Presentation by Alan I. Mishael, Esq., Board Certified in Adoption Law*
An Overview of Certain Adoption-Related Aspects of Florida's Child Welfare System

"Give me a lever long enough and a fulcrum on which to place it, and I shall move the world."
-*Archimedes*

"You take the blue pill - the story ends, you wake up in your bed and
believe whatever you want to believe. . . .
You take the red pill –you stay in Wonderland
and I show you how deep the rabbit-hole goes."

-*The Matrix*, Morpheus to Neo

The course of a dependency case, from shelter to permanency, is often unpredictable. Proceedings under the Florida Rules of Juvenile Procedure and Chapter 39, *Fla. Stat.*, are different from the Civil and Family Law Rules in a variety of large and small ways. For example, you are a party if you are a private Petitioner, DCF, the Respondent Parents of the Child, the Guardian Ad Litem or the Child herself (often an unrepresented infant). In general, you are not a party if you do not occupy one of the foregoing roles, even though you are actually the child's caregiver 24-7. You are then deemed a statutory participant whose rights in no way approach those of a party.

As a matter of practice therefore, relative custodians, non-relative custodians and foster parents (collectively "custodians") who, for one reason or another, have not themselves taken steps, if appropriate, to become a private Petitioner, may from time to time be led to believe that they should (a) remain passive (b) that they have scant rights (c) that their views and input are not as valuable as input from statutory parties, (d) that they have little role in court (if and) until the child becomes available for adoption, and (e) they will be violating duties owed to DCF if they exercise statutory rights or seek legal advice.

This is an undesirable state of affairs and such blanket statements to custodians are inaccurate. More information is generally better than less information. Custodians have many rights, though some would argue, too few. If a custodian wants her rights to be honored, it is important that custodians first know what those rights are, have some idea how the system is supposed to work, that they attend as many hearings and staffings as they possibly can and when they wish to be heard, that they take the initiative to raise their hand. Sometimes the custodian will find an existing party who is an ally. Sometimes the custodian will not.

The course of a dependency case, from shelter to permanency, may often lack an optimal degree of organization. Last-minute filings, haphazard notice, informality of practice, backed-up

calendars, revolving door judicial assignments, personality issues, people talking over one another in vying for attention, lack of adequate accountability and a general legislative underfunding of the child welfare system, are not conducive to ideal decision-making. It can breed surprise, mistake and unfairness. Meanwhile, the custodian is typically more informed about the child's daily life and the history of the case than many others in the courtroom. The custodian's mere presence and articulate concern for how the case is proceeding often conveys to the judge the custodian's bedrock commitment to the welfare of the child.

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

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

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

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

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

This is the general rule. More compulsory requirements empowering custodians exist in

connection with periodic judicial reviews ("JR's"). These are critically important hearings, for which preparation is essential as it may yield results. The JR statute is long, but you may be surprised once you read it. Knowledge is power. Section 39.701, *Fla. Stat*., provides:

> (f) Notice of a judicial review hearing or a citizen review panel hearing, and a copy of the motion for judicial review, if any, must be served by the clerk of the court upon all of the following persons, if available to be served, regardless of whether the person was present at the previous hearing at which the date, time, and location of the hearing was announced:
> 1. The social service agency charged with the supervision of care, custody, or guardianship of the child, if that agency is not the movant.
> 2. The foster parent or legal custodian in whose home the child resides.
> 3. The parents.
> 4. The guardian ad litem for the child, or the representative of the guardian ad litem program if the program has been appointed.
> 5. The attorney for the child.
> 6. The child, if the child is 13 years of age or older.
> 7. Any preadoptive parent.
> 8. Such other persons as the court may direct.
>
> (g) The attorney for the department shall notify a relative who submits a request for notification of all proceedings and hearings pursuant to s. 39.301(14)(b). The notice shall include the date, time, and location of the next judicial review hearing.
>
> ***
>
> (2) REVIEW HEARINGS FOR CHILDREN YOUNGER THAN 18 YEARS OF AGE.—
> (a) Social study report for judicial review. —Before every judicial review hearing or citizen review panel hearing, the social service agency shall make an investigation and social study concerning all pertinent details relating to the child and shall furnish to the court or citizen review panel a written report that includes, but is not limited to:
> 1. A description of the type of placement the child is in at the time of the hearing, including the safety of the child and the continuing necessity for and appropriateness of the placement.
> 2. Documentation of the diligent efforts made by all parties to the case plan to comply with each applicable provision of the plan.
> 3. The amount of fees assessed and collected during the period of time being reported.
> 4. The services provided to the foster family or legal custodian in an effort to address the needs of the child as indicated in the case plan.
> 5. A statement that either:
> a. The parent, though able to do so, did not comply substantially with the case plan, and the agency recommendations;
> b. The parent did substantially comply with the case plan; or
> c. The parent has partially complied with the case plan, with a summary of additional progress needed and the agency recommendations.
> 6. A statement from the foster parent or legal custodian providing any material evidence concerning the well-being of the child, the impact of any services provided to

the child, the working relationship between the parents and the caregivers, and the return of the child to the parents.
7. A statement concerning the frequency, duration, and results of the parent-child visitation, if any, and the agency and caregiver recommendations for an expansion or restriction of future visitation.
8. The number of times a child has been removed from his or her home and placed elsewhere, the number and types of placements that have occurred, and the reason for the changes in placement.
9. The number of times a child's educational placement has been changed, the number and types of educational placements which have occurred, and the reason for any change in placement.
10. If the child has reached 13 years of age but is not yet 18 years of age, a statement from the caregiver on the progress the child has made in acquiring independent living skills.
11. Copies of all medical, psychological, and educational records that support the terms of the case plan and that have been produced concerning the parents or any caregiver since the last judicial review hearing.
12. Copies of the child's current health, mental health, and education records as identified in s. 39.6012.

(b) Submission and distribution of reports.—
1. A copy of the social service agency's written report and the written report of the guardian ad litem must be served on all parties whose whereabouts are known; to the foster parents or legal custodians; and to the citizen review panel, at least 72 hours before the judicial review hearing or citizen review panel hearing. The requirement for providing parents with a copy of the written report does not apply to those parents who have voluntarily surrendered their child for adoption or who have had their parental rights to the child terminated.
2. In a case in which the child has been permanently placed with the social service agency, the agency shall furnish to the court a written report concerning the progress being made to place the child for adoption. If the child cannot be placed for adoption, a report on the progress made by the child towards alternative permanency goals or placements, including, but not limited to, guardianship, long-term custody, long-term licensed custody, or independent living, must be submitted to the court. The report must be submitted to the court at least 72 hours before each scheduled judicial review.
3. In addition to or in lieu of any written statement provided to the court, the foster parent or legal custodian, or any preadoptive parent, shall be given the opportunity to address the court with any information relevant to the best interests of the child at any judicial review hearing.

(c) Review determinations.—The court and any citizen review panel shall take into consideration the information contained in the social services study and investigation and all medical, psychological, and educational records that support the terms of the case plan; testimony by the social services agency, the parent, the foster parent or caregiver, the guardian ad litem or surrogate parent for educational decisionmaking if one has been appointed for the child, and any other person deemed appropriate; and any relevant and material evidence submitted to the court, including written and oral reports to the extent of their probative value. These reports and evidence may be received by the court in its effort to determine the action to be taken with regard to the child and may be relied upon

to the extent of their probative value, even though not competent in an adjudicatory hearing. In its deliberations, the court and any citizen review panel shall seek to determine:

1. If the parent was advised of the right to receive assistance from any person or social service agency in the preparation of the case plan.

2. If the parent has been advised of the right to have counsel present at the judicial review or citizen review hearings. If not so advised, the court or citizen review panel shall advise the parent of such right.

3. If a guardian ad litem needs to be appointed for the child in a case in which a guardian ad litem has not previously been appointed or if there is a need to continue a guardian ad litem in a case in which a guardian ad litem has been appointed.

4. Who holds the rights to make educational decisions for the child. If appropriate, the court may refer the child to the district school superintendent for appointment of a surrogate parent or may itself appoint a surrogate parent under the Individuals with Disabilities Education Act and s. 39.0016.

5. The compliance or lack of compliance of all parties with applicable items of the case plan, including the parents' compliance with child support orders.

6. The compliance or lack of compliance with a visitation contract between the parent and the social service agency for contact with the child, including the frequency, duration, and results of the parent-child visitation and the reason for any noncompliance.

7. The frequency, kind, and duration of contacts among siblings who have been separated during placement, as well as any efforts undertaken to reunite separated siblings if doing so is in the best interest of the child.

8. The compliance or lack of compliance of the parent in meeting specified financial obligations pertaining to the care of the child, including the reason for failure to comply, if applicable.

9. Whether the child is receiving safe and proper care according to s. 39.6012, including, but not limited to, the appropriateness of the child's current placement, including whether the child is in a setting that is as family-like and as close to the parent's home as possible, consistent with the child's best interests and special needs, and including maintaining stability in the child's educational placement, as documented by assurances from the community-based care provider that:

a. The placement of the child takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement.

b. The community-based care agency has coordinated with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement.

10. A projected date likely for the child's return home or other permanent placement.

11. When appropriate, the basis for the unwillingness or inability of the parent to become a party to a case plan. The court and the citizen review panel shall determine if the efforts of the social service agency to secure party participation in a case plan were sufficient.

12. For a child who has reached 13 years of age but is not yet 18 years of age, the adequacy of the child's preparation for adulthood and independent living. For a child who is 15 years of age or older, the court shall determine if appropriate steps are being taken for the child to obtain a driver's license.

***

14. If the parents and caregivers have developed a productive relationship that includes meaningful communication and mutual support.

There is an additional notice requirement when a TPR petition is filed. Although that proceeding is not open to the public, and non-party custodians may not watch the trial (unless the trial is on their own TPR petition that by law they have a right to file at their own expense (see below), *Natural Parents of J.B. v. DCF*, 780 So. 2d 6 (Fla. 2001), the legislature has seemingly provided that non-party custodians have a right of access to the initial pretrial hearing:

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

Section 39.801(3)(a), *Fla. Stat.* The government may at times fail to provide the petition and notice to the custodians, timely or otherwise. A custodian may need to bring his statutory right to the petition to the government's attention once it is announced that a petition will be filed or has been filed already. Often, the custodian will be testifying at trial as a witness called by either DCF or the Guardian Ad Litem Program. Taking the initiative to proactively inquire about this from DCF or the GAL Program in advance of trial is often intelligent.

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

> The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. . . . (emphasis added)

Section 39.814(3), *Fla. Stat.* Access to the record is likely to be crucial to the custodian's ability to present effective advocacy either internally with allies or when allowed by the court. **Exercising this right may require being pro-active.** The custodian may, citing the statute, ask the judge to enter an order directing the clerk to grant her such access, as the clerk may not be inclined to make that decision unilaterally.

It cannot be emphasized enough, that access to the record may assist the custodian *in deciding for themselves* what they think about how the case is being handled, and what they may wish to take the initiative to themselves bring to the court's attention at future hearings. Even if no TPR case has been filed, and even outside what must be provided to custodians in connection

with a judicial review hearing, the legislature has directed DCF to also provide the following information to custodians *who make a point of requesting it, preferably in writing to the CBC legal counsel or DCF Chief Regional Counsel:*

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

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

> 39.202 Confidentiality of reports and records in cases of child abuse or neglect.—
>
> (1) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by this chapter. Such exemption from s. 119.07(1) applies to information in the possession of those entities granted access as set forth in this section.

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

* * *

(t) Persons with whom the department is seeking to place the child or to whom placement has been granted, including foster parents for whom an approved home study has been conducted, the designee of a licensed child-caring agency as described in s. 39.01(41), an approved relative or nonrelative with whom a child is placed pursuant to s. 39.402, preadoptive parents for whom a favorable preliminary adoptive home study has been conducted, adoptive parents, or an adoption entity acting on behalf of preadoptive or adoptive parents.

2021's SUBSTANTIAL LEGISLATIVE CHANGES IN PLACEMENT DECISION-MAKING

First, in 2021, the Florida legislature substantially revised its direction of how sibling placement issues should be evaluated, **and that represents an excellent improvement over prior law as it mandates a genuinely holistic, child-driven analysis as to each individual child**.

Second, it also the created a very important new opportunity for current custodians of the Child in the system to judicially challenge changes in custody. That statutory reform nonetheless has many limitations and easily overlooked deadlines in order for the new statute's protections to be activated. And at the point that it applies, too few actors in the child welfare system may go out of their way to bring these opportunities and the deadlines to the custodians' attention, which of course is exacerbated by many custodians having scant access to the funds necessary to hire competent counsel.

Very few appellate decisions, if any, interpreting the new law have thus far come out exploring its opportunities, limitations, vulnerabilities and applying it in harmony with other statutory provisions. The opportunities thereby offered opponents of the existing custodians are thus formidable, whether or not misguided. The first statute, which is quite long but definitely worth reading, is section 39.522(3), *Fla. Stat*., providing as follows and which is set out in bold:

39.522 Postdisposition change of custody.—

(1) The court may change the temporary legal custody or the conditions of protective supervision at a postdisposition hearing, without the necessity of another adjudicatory hearing.

(2)(a) At any time before a child is residing in the permanent placement approved at the permanency hearing, a child who has been placed in the child's own home under the protective supervision of an authorized agent of the department, in the home of a relative, in the home of a legal custodian, or in some other place may be brought before the court by the department or by any other interested person, upon the filing of a motion alleging a need for a change in the conditions of protective supervision or the placement. If any party or the current caregiver denies

the need for a change, the court shall hear all parties in person or by counsel, or both.

(b) Upon the admission of a need for a change or after such hearing, the court shall enter an order changing the placement, modifying the conditions of protective supervision, or continuing the conditions of protective supervision as ordered. The standard for changing custody of the child shall be the best interests of the child. When determining whether a change of legal custody or placement is in the best interests of the child, the court shall consider the factors listed in s. 39.01375 and the report filed by the multidisciplinary team, if applicable, unless the change of custody or placement is made pursuant to s. 63.082(6). The court shall also consider the priority of placements established under s. 39.4021 when making a decision regarding the best interest of the child in out-of-home care.

(c) If the child is not placed in foster care, the new placement for the child must meet the home study criteria and court approval under this chapter.

(3)(a) For purposes of this subsection, the term "change in physical custody" means a change by the department or community-based care lead agency to the child's physical residential address, regardless of whether such change requires a court order to change the legal custody of the child. However, this term does not include a change in placement made pursuant to s. 63.082(6).

(b)1. In a hearing on the change of physical custody under this section, there shall be a rebuttable presumption that it is in the child's best interest to remain permanently in his or her current physical placement if:

a. The child has been in the same safe and stable placement for 9 consecutive months or more;

b. Reunification is not a permanency option for the child;

c. The caregiver is able, willing, and eligible for consideration as an adoptive parent or permanent custodian for the child;

d. The caregiver is not requesting the change in physical placement; and

e. The change in physical placement being sought is not to reunify the child with his or her parent or sibling or transition the child from a safe and stable nonrelative caregiver to a safe and stable relative caregiver.

2. In order to rebut the presumption established in this paragraph, the court shall hold an evidentiary hearing on the change in physical custody to determine if the change in placement is in the best interest

of the child. As part of the evidentiary hearing, the court must consider competent and substantial evidence and testimony related to the factors enumerated in s. 39.01375 and any other evidence deemed relevant to a determination of placement, including evidence from a court-selected neutral and independent licensed professional with expertise in the science and research of child-parent bonding.

3. This presumption may not be rebutted solely by the expressed wishes of a biological parent, a biological relative, or a caregiver of a sibling of the child.

(c)1. The department or community-based care lead agency must notify a current caregiver who has been in the physical custody placement for at least 9 consecutive months and who meets all the established criteria in paragraph (b) of an intent to change the physical custody of the child, and a multidisciplinary team staffing must be held in accordance with ss. 39.4022 and 39.4023 at least 21 days before the intended date for the child's change in physical custody, unless there is an emergency situation as defined in s. 39.4022(2)(b). If there is not a unanimous consensus decision reached by the multidisciplinary team, the department's official position must be provided to the parties within the designated time period as provided for in s. 39.4022.

2. A caregiver who objects to the department's official position on the change in physical custody must notify the court and the department or community-based care lead agency of his or her objection and the intent to request an evidentiary hearing in writing in accordance with this section within 5 days after receiving notice of the department's official position provided under subparagraph 1. The transition of the child to the new caregiver may not begin before the expiration of the 5-day period within which the current caregiver may object.

3. Upon the department or community-based care lead agency receiving written notice of the caregiver's objection, the change to the child's physical custody must be placed in abeyance and the child may not be transitioned to a new physical placement without a court order, unless there is an emergency situation as defined in s. 39.4022(2)(b).

4. Within 7 days after receiving written notice from the caregiver, the court must conduct an initial case status hearing, at which time the court must:

a. Grant party status to the current caregiver who is seeking permanent custody and has maintained physical custody of that child for at least 9 continuous months for the limited purpose of filing a motion for a hearing on the objection and presenting evidence pursuant to this subsection;

b. Appoint an attorney for the child who is the subject of the permanent custody proceeding, in addition to the guardian ad litem, if one is appointed;

c. Advise the caregiver of his or her right to retain counsel for purposes of the evidentiary hearing; and

d. Appoint a court-selected neutral and independent licensed professional with expertise in the science and research of child-parent bonding.

(d) The court must conduct the evidentiary hearing and provide a written order of its findings regarding the placement that is in the best interest of the child no later than 90 days after the date the caregiver provided written notice to the court under this subsection. The court must provide its written order to the department or community-based care lead agency, the caregiver, and the prospective caregiver. The party status granted to the current caregiver under sub-subparagraph (c)4.a. terminates upon the written order by the court, or upon the 90-day time limit established in this paragraph, whichever occurs first.

(e) If the court orders that the physical custody of the child change from the current caregiver after the evidentiary hearing, the department or community-based care lead agency must implement the appropriate transition plan developed in accordance with ss. 39.4022 and 39.4023 or as ordered by the court.

As one can see, the legislature is implementing its awareness of the psychological importance to the child, who has been in the same home at least nine months, of the primary and secondary attachments he has formed during that time.

When the statute applies (and its exceptions do not), the burden shifts to those promoting a change in placement to convince the court to do so. It likewise grants the existing custodian party status in the trial court, which should be construed to carry with it the current custodian's right to exercise the same rights of a party that the preexisting parties already enjoy (DCF, the GAL Program, the Respondent Parents and the Child (assuming the Child has counsel)), for example, to take depositions, to subpoena witnesses and records, to receive access to the other side's evidence in advance of trial, etc.). One limitation is that the new statute suggests that the current custodian's party status evaporates should the trial court ultimately rule against her. In other words, that no appeal may be taken by the now current custodian who is no longer a party because she lost in the trial court and as a non-party may not file an appeal. (A potential problem under the Florida Constitution to that statutory disability to appeal an adverse trial court decision lies beyond the scope of this discussion).

As the statute also makes clear, there are some clear-cut exceptions and some others that may or may not apply based upon the arguments raised. The current custodian may also become easily ensnared by the strict timetable for invoking that statute conferring party status and the benefit of the rebuttable presumption. It starts with a multidisciplinary team staffing. At that point the custodian must turn square corners in timely furnishing written notice and must disregard any contrary assurances from possibly well-meaning others that strict and exact compliance is not really necessary. See subsection (3)(c).

Within 7 days after receiving written notice from the caregiver, the court must conduct an initial case status hearing, at which time the court must:

a. Grant party status to the current caregiver who is seeking permanent custody and has maintained physical custody of that child for at least 9 continuous months for the limited purpose of filing a motion for a hearing on the objection and presenting evidence pursuant to this subsection;

b. Appoint an attorney for the child who is the subject of the permanent custody proceeding, in addition to the guardian ad litem, if one is appointed;

c. Advise the caregiver of his or her right to retain counsel for purposes of the evidentiary hearing; and

d. Appoint a court-selected neutral and independent licensed professional with expertise in the science and research of child-parent bonding.

(d) The court must conduct the evidentiary hearing and provide a written order of its findings regarding the placement that is in the best interest of the child no later than 90 days after the date the caregiver provided written notice to the court under this subsection. The court must provide its written order to the department or community-based care lead agency, the caregiver, and the prospective caregiver.

We have watched this process in action, and although the 2021 revision of section 39.522 is not procedurally perfect or as applicable to a broader range of fact-patterns to which it should be, it represents a better opportunity to focus attention on the needs of the child rather than the desires of the adults, and it better dilutes the outcome-determinative impact of the current custodian typically having fewer economic resources for undertaking litigation than those collectively arrayed against that custodian.

At the same time, the importance of the above 2021 enactment may be diminished depending upon judicial resolution of how to reconcile it with a second 2021 enactment:

39.4021 Priority placement for out-of-home placements.—

(1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds that it is a basic tenet of child welfare practice and the law that a child be placed in the least restrictive, most family-like setting available in close proximity to the home of his or her parents which meets the needs of the child, and that a child be placed in a permanent home in a timely manner.

(2) PLACEMENT PRIORITY.—

(a) When a child cannot safely remain at home with a parent, out-of-home placement options must be considered in the following order:

1. Nonoffending parent.
2. Relative caregiver.
3. Adoptive parent of the child's sibling, when the department or community-based care lead agency is aware of such sibling.
4. Fictive kin with a close existing relationship to the child.
5. Nonrelative caregiver that does not have an existing relationship with the child.
6. Licensed foster care.
7. Group or congregate care.

(b) Except as otherwise provided for in ss. 39.4022 and 39.4024, sibling groups must be placed in the same placement whenever possible and if placement together is in the best interest of each child in the sibling group. Placement decisions for sibling groups must be made pursuant to ss. 39.4022 and 39.4024.

(c) Except as otherwise provided for in this chapter, a change to a child's physical or legal placement after the child has been sheltered but before the child has achieved permanency must be made in compliance with this section.

Likewise, a third 2021 statutory revisions is as follows:

> **39.01375 Best interest determination for placement.**—The department, community-based care lead agency, or court shall consider all of the following factors when determining whether a proposed placement under this chapter is in the child's best interest:
>
> (1) The child's age.
>
> (2) The physical, mental, and emotional health benefits to the child by remaining in his or her current placement or moving to the proposed placement.
>
> (3) The stability and longevity of the child's current placement.
>
> (4) The established bonded relationship between the child and the current or proposed caregiver.
>
> (5) The reasonable preference of the child, if the child is of a sufficient age and capacity to express a preference.
>
> (6) The recommendation of the child's current caregiver, if applicable.
>
> (7) The recommendation of the child's guardian ad litem, if one has been appointed.

(8) The child's previous and current relationship with a sibling and if the change of legal or physical custody or placement will separate or reunite siblings, evaluated in accordance with s. 39.4024.

(9) The likelihood of the child attaining permanency in the current or proposed placement.

(10) The likelihood the child will be required to change schools or child care placement, the impact of such change on the child, and the parties' recommendations as to the timing of the change, including an education transition plan required under s. 39.4023.

(11) The child's receipt of medical, behavioral health, dental, or other treatment services in the current placement; the availability of such services and the degree to which they meet the child's needs; and whether the child will be able to continue to receive services from the same providers and the relative importance of such continuity of care.

(12) The allegations of any abuse, abandonment, or neglect, including sexual abuse and human trafficking history, which caused the child to be placed in out-of-home care and any history of additional allegations of abuse, abandonment, or neglect.

(13) The likely impact on activities that are important to the child and the ability of the child to continue such activities in the proposed placement.

(14) The likely impact on the child's access to education, Medicaid, and independent living benefits if moved to the proposed placement.

(15) Any other relevant factor.

Fla. Stat. §39.01375. However one may believe these three enactments should be applied to a given fact-pattern, it is imperative that all three statutes equally be brought to the Court's attention by counsel for the various litigants, and therefore weighed by the Court following argument.

"<u>But Our Worker Told Us We're Just Participants</u>"

First, the basic definitions:

(57) "Participant," for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding, means any person who is not a party <u>but who should receive notice of hearings involving the child, including the actual custodian</u>

> of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child. A community-based agency under contract with the department to provide protective services may be designated as a participant at the discretion of the court. Participants may be granted leave by the court to be heard without the necessity of filing a motion to intervene.

Section 39.01(57), *Fla. Stat.*

> (58) "Party" means the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child. The presence of the child may be excused by order of the court when presence would not be in the child's best interest. Notice to the child may be excused by order of the court when the age, capacity, or other condition of the child is such that the notice would be meaningless or detrimental to the child.

Section 39.01(58), *Fla. Stat.* As a general rule, the lack of "party" status means no right exists to subpoena witnesses or documents, to conduct pretrial discovery (for example, depositions), or, as a general rule, to appeal. See, e.g., *R. H. v. DCF*, 994 So. 2d 1153 (Fla. 3d DCA 2008) (court-ordered custodians who are not parties lack standing to appeal as of right). See also, Rule 8.210(b), Fla. R. Juv. P. As discussed above, to reiterate, one very important thing to know is that in 2021 the legislature overhauled several statutes now having a profound and helpful influence on issues such as sibling placement decision-making and the rights of custodians to be granted party status enabling them to better advocate for the child under a new legal process.

"Participant" status, however applied in practice will invariably fall short of effective advocacy. Although the statutory definition of a "party" includes only DCF, the parents, the Guardian Ad Litem Program, and the Child (who usually has no legal representation), Florida law, at the same time, allows *knowledgeable* private persons to file their own dependency petitions and termination of parental rights petitions, thereby acquiring party status. These are not common occurrences.

When a private petition is pursued (and for the sake of this discussion, when the custodians are being represented by their own attorney in doing so), the participant has been able to thereby attain the status of a party, and seek to exercise (with appropriate reserve, discretion and collegiality) much the same pro-active role as DCF, the Guardian Ad Litem Program and the birth parents.

> (1) All proceedings seeking an adjudication that a child is dependent shall be initiated by the filing of a petition by an attorney for the department, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true. 39.501(1), *Fla. Stat.* (emphasis added)

> (1) All proceedings seeking an adjudication to terminate parental rights pursuant to this chapter must be initiated by the filing of an original

> petition by the department, the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true. 39.802(1), *Fla. Stat.* (emphasis added)

In January 2012, the Second District Court of Appeal in Tampa addressed a situation where the grandparents had filed a petition of their own and DCF questioned how that could give them party status:

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

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

What cannot be emphasized enough however is that the decision whether to take that approach in a given situation requires thoughtful and advance evaluation of many legal, strategic, interpersonal and economic considerations that will vary from case to case, and should be preceded by first obtaining competent and experienced legal advice.

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

In some situations, the Guardian Program may exercise its co-equal right as a pre-existing party to file a termination of parental rights petition of its own, either because DCF prefers a course different from termination of parental rights, or in an effort to assist DCF in achieving a successful outcome. In other situations, DCF may be amenable to filing a joint TPR petition with the custodians and/or the Guardian Program. Conversely, when DCF declines to view a risk as

sufficient to warrant the filing of a dependency or TPR petition, it is possible for a knowledgeable private person to do so. As a practical matter however, and because you do not want to lose precious time or devote your savings to a quixotic goal, thinking maturely about the wisdom of filing your own petition, and effectively litigating a private petition in any particular case warrants reflection.

When Parental Rights May Be Terminated

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

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

offense in another jurisdiction which is substantially similar to one of the offenses listed in this paragraph. As used in this section, the term "substantially similar offense" means any offense that is substantially similar in elements and penalties to one of those listed in this subparagraph, and that is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction; or

3. The court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interest of the child. When determining harm, the court shall consider the following factors:

a. The age of the child.

b. The relationship between the child and the parent.

c. The nature of the parent's current and past provision for the child's developmental, cognitive, psychological, and physical needs.

d. The parent's history of criminal behavior, which may include the frequency of incarceration and the unavailability of the parent to the child due to incarceration.

e. Any other factor the court deems relevant.

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

1. The child continues to be abused, neglected, or abandoned by the parent or parents. The failure of the parent or parents to substantially comply with the case plan for a period of 12 months after an adjudication of the child as a dependent child or the child's placement into shelter care, whichever occurs first, constitutes evidence of continuing abuse, neglect, or abandonment unless the failure to substantially comply with the case plan was due to the parent's lack of financial resources or to the failure of the department to make reasonable efforts to reunify the parent and child. The 12-month period begins to run only after the child's placement into shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the court's approval of a case plan having the goal of reunification with the parent, whichever occurs first; or

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

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

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

1. As used in this subsection, the term "sibling" means another child who resides with or is cared for by the parent or parents regardless of whether the child is related legally or by consanguinity.
2. As used in this subsection, the term "egregious conduct" means abuse, abandonment, neglect, or any other conduct that is deplorable, flagrant, or outrageous by a normal standard of conduct. Egregious conduct may include an act or omission that occurred only once but was of such intensity, magnitude, or severity as to endanger the life of the child.

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

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

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

*(j) The parent or parents have a history of extensive, abusive, and chronic use of alcohol or a controlled substance which renders them incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights.

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

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

*(m) The court determines by clear and convincing evidence that the child was conceived as a result of an act of sexual battery made unlawful pursuant to s. 794.011, or pursuant to a similar law of another state, territory, possession, or Native American tribe where the offense occurred. It is presumed that termination of parental rights is in the best interest of the child if the child was conceived as a result of the unlawful sexual battery. A petition for termination of parental rights under this paragraph may be filed at any time. The court must accept a guilty plea or conviction of unlawful sexual battery

pursuant to s. 794.011 as conclusive proof that the child was conceived by a violation of criminal law as set forth in this subsection.

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

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

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

(4) If an expedited termination of parental rights petition is filed, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.

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

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

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

(2) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.

(3) The capacity of the parent or parents to care for the child to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered upon the child's return home.

(4) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

(5) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.

(6) The likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.

(7) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

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

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

(10) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

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

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

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

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

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

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

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

(e) If the parent whose rights are being terminated meets any of the criteria specified in s. 39.806 (1)(c), (d), (f), (g), (h), (i), (j), (k), (l), (m), or (n).

Fla. Stat. 39.811(6).

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

Often, the birth parents named in a chapter 39 proceeding may decide that they are willing to voluntarily consent to the adoption of their child in the dependency system by persons they choose. When the designated adoptive parents meet certain requirements, "the adoption entity [for example, a private law firm's principal paid by the persons wishing to adopt the child] may intervene in the dependency case as a party in interest…" This is commonly referred to as "intervention." Section 63.082(6), *Fla. Stat*.

This is a highly both complex and controversial area of law, attempting to balance a number of at times differing legal and public policy considerations. It may or may not benefit the child depending on the particular fact-pattern. Custodians hoping one day to be considered to adopt the child they have already been raising for quite some time should the child become available for adoption, owe it to themselves to be aware of this law, to think about it very carefully and consider how best to prepare for the possibility of the birth parents choosing someone else to adopt instead.

> (6)(a) If a parent executes a consent for adoption of a minor with an adoption entity or qualified prospective adoptive parents and the minor child is under the supervision of the department, or otherwise subject to the jurisdiction of the dependency court as a result of the entry of a shelter order, a dependency petition, or a petition for termination of parental rights pursuant to chapter 39, but parental rights have not yet been terminated, the adoption consent is valid, binding, and enforceable by the court.
>
> (b) Upon execution of the consent of the parent, the adoption entity shall be permitted to intervene in the dependency case as a party in interest and must provide the court that acquired jurisdiction over the minor, pursuant to the shelter order or dependency petition filed by the department, a copy of the preliminary home study of the prospective adoptive parents and any other evidence of the suitability of the placement. The preliminary home study must be maintained with strictest confidentiality within the dependency court file and the department's file. A preliminary home study must be provided to the court in all cases in which an adoption entity has intervened pursuant to this section. Unless the court has concerns regarding the qualifications of the home study provider, or concerns that the home study may not be adequate to determine the best interests of the child, the home study provided by the adoption entity shall be deemed to be sufficient and no additional home study needs to be performed by the department.
>
> (c) If an adoption entity files a motion to intervene in the dependency case in accordance with this chapter, the dependency court shall promptly grant a hearing to determine whether the adoption entity has filed the required documents to be

permitted to intervene and whether a change of placement of the child is in the best interests of the child. Absent good cause or mutual agreement of the parties, the final hearing on the motion to intervene and the change of placement of the child must be held within 30 days after the filing of the motion, and a written final order shall be filed within 15 days after the hearing.

(d) If after consideration of all relevant factors, including those set forth in paragraph (e), the court determines that the prospective adoptive parents are properly qualified to adopt the minor child and that the adoption is in the best interests of the minor child, the court shall promptly order the transfer of custody of the minor child to the prospective adoptive parents, under the supervision of the adoption entity. The court may establish reasonable requirements for the transfer of custody in the transfer order, including a reasonable period of time to transition final custody to the prospective adoptive parents. The adoption entity shall thereafter provide monthly supervision reports to the department until finalization of the adoption. If the child has been determined to be dependent by the court, the department shall provide information to the prospective adoptive parents at the time they receive placement of the dependent child regarding approved parent training classes available within the community. The department shall file with the court an acknowledgment of the parent's receipt of the information regarding approved parent training classes available within the community.

(e) In determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent or adoption entity, the court shall consider and weigh all relevant factors, including, but not limited to:

1. The permanency offered;
2. The established bonded relationship between the child and the current caregiver in any potential adoptive home in which the child has been residing;
3. The stability of the potential adoptive home in which the child has been residing as well as the desirability of maintaining continuity of placement;
4. The importance of maintaining sibling relationships, if possible;
5. The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient maturity, understanding, and experience to express a preference;
6. Whether a petition for termination of parental rights has been filed pursuant to s. 39.806(1)(f), (g), or (h);
7. What is best for the child; and
8. The right of the parent to determine an appropriate placement for the child.

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

(g) At the arraignment hearing held pursuant to s. 39.506, in the order that approves the case plan pursuant to s. 39.603, and in the order that changes the permanency goal to adoption pursuant to s. 39.621, the court shall provide written notice to the biological parent who is a party to the case of his or her right to participate in a private adoption plan including written notice of the factors provided in paragraph (e).

The current statute represents an improved balance from the original version of the law but remains riddled with ambiguities and cross-currents. A custodian who has not been able to develop well-founded confidence that existing governmental parties have both a genuine commitment and capability to vigorously advocate and litigate in defense of the existing placement for the child (when the intervenor is not representing the custodians themselves as has on occasion occurred) and/or allocate the time and resources necessary to do so, may wish to promptly and seriously consider retaining her own legal counsel well in advance for advice and possible independent advocacy through a variety of different means having support in established Florida law.

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

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

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

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

Melton v. State, 56 So. 3d 868, 8711 (Fla. 1st DCA 2011)(citations and footnotes omitted).

Psychological Underpinning of Current Law:

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

Wakeman v. Dixon, 921 So. 2d 669, 675 n. 6 (Fla. 1st DCA) (Van Nortwick, J., specially

concurring) quoting Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (Free Press 1973) (hereinafter "Best Interests"), *rev. denied*, 931 So. 2d 902 (2006). As a matter of human nature, the highly intimate daily associations between a young child and the caregivers who consistently meet his needs swiftly coalesce into the activities of family life. This is the identity he develops of herself and it furnishes the perspective he has of the world around him and his place within it.

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

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

Id. at 999-1000 (citations omitted).

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

> This outlook reflects research in the field of child psychology:
>
> Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world.
>
> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones. . . .
>
> Change of the caretaking person for infants and toddlers further affects the course of their emotional development.

> Their attachments, at these ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful. When continuity of such relationships is interrupted more than once, as happens due to multiple placements in the early years, the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings.

Best Interests, at 32-33. "It is presumptively in the best interests of a child to remain in the home where he or she has spent the majority of his or her life." *DCF v. J. C.*, 847 S. 2d 487, 491 (Fla. 3d DCA 2002), *reh. en banc denied*. ("J.C."). In light of the 2021 statutory amendments reviewed above, the length and quality of an existing and potentially pre-adoptive placement will continue to be extremely important.

Special Procedural Rights of Custodians in Adoption Disputes

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

Previously, Florida child welfare agencies had asserted ultimate authority to select who may retain custody or adopt a foster child. For a variety of reasons, that reality began to change in the mid-1990s, giving courts a larger say in the decision-making process. In 2004, the legislature authorized courts to waive DCF's consent when unreasonably withheld, *Fla. Stat.* § 39.812(5), and (b) the Florida Supreme Court shortly thereafter held in *B. Y. v. DCF*, 887 So. 2d 1253 (Fla. 2004) ("*B.Y.*") that juvenile courts had possessed authority to overrule DCF's refusal to furnish adoptive consent.

The key statutes are:

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

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

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

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

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

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

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

(a) the dependency court may:

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

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

(b) the adoption court may:

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

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

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

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

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

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

In the Matter of the Adoption of John Doe, 16 Fla. L. Weekly Supp. 75, 2008 WL 5070056, at *30 n. 31 (Fla. 16th Jud. Cir. Aug. 29, 2008). Until the administrative appeal mechanism has run its course, or been waived, DCF is not lawfully authorized to issue a final administrative order furnishing its adoptive consent to either of the contestants.[1] Unfortunately, DCF personnel and private community-based care officials are occasionally unaware of this limitation on their authority.

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

In addition to being another way to try to change DCF's internal decision of who will

---

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

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

There are other potential limitations on DCF's authority to choose who will adopt a child. In licensed care. For example, federal civil rights laws (e.g., 42 U.S.C. 1996b (Interethnic Adoption Act of 1996)[2]; Title II of the Americans with Disabilities Act and implementing regulations) have previously been used in successful efforts to overrule decisions influenced by consideration of race (euphemistically referred to perhaps as "culture") or physical disability of existing family members in the adoptive household.

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

Open Adoption

All adoptions in Florida start from the same premise:

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

---

[2] (1) Prohibited Conduct

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

(2) Enforcement

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

42 U.S.C. § 1996b.

Section 63.172(1)(b), *Fla. Stat.* Once the final judgment is entered, the adoptive petitioners become the child's parents. *See* section 63.172(1)(c), *Fla. Stat.* As an exception to the closed nature of adoptions, the legislature authorizes approval of *agreements* that (a) arise from termination of parental rights under chapter 39 (e.g. foster children), and (b) are in the child's best interest. Adoptions in the United States have historically been closed. "[T]raditional adoptions in most states involve statutorily imposed anonymity of the parties, secrecy, and sealed records. The rational given for such secrecy is smooth integration of the adopted child into the adoptive family." Tammy M. Somogye, Comment, *Opening Minds to Open Adoption*, 45 U. Kan. L. Rev. 619, 620 (1997) (footnotes omitted). Florida has ordinarily followed this approach. *See, e.g.,* § 63.162(1), Fla. Stat. (2006) (confidentiality of hearings and files). Conversely, "[o]pen adoption is a rather new issue in the area of family law and children's rights which has generated a great deal of controversy. . . . In general terms, an open adoption occurs when the adopted child and one or more family members of the biological family maintain contact after adoption has occurred." Laurie A. Ames, Note, *Open Adoptions: Truth and Consequences*, 16 Law & Psychology Rev. 137, 137 (1992).

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

When the outcome of a termination of parental rights case cannot be predicted with reasonable certainty, an open adoption, if carefully structured to address the peculiarities of the given case, may help maximize control over risk, by ensuring that parental rights are terminated, while imposing, as a trade-off, tolerable restrictions on post-adoptive contact. Although negotiating such agreements can be frustrating, time-consuming, and ultimately lead nowhere if agreement is either not reached or disapproved by the court, <u>it offers a possible alternative to the risks of litigation reliant upon the imperfect record of months if not years of prior and typically underfunded social work performed by the government.</u>

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

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

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

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

(c) Statements of the prospective adoptive parents.

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

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

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

In Florida, attempting to resolve termination of parental rights cases through child-friendly and court-approved open adoption agreements requires thinking outside the box. One of the procedural complications involved in structuring an open adoption is the frequent unwillingness of DCF and CBC personnel to accept a voluntary surrender of parental rights that is in any way conditional on the court's acceptance of the open adoption agreement, or in which a commitment from DCF is necessary as to whom its adoption consent will then be given. Strictly speaking, there is no reason why a conditional consent may not be accepted if otherwise appropriate for a given case. Compare, *C. G. v. Guardian Ad Litem Program*, 920 So. 2d 854 (Fla. 4th DCA 2006) (noting significance of the fact that the surrender and consent in that particular case was not conditional). However, one possible approach for attempting to work around that potential impasse if it arises may involve including in the section 63.0427 open adoption agreement executed and approved by the court at the time the unconditional surrender is simultaneously accepted by the court, language as follows: "It is understood and agreed that to the extent of any inconsistency between Composite Exhibit "A" [the unconditional surrender] and the terms contained in this Agreement, the Agreement shall prevail."

Consideration of Age

Under applicable law, age is a relevant consideration that may or may not be a pivotal

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

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

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

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

A decision from outside Florida, *Cain v. Adams*, 195 N. W. 2d 489 (Nebr. 1972), offers

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

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

ADOPTION SUBSIDY AND RELATED MATTERS

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

> (b) "Child within the child welfare system" or "child" means a difficult-to-place child and any other child who was removed from the child's caregiver due to abuse or neglect and whose permanent custody has been awarded to the department or to a licensed child-placing agency.
> (c) "Department" means the Department of Children and Families.
> (d) "Difficult-to-place child" means:
> 1. A child whose permanent custody has been awarded to the department or to a licensed child-placing agency;
> 2. A child who has established significant emotional ties with his or her foster parents or is not likely to be adopted because he or she is:
> a. Eight years of age or older;
> b. Developmentally disabled;

c. Physically or emotionally handicapped;
d. A member of a racial group that is disproportionately represented among children described in subparagraph 1.; or
e. A member of a sibling group of any age, provided two or more members of a sibling group remain together for purposes of adoption; and
3. Except when the child is being adopted by the child's foster parents or relative caregivers, a child for whom a reasonable but unsuccessful effort has been made to place the child without providing a maintenance subsidy. F.S. 409.166.

The available package includes a $1000 per child non-recurring adoption expense subsidy earmarked for legal expenses in finalizing the adoption, Medicaid eligibility until the child turns 18, a monthly maintenance subsidy that is ordinarily between 80% - 100% of the foster care board rate, and in-state public college tuition. *Fla. Stat.* §1009.25. An "Adoption Assistance Agreement" sets forth what the government is agreeing to pay and it must be signed prior to the adoption being finalized. Otherwise, the adoptive family has the burden in a post-adoption administrative fair hearing (that the family must initiate and litigate at its expense) to demonstrate why DCF should belatedly agree to furnish a subsidy. When DCF denies a request for a higher subsidy, that denial should be in writing and accompanied by a written notice to the family that they have a right to administratively appeal the denial. As a practical matter, such required notice is rarel furnished. Though perhaps increasingly less common, there may be a "take it or leave it" attitude, and at times an implicit threat that the child may go to someone else if the adoptive parents do not toe the line. So long as it is in the best interest of the child, the government is entitled to prefer an otherwise appropriate adoption placement that is willing to waive an adoption subsidy, with the exception of existing foster parents to whom the child is already attached.

Provider agencies may furnish prospective adoptive parents a written or verbal list of one or more attorneys available to handle finalizations. It goes without saying that the attorney retained by the adopting parents owes a duty of loyalty and competence to the adoptive parents. However, there may be an expectation on the part of the adopting parents that all of the required legal work ought to be funded exclusively out of the $1000 in legal expenses to be reimbursed by the CBC. Consequently, an attorney may understand his or her role is to simply complete a barebones adoption, rather than also if necessary, challenging a proposed subsidy being offered by the CBC as too low, encouraging commencement and handling of administrative proceedings prior to the adoption finalization to attempt to secure certain benefits, preparing for and accompanying the clients to meetings with the Adoption Applicant Review Committee, etc. Most prospective adoptive parents don't know what they don't know, and therefore do not know what it may be in their interest to ask that their chosen attorney do on their behalf, whether the attorney will agree that is part of the engagement, whether he or she feels comfortable doing so, and if so, if and how he or she will be compensated for doing so. Many adoptive parents have few resources available to pay attorneys themselves. Bear in mind, however, that every $100 increase approved for a one-year-old adoptee over the basic monthly maintenance subsidy

ultimately equals $20,400 until the child turns 18 ($100 x 12 months x 17 years). Making sure a dependent child with serious physical, psychological or developmental problems receives an appropriate subsidy from DCF in the sound exercise of its discretion may be one of the most important things any child advocate does for that child. Under certain circumstances in the case of severely disabled children, DCF has discretion to approve monthly maintenance subsidies is much higher amounts.

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

Another issue that arises from time to time is whether DCF must pay adoption subsidies when the child is adopted based on a judicial determination that DCF's adoptive consent has been unreasonably withheld, rather than based upon DCF's adoptive consent. The applicable statutory provision, section 409.166, *Fla. Stat.*, does not condition subsidy eligibility upon DCF adoptive consent. Therefore, the fact that the adoptive parent was compelled to successfully overcome DCF's resistance in court, cannot force the adoptive parents to choose between adopting and foregoing a subsidy. It is important before finalizing the adoption that the adoptive parents document DCF's commitment, however reluctantly, to paying the subsidy under those circumstances through pre-adoption litigation and in any case pre-adoption execution by DCF of an Adoption Assistance Agreement. Another issue that has also arisen is whether subsidy eligibility exists when the child is adopted through the intervention procedure, *Fla. Stat.* § 63.082(6). This is a complex area of law and it is important to obtain competent legal advice prior to finalizing the adoption, particularly in light of a very recently adopted administrative rule from DCF, asserting a right by DCF to cancel an adoption subsidy agreement following the actual adoption if DCF determines a "mistake" was made:

> **65C-16.013 Determination of Maintenance Subsidy Payments.**
>
> ***
>
> (12) The adoption subsidy agreement remains in effect until:
>
> (a) The child dies.
>
> (b) The child reaches 18 years of age or is emancipated.
>
> (c) The parents are no longer legally responsible for the support of the child, including the death of a parent when the adoption is by a single parent or both parents when the adoption is by a married couple, or the parental rights of the adoptive parents have been terminated.

(d) The parents are no longer providing any support to the child. Support includes emotional and/or financial support, even in situations when the child is no longer living in the home.

(e) The Department discovers the child was mistakenly determined eligible for benefits.

***

F.A.C. §65C-16.013(12)(2022). This creates the potential for families adopting out of Florida's child welfare system to have negotiated an adoption maintenance subsidy for the child, for DCF and the CBC to have executed a written Adoption Assistance Agreement promising to pay that each month until the Child becomes an adult, after the adoptive parents determined they could afford to adopt this new member of the family based at least in part on the promised adoption assistance, to finalize the adoption, only to then be told that the promise made in writing to the adoptive parents was "a mistake." By that point, the adoptive family may likely have lost all recourse other than to hope to prevail in a lawsuit they must themselves fund to reinstate the subsidy by proving that there was no undefined "mistake." Generally speaking, such a "mistake" would have been the responsibility of DCF and its Community-Based Care Provider to identify and address prior to the finalization of the adoption. This recent administrative change would appear to be an attempt by DCF to shift responsibility for the government's "mistake" from the government and its contractor responsible for making the mistake to the adoptive family instead.

Other Programs

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

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

65C-16.014 Post Adoption Services.

(1) After finalization, the adoptive family may require temporary case management support, information and referral assistance and related services. The need for medical assistance must be established prior to the adoption placement, although the service might not actually be needed until a later date. When this need is not established prior to the placement and the adoptive parents feel they have been wrongly denied services on behalf of an adopted child, they have the right to request a fair hearing. If, through the fair hearing process, a service is approved, the effective date of the service will be the date the family officially requested the service. Retroactive payment dating back to the date of placement will not be approved.

(2) A service must be terminated when the condition for which it was granted no longer exists or on the child's 18th birthday, whichever occurs first. Children needing residential mental health services will be referred to the district's Alcohol, Drug Abuse and Mental Health Program Office, children's program for services.

(3) The cost for a service will not be paid when those costs can be or are covered by the adopting family's medical insurance, Children's Medical Services, Children's Mental Health Services, Medicaid, Agency for Persons with Disabilities or local school districts.

(4) The adoptive parents must obtain the approval of the community based care provider or sub-contractor agency prior to planning for the use of a service. The adoptive parents must submit a copy of the bill for the service to the community based care provider or sub-contractor agency to initiate reimbursement. The bill must be clearly legible and must specify the name of the child, the service rendered and the date of the service, in addition to the charge for the service.

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

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

> The Home and Community-Based Waiver provides for an individual support plan designed to meet the individual's needs for health and rehabilitative services in a home or in a small home-like setting. Indeed, the program contemplates personal privacy and basic freedom to make choices, including choices about when to go to bed and arise. Participants may, to the extent they are able, plan menus, grocery shop and cook. Ideally, the individuals live in residential neighborhoods and have the opportunity to participate in community activities. *Cramer v. Chiles*, 33 F. Supp. 2d 1342 (S. D. Fla. 1999).

This program is administered by the Florida Agency for Persons with Disabilities ("APD"). Typically, a determination is made whether a developmentally-disabled foster child meets the criteria for eligibility to be placed "on the Waiver." However, the child, even if eligible, is presumptively not placed on the Waiver, but on a waitlist, joining thousands of other Floridians. Only eligible persons deemed in "crisis" go to the front of the line, and very few Floridians are approved for "crisis status" each month. As a result, there was historically a disincentive for the disabled child's caregivers to adopt (or for the biological family to gain the confidence that they would receive the support they need to welcome reunification), and thereby assume complete and permanent financial responsibility for the child.

In 2010, DCF and APD agreed as a result of the filing of administrative litigation, that children who needed only to be placed on the Waiver in order to be adopted or reunified with their families would be deemed as "in crisis" for immediate movement from the waitlist to the Waiver. If this opportunity is not exercised prior to the eligible child's adoption, that child will

often face remaining on the waitlist for years to come. It is therefore essential that prospective adoptive parents at least consider whether they want this conclusively addressed before finalizing the adoption.

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

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

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

---

* **Alan I. Mishael** graduated from the University of Chicago, and the University of Miami with honors in 1981, he was a trial attorney with the U.S. Department of Justice, Washington, D.C., an Assistant U.S. Attorney, Miami and a litigation partner with Shutts & Bowen, Miami. He began performing volunteer work for the GAL Program in 1991 and in 1998 opened Alan I. Mishael, P.A., Tele: (786) 282-2228, Email: Alan@AlanMishael.com. He is the recipient of the *Outstanding Legal Advocacy Award,* National Association of Counsel for Children, *Hugh S. Glickstein Child Advocate of the Year Award,* Florida Bar's Public Interest Law Section, *Annual Pro Bono Award,* Florida Bar's Appellate Practice Section, *Edward Smith Child Advocate of the Year Award,* Lawyers for Children America, Inc., and the *Angels in Adoption Award,* Congressional Coalition on Adoption.

In 2014, the Daily Business Review (Miami-Dade County) named Mr. Mishael and his co-counsel the *Most Effective Lawyers (Appellate Law)* for achieving the first appellate decision in Florida

concerning same-sex co-parenting through adoption: *In the Matter of Adoption of D.P.P.*, 158 So. 3d 633 (Fla. 5th DCA), *rev. denied,* 148 So. 3d 769 (Fla. 2014). Mr. Mishael has been instrumental in helping reform Florida's child welfare system through impact litigation, statutory reform and administrative rule-making. Board-Certified in Adoption Law, AV-rated, he has served on the Florida Bar Adoption Law Certification Committee. He represents private clients in child welfare, domestic and international adoption matters, in trial and appellate courts, and before administrative agencies.

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