's Juvenile Justice Act, the legislature has mandated that the Department of Health and Rehabilitative Services (HRS) administer a program for dependent children and their families. The legislature set forth the goals toward which the program was to be directed and once again clearly indicated its preference for reunification of the natural family.<sup>108</sup> For some time, therefore, it has been the legislative policy in Florida to recognize the importance of family reunification and preservation as a goal. The concomitant search for realistic standards has long been a legislative priority.

The issues raised by the foster care review legislation are beginning to be addressed by Florida courts as the family reunification tools begin to be enforced. *Quaintance v. Pingree*<sup>109</sup> establishes the importance of having regular judicial reviews on a timely basis and interprets the provisions of section 409.168 as mandatory. *In re V.M.C.*,<sup>110</sup> holding that an out-of-state placement of a Florida foster child is not authorized by statute, also establishes the principle that the dispositional alternatives contained in section 409.168 are mandatory and exclusive.

---

106. *Id.* at 2.

107. FLA. STAT. §§ 39.001-39.516 (1979).

108. FLA. STAT. § 409.145 (1978).

109. 394 So. 2d 161 (Fla. 1st Dist. Ct. App. 1981).

110. 369 So. 2d 660 (Fla. 1st Dist. Ct. App. 1979).

The first case to trace at length the legislative history of section 409.168 and the policy implications of the foster care scheme chosen by Florida is *In re A.B.*<sup>111</sup> This decision makes clear that the Florida legislature in enacting Chapter 39 and section 409.168 replaced any common law best interests of the child standard with a specific set of statutory requirements designed for reconciliation of children with their natural parents whenever possible and their permanent placement in adoptive homes when that is not possible. The decision emphasizes that the legislative goal for Florida's foster children is permanence. This goal can only be achieved if HRS has fulfilled its affirmative obligation to design and carry out a meaningful performance agreement.

#### IV. Family Preservation Issues and Proposed Legislation For Florida

Although much has been accomplished through federal and state laws to improve the dependency process, a great deal remains to be done. During its 1983 session, Florida's legislature addressed many of these open issues and will address these problems again in the 1984 session. This section identifies the crucial family preservation issues currently at stake in Florida, and suggests some ways these issues can be resolved.

##### A. Compliance with the Adoption Assistance and Child Welfare Act

In order for Florida to continue to receive federal foster care and child welfare funds, Florida must meet the requirements of the federal Adoption Assistance and Child Welfare Act.<sup>112</sup> While not all of the Act's requirements require legislative changes, Florida's dependency statute must be examined in light of the federal requirements to determine where changes are needed. The Proposed Committee Bill 2 addresses many of these issues in a positive manner. Florida law presently requires proof of abandonment, abuse, or neglect.<sup>113</sup> Neglect, as defined, precludes an adjudication of dependency if the reason for the child's deprivation is poverty or "financial inability."<sup>114</sup> An amendment

---

111. 9 FLA. L.W. 40 (Fla. 1st Dist. Ct. App. Dec. 30, 1983) (No. AQ-331).

112. See *supra* note 74 and accompanying text.

113. FLA. STAT. § 39.01(9) (1980).

114. FLA. STAT. § 39.01(26) (1980).

contained in the proposed bill would modify the financial inability language by permitting an adjudication of neglect in cases of financial inability if "services were offered and rejected". This proposed change is consistent with the goal of prevention and the requirements of the Adoption Assistance Act that "reasonable efforts" be made to avoid the need for placement in foster care.<sup>115</sup> In any event, a program of preventive services may soon be required as a condition for receiving additional funds under Title IV-B for the state of Florida. Earlier drafts of Proposed Committee Bill 2 would have permitted an adjudication if services were offered and rejected and in the additional situation when services for relief were merely unavailable. The unavailability language, which is inconsistent with the goal of the federal law, has been deleted from the proposed bill.

Federal law prohibits federal funding for a foster care placement, absent a judicial finding as to "reasonable efforts" to prevent the placement.<sup>116</sup> To bring Florida law into compliance, the Proposed Committee Bill 2 contains amendments which would insert the "reasonable efforts" determination into the Florida statute, not only at the disposition hearing when the placement is ordered, but also at earlier stages in the proceeding. Thus, the judicial inquiry into preventive efforts would begin at the detention stage, and if efforts have not been reasonable, the court can order that services be provided to maintain the child in the home. By inserting these requirements into the early stages of the proceedings, the proposed amendments adhere to the preventive goals of the Adoption Assistance Act and are consistent with the constitutional prohibition on separating children from fit parents.

The Title IV-E requirements for case plans and a case review system are largely met by the judicial review and performance agreement provisions of section 409.168, Florida Statutes. The performance agreement should contain most of the substantive elements of a case plan. Under current Florida law, the decision to return a foster child to his home turns on improving the conditions which caused removal, as set forth in the performance agreement.<sup>117</sup> The language in the Proposed Committee Bill 2 uses the word "remediate" in establishing a standard. This is consistent with the language of the federal statute which focuses on "alleviating or mitigating" the problems causing foster care place-

---

115. 42 U.S.C. § 672(a)(1) (1980).

116. *Id.*

117. FLA. STAT. 409.168(3)(a)b.a. (1980).

ment at the review hearing.<sup>118</sup> Any legislative changes which would amend Florida's standard by shifting the focus away from the correction of the problems which caused the placement and toward a "best interests" standard, could jeopardize Florida's receipt of federal funds. Another amendment contained in the proposed bill requires an eighteen month judicial review hearing. This would satisfy the Adoption Assistance Act's requirement for a "disposition hearing" within eighteen months.<sup>119</sup> Current Florida law provides for an equivalent of the federal disposition hearing only after twenty four months in foster care.<sup>120</sup>

These and other proposed legislative changes address most of the requirements of the Adoption Assistance and Child Welfare Act which necessitate statutory change. Other requirements of the Act, while capable of being met by HRS, should be considered for future legislative action. For example, the statewide information system and the reunification and prevention services programs funded under Title IV-B could be the subject of specific legislation. Not only would such legislation assure Florida's compliance with the Act but it would also strengthen Florida's response to the challenge of designing a realistic and consistent system for dependent children.

## B. The Criteria for Removal and Return

Legal and social work commentators and the United States Supreme Court have in their separate approaches identified the need to connect the statutory criteria for removal of children from their homes and placement in substitute care with the criteria for their return home or for their permanent placement if they cannot go home. Prior to 1980 this problem represented a glaring flaw in Florida law because the criteria for disposition of dependent children were unclear. The Florida Supreme Court in 1958 broadly interpreted Florida's juvenile dependency law in *Pendarvis v. State*.<sup>121</sup> The court stated that once a child has lawfully been declared a dependent child, he becomes a ward of the state and broad discretion is vested in the juvenile court to do whatever it believes is in the best interests of the child.<sup>122</sup> The problems with this interpretation from a practical point of view have been described by

---

118. 42 U.S.C. § 675(5)(b) (1980).

119. 42 U.S.C. § 675(5)(c) (1980).

120. FLA. STAT. § 409.168(3)(b) (1980).

121. 104 So. 2d 651 (Fla. 1958).

122. 104 So. 2d at 652.

Mnookin.<sup>123</sup> The legal problems become evident by comparing the language of *Pendarvis* to the constitutional limits imposed by *Pierce v. Society of Sisters*,<sup>124</sup> *Bellotti v. Baird*,<sup>124</sup> *Smith v. OFFER*,<sup>126</sup> and *Santosky v. Kramer*.<sup>127</sup>

In 1980 the Florida legislature attempted to make the connection between standards for removal and standards for reunification of families by designing the performance agreement. The legislature provided for the return of children if parents substantially complied with the performance agreement and for permanent commitment if parents did not.<sup>80</sup> The performance agreement must contain a description of the reasons for the placement of the child in foster care, the problems or conditions of the natural home that necessitated removal and the remediation which will determine the return of the child to the home.<sup>129</sup> It also must contain a statement of the specific actions to be taken by the parents to eliminate or correct the identified problems or conditions.<sup>130</sup>

While the statutory language appears clear on its face, there have been serious problems in the implementation of this law. The lines have been drawn between those forces committed to the concepts of family reunification and permanence for children and those forces determined to retreat to the vague best interest standard that allows a court to find "better parents" for dependent children, the 1970s debate staged anew. The Florida First District Court of Appeal in its comprehensive decision *In re A.B.*,<sup>131</sup> has clarified the applicability of the simple best interests test in state intervention cases. This decision establishes that the goal of Florida's foster care system is not to search for a fuller life with more desirable parents for a child.<sup>132</sup> A passive system of relying upon a judge's perception of the "best interest of the child" demands "more wisdom than Solomon's and its discriminatory ramifications, penalizing the poor by reparenting their children to more affluent candidates, are

---

123. See Mnookin, *supra* note 14 and accompanying text.

124. 268 U.S. 510 (1925). See *supra* note 37 and accompanying text.

125. 443 U.S. 622 (1979). See *supra* note 44 and accompanying text.

126. 431 U.S. 816 (1977). See *supra* note 30 and accompanying text.

127. 455 U.S. 745, 102 S. Ct. 1388 (1982). See *supra* note 66 and accompanying text.

128. FLA. STAT. § 39.41(6)(b); 39.41(1)(f)1.d. (1980).

129. FLA. STAT. § 409.168(3)(a)6 (1980).

130. *Id.*

131. 9 FLA. L. W. 40 (Fla. 1st Dist. Ct. App. Dec. 30, 1983) (No. AQ-331).

132. *Id.* at 44.



distressingly evident."<sup>133</sup> Some of the debate and confusion, therefore, has been laid to rest.

The Florida House of Representatives HRS Subcommittee on Health, Economic and Social Services, furthermore, has addressed this debate in Proposed Committee Bill 2 by defining more specifically the concept of substantial compliance with the terms of a performance agreement. The bill provides " '[s]ubstantial compliance' means that the circumstances which caused the placement in foster care have been remediated to the extent that the well being and safety of the child will not be endangered upon the child being returned to the parent or guardian."<sup>134</sup> The strength of this definition lies in the extent to which it corrects the problems identified earlier in Parts II and III. It gives certainty to social workers, courts, parents, and children. It deals with serious harm to children and their endangerment. It adheres to constitutional principles of family preservation and limitations on state intervention in family life. It, finally, assures Florida's compliance with the Adoption Assistance and Child Welfare Act for the purpose of receiving federal funds.

### C. Poverty as a Standard for Dependency

The legal and social work commentators and the United States Supreme Court have been sensitive about the extent to which the burden of state intervention in family life falls disproportionately upon the poor and victims of discrimination.<sup>135</sup> In 1978 the Florida legislature ameliorated this problem by defining "neglect" as requiring financial ability<sup>136</sup> and by defining abandonment as also requiring ability to support and communicate with a child.<sup>137</sup> Difficult economic times and cutbacks in federal funds have spurred the poverty debate again in Florida. There is no financial assistance available in Florida for two-parent families who have exhausted their financial resources. Yet some trial courts persist in claiming the need to protect the children of the unemployed and allege that children are better off in foster care than in these homes without means.

---

133. *Id.*

134. *See supra* note 2 and accompanying text. Proposed bill available from Fla. H.R., HRS Subcommittee on Health, Eco. & Soc. Serv.

135. *Smith v. OFFER*, 431 U.S. 816 (1977). *See also Santosky v. Kramer*, 455 U.S. 745 (1982).

136. FLA. STAT. § 39.01(27) (1978).

137. *Id.*

The Subcommittee on Health, Economic and Social Services has resolved this debate in Proposed Committee Bill 2 by broadening the definition of neglect and abandonment and by modifying the requirements of financial ability and the ability to support and communicate. The bill conditions an adjudication of neglect in cases of parental poverty upon the offer and rejection of services to assist the family. The more troublesome language of earlier drafts which refers only to the offer of "available" services has been removed. This language evolved after substantial debate and discussion. Lines were drawn between those forces clearly committed to adjudications of dependency solely for poverty reasons and those forces opposed to any such change in the existing laws. Any effort to further weaken the statutory protection for parents without financial ability would be subject to legal challenges. In addition, such results would strike at the essence of a fundamentally fair societal value system. Statutory provisions that make poverty a basis for state intervention between parent and child could violate the equal protection and due process rights of the United States Constitution in their abrogation of the rights of family autonomy, family privacy, and family preservation.<sup>138</sup> Such definitions would establish a cultural value choice that poverty is per se unwholesome for children and would establish the solution as removal of children from their homes rather than providing financial subsistence for the families. The effects on parents and children of "separation trauma" would be ignored and social workers and resources are diverted from cases where children are in grave danger. Cases of poverty are better solved elsewhere than in the juvenile courts because there is no certain body of research that children are fatally and inexorably harmed by growing up poor and the proposed bill preserves this solution.

#### D. Right to Counsel for Parents in the Dependency Process

Perhaps the most pressing family preservation issue currently at stake in Florida is that of the absolute right to counsel on an appointed basis for indigent parents at every stage in the dependency process. Currently each interest is represented in Florida dependency proceedings except the accused parent.<sup>139</sup> Florida courts now use complex evidence presented by child protection teams at adjudication. It is not unusual to see at least six professionals, including lawyers, HRS

---

138. Areen, *supra* note 4, at 930-32.

139. FLA. STAT. §§ 39.404(3), § 415.508 (1983).

counselors, and psychologists marshalled against an unrepresented parent standing alone. It should be recognized that the present proposed revisions to Chapter 39 would make it easier to adjudicate neglect and abandonment in the first instance because these definitions are expanded. Thus an even greater death blow is dealt to the natural parent's rights. At the very least, Proposed Committee Bill 2 makes the dependency process even more complicated for the unsophisticated parent to understand.

The Subcommittee on Health, Economic and Social Services has recognized the importance of the right to counsel and has included provisions for appointed counsel in its proposals. The reasons for supporting this provision are compelling. For example, on September 15, 1983, the United States Fifth Circuit Court of Appeals issued an en banc decision in *Davis v. Page*<sup>140</sup> which has generated great confusion. Twenty-four judges participated in the decision which concerned indigent parents' due process rights to appointed counsel in state dependency proceedings.<sup>141</sup> Five judges held that the decision of the United States Supreme Court in *Lassiter v. Department of Social Services*<sup>142</sup> requires that the right to counsel in Florida dependency proceedings be determined on a case-by-case basis. These five judges required the court to apply the *Mathews v. Eldridge*<sup>143</sup> three-pronged due process test and determine in each case: 1) the parental issue at stake, including the possibility of the child remaining in his home or with relatives as opposed to removal from the home and placement in foster care, 2) the state's interest in an accurate and just decision, and 3) the risk that a parent will be erroneously deprived of custody because the parent is not represented by counsel.<sup>144</sup>

One Fifth Circuit judge concurred with the above five but stated that "due process will require counsel in most cases of this kind (unless saved by a determination that the evidence was sufficiently great "that the absence of counsel's guidance did not render the proceedings fundamentally unfair)."<sup>145</sup> Eight judges ordered the entry of judgment for the defendant judges, stating that the pleadings did not present a case or controversy. No comment on the merits of right to counsel was made

---

140. 714 F.2d 512 (5th Cir. 1983).

141. 714 F.2d at 513.

142. 453 U.S. 927 (1981).

143. 424 U.S. 319 (1976).

144. 714 F.2d at 516-17.

145. *Id.* at 522.

by these judges.<sup>146</sup> Eleven judges joined in dissenting from the order of judgment for the defendants.<sup>147</sup> In addition to finding a case or controversy these judges would require an absolute right to counsel. The reasons given for this right included: 1) adjudications of dependency are different in nature from permanent commitment hearings; 2) initial separation of parent and child involves an intact family unit with constitutional rights to family integrity that are of greater constitutional significance than those of families whose bonds have been severed; 3) adjudications of dependency in Florida deal a "death blow" to parental rights and have a lasting chill on the exercise of these rights; 4) certain legal rights are lost if not asserted at the adjudicatory stage in dependency proceedings; 5) initial adjudications stigmatize or sever the presumption that a parent is fit, a showing that can never fully be regained by subsequent evidence produced at later stages; 6) the state's *parens patriae* interest in child protection favors preservation not severance of natural family bonds; 7) Florida's dependency proceedings are formal accusatory proceedings where: the state is always represented, the formal rules of evidence are employed, a guardian ad litem represents the child, and every interest but the parent's is represented by counsel. Psychological, medical and sociological evidence is used; 8) issues adjudicated in Florida's dependencies are speculative and far-reaching; 9) unrepresented parents lose custody of their children more often than parents who are represented; and 10) proceedings entailing substantive adjudications of fundamental liberty interests require counsel absolutely, while proceedings involving placement on the basis of previous substantive adjudications require counsel on a case by case basis.<sup>148</sup> The mandate of the Fifth Circuit in *Davis* had been stayed pending a petition for review by writ of certiorari to the United States Supreme Court. This petition was denied January 10, 1984.<sup>149</sup>

In examining other right to counsel cases in Florida, a similar confusing array of decisions is evident. In *In re D.B. and D.S.*,<sup>150</sup> the Florida Supreme Court required trial judges to appoint counsel for parents whenever permanent termination of parental rights might result or when the proceedings, by their nature, might lead to criminal child

---

146. *Id.* at 518-22.

147. *Id.* at 524.

148. *Id.* at 525-32.

149. *Cert. den. sub nom Davis v. Gladstone*, 52 U.S.L.W. 3503 (Jan. 10, 1984).

150. 385 So. 2d 83 (Fla. 1980).

abuse charges.<sup>151</sup> This result is compelled by the federal Constitution.<sup>152</sup> In all other cases, trial judges are required to use all available legal aid services and when these services are unavailable, to request private counsel to provide the necessary services.<sup>153</sup>

A case closely analogous to *In re D.B. and D.S.*, is *In re Hutchins*.<sup>154</sup> The Florida Supreme Court in *Hutchins* considered the previous "ungovernability" classification contained in Florida law. That statute provided that a child who committed a second act of ungovernability could be adjudicated delinquent.<sup>155</sup> *In re Gault*<sup>156</sup> had long ago established the child's right to counsel in a delinquency proceeding. The Florida Supreme Court explained that the right to counsel was not mandatory at the first hearing on ungovernability, because that first hearing was not necessarily the first step in an adjudication of delinquency, depending upon the conduct of the child.<sup>157</sup> But the court concluded that it was impermissible to base an adjudication of ungovernability for the second time on a previously conducted hearing in which the child was not represented by counsel.<sup>158</sup> It stated that the first adjudicatory hearing is a "critical first step" in the delinquency proceeding and the accused is entitled to all due process rights at each step in the procedure.<sup>159</sup> De novo review at a subsequent hearing in which all the facts of the first ungovernability hearing were reheard does not provide adequate constitutional safeguards since the first adjudication remains an essential element of delinquency.<sup>160</sup>

The Florida dependency scheme is similar to the former ungovernability scheme in that there are a series of "critical first steps," beginning with detention and ending with permanent commitment.<sup>161</sup>

151. *Id.* at 90.

152. *Id.*

153. *Id.* at 92. The Florida Attorney General has argued that because all adjudications of dependency threaten a parent with permanent termination of parental rights and the possibility of criminal charges, State law already sweeps more broadly than *Lassiter* (Brief in opposition ot Petition for Certiorari, *Davis v. Gladstone*, 52 U.S.L.W. 3503 (Jan. 10, 1984).

154. 345 So. 2d 703 (Fla. 1977).

155. *Id.* at 706.

156. 387 U.S. 1 (1967).

157. 345 So. 2d at 706.

158. *Id.* at 707.

159. *Id.*

160. *Id.*

161. FLA. STAT. §§ 39.401, 30.402, 39.404, 30.408, 39.41 (1980).

The seriousness of this issue is illustrated by *In re C.M.H.*<sup>162</sup> In this case the Florida First District Court of Appeal held that the original adjudication of abuse, neglect and abandonment was sufficient to form the basis for subsequent permanent commitment without further proof.<sup>163</sup> While this decision may be constitutionally invalid under *Santosky v. Kramer*,<sup>164</sup> and has been somewhat clarified by *In re A.B.*,<sup>165</sup> the original adjudication of dependency is still a critical stage in any subsequent proceedings to terminate parental rights.

In *Hutchins* terms, initial dependency proceedings are "critical first steps" because they may result in permanent commitment at a subsequent hearing. The issue of parental unfitness is substantively adjudicated in the initial adjudicatory hearing. As Judge Vance pointed out in *Davis*, due process absolutely requires counsel in proceedings entailing substantive adjudications of fundamental liberty interests.<sup>166</sup> Lower court decisions on the right to counsel in Florida include *Alton v. Conklin*, which holds that parents have a right to counsel whenever their child may be committed to an institution;<sup>167</sup> *In re R.W.*, which holds that parents have a right to counsel at the time of a stipulation as to an adjudication of dependency;<sup>168</sup> and *A.T.P. v. State*, which holds that parent and child have a right to counsel at detention hearings that are akin to summary adjudications.<sup>169</sup> A permanent commitment order was overturned in *In re R.W.H.* when the record did not reveal the mother's intelligent waiver of counsel.<sup>170</sup>

After considering these decisions, it appears that Florida trial courts must pursue the following analysis at a minimum: 1) the parental interest at stake; 2) the state interest at stake; 3) the risk of an erroneous decision; 4) the formality and complexity of the proceeding; 5) the likelihood of use of medical, psychological or sociological evidence; 6) the likelihood that a child will remain at home or with relatives as opposed to removal from the home; 7) the possibility of criminal child abuse charges; 8) the possibility of a subsequent permanent commitment; 9) the presence of a stipulation; and 10) the possibility

---

162. 413 So. 2d 418 (Fla. 1st Dist. Ct. App. 1982).

163. *Id.* at 427.

164. 455 U.S. 745 (1982).

165. 9 FLA. L.W. 40 (Fla. 1st Dist. Ct. App. Dec. 30, 1983) (No. AQ-331).

166. 714 F.2d at 533.

167. 421 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1982).

168. 429 So. 2d 711 (Fla. 5th Dist. Ct. App. 1983).

169. 427 So. 2d 355 (Fla. 5th Dist. Ct. App. 1983).

170. 375 So. 2d 321 (Fla. 2d Dist. Ct. App. 1979).

that the child may be committed to an institution.

The complexity of this formula leads to the conclusion that the absolute right to counsel conferred by statute would avoid the expense of judicial decision making on a case-by-case basis and its endless appellate litigation. The two state statutes reviewed by the United States Supreme Court in *Lassiter*<sup>171</sup> and *Santosky*<sup>172</sup> require court appointed counsel at adjudication. In enacting right to counsel legislation, Florida would join a host of sister states, such as New York and North Carolina. The Supreme Court in *Lassiter* reminds us that wise public policy and informed opinion holds that appointed counsel is necessary not only in permanent commitment proceedings but in neglect and dependency proceedings as well.<sup>173</sup> The proposed amendment will simplify judicial decision making and will bring Florida in line with the national trend towards an absolute right to counsel.

#### E. The Standard of Proof for Permanent Commitment

The final family preservation issue currently facing Florida is the standard of proof required at permanent commitment hearings. Florida's statute has never specified a standard. Until recently, appellate courts had consistently ruled that clear and convincing proof of 1) parental unfitness and 2) the manifest best interests of the child were required at permanent commitment hearings.<sup>174</sup>

Last year, however, the First District Court of Appeal interpreted the existing Florida statute in *In re C.M.H.*, holding that only the manifest best interests of the child need to be demonstrated by clear and convincing evidence in order to terminate parental rights.<sup>175</sup> The initial adjudication of dependency (by a lower standard of proof than clear and convincing), the court decided, made the issue of parental unfitness *res judicata* in a subsequent proceeding to terminate parental rights.<sup>176</sup> Because the appellate court's ruling in *C.M.H.* does not meet the standards of constitutional due process, set forth by the Supreme Court in

---

171. 453 U.S. 927 (1981).

172. 455 U.S. 745, 102 S. Ct. 1388 (1982).

173. *Id.*

174. See *Carlson v. State*, 378 So. 2d 868 (Fla. 2d Dist. Ct. App. 1979); *In Re D.A.H.*, 309 So. 2d 379 (Fla. 5th Dist. Ct. App. 1980).

175. 413 So. 2d 418, 425 (Fla. 1st Dist. Ct. App. 1982).

176. 413 So.2d at 425.

*Santosky*,<sup>177</sup> and because the current statute is silent as to this important issue, this topic is currently ripe for legislative action.

Parental rights can be terminated upon a showing that the parent has abandoned, abused, or neglected the child or has failed to substantially comply with a performance agreement, and that permanent commitment is manifestly in the best interests of the child.<sup>178</sup> Dispositional hearings are more relaxed than adjudicatory hearings. The present statute is silent as to whether the formal rules of evidence are applied at a permanent commitment hearing. Florida courts had repeatedly held that a finding of permanent commitment must be based on clear and convincing evidence both as to present parental unfitness and as to the best interests of the child<sup>179</sup> until *In re C.M.H.* was decided.

"Clear and convincing" is a higher legal standard than the more-likely-than-not standard of a "preponderance of the evidence" which applies at dependency adjudications and in most civil actions. Clear and convincing, however, is not as high a legal standard as the "beyond a reasonable doubt" applicable in criminal proceedings. The United States Supreme Court in *Santosky* ruled that proof of parental unfitness by a mere preponderance of the evidence is unconstitutional.<sup>180</sup> The Court stated that applying a standard of proof "no greater than that necessary to award money damages in an ordinary civil action" failed to meet the requirements of due process and to adequately protect the parent's fundamental constitutional interest in the future of his family unit.<sup>181</sup> In analyzing New York's termination statute, the Supreme Court said that the findings of permanent neglect may be made only upon a showing of clear and convincing evidence.<sup>182</sup> At that stage of the proceedings, the natural parents are pitted against the state and the only issue is the unfitness of the parents. Because the consequences of permanent commitment are so severe, and because, at this fact-finding stage both parent and child share interest in avoiding the erroneous termination of parental rights, only a clear and convincing evidence standard can adequately allocate the risk between the family's interests and the state's interests.<sup>183</sup> The Supreme Court emphasized that at this

---

177. 455 U.S. 745, 102 S. Ct. 1388 (1982).

178. FLA. STAT. § 39.41(b) (1979).

179. See *In re C.K.G.*, 365 So. 2d 424 (Fla. 2d Dist. Ct. App. 1978); *Carlson v. State*, 378 So. 2d 868 (Fla. 2d Dist. Ct. App. 1979).

180. 455 U.S. at 749, 102 S. Ct. at 1402.

181. 455 U.S. at 752, 759.

182. 455 U.S. at 748-49.

183. *Id.*



stage the question of whether it would be in the best interests of the child to return home is not at issue.<sup>184</sup> The Court noted that even if permanent commitment is denied, the child's placement in foster care can still be maintained.<sup>185</sup>

*Santosky* is not cited in the opinion of *In re C.M.H.*, nor is the constitutional due process issue analyzed. To date, no Florida court has clearly addressed the requirements of *Santosky*, but it is evident that the statutory interpretation arrived at in *C.M.H.* cannot withstand judicial scrutiny in light of *Santosky*. In the process of substantially revising Florida's dependency statute, provisions relating to permanent commitment should be amended to comply with the Supreme Court's decision in *Santosky v. Kramer*. Revising the statute will ensure that future permanent commitment proceedings will not be subject to a reversal on constitutional grounds, and will provide finality to the permanent commitment process.

## V. Conclusion

The current efforts of the Florida legislature to revise the state's dependency laws offer tremendous opportunities for progress. Looking back at previous efforts to forge realistic standards helps identify the problems and pitfalls in the child welfare system and these laws' constitutional foundations. Previous Florida efforts have provided an opportunity to test and retest solutions. The federal Adoption Assistance and Child Welfare Act offers new solutions along with financial aid to the state. In its effort to reform, Florida should, in caution, remember the cherished American values of family autonomy and privacy and the limitations of state intervention in family life. In the search for realistic and consistent standards in the emotion-laden area of dependency law, the only standard which has endured the test of time, social change, and varying economic conditions is the standard of family preservation.

---

184. 455 U.S. at 754-56.

185. *Id.*