In the Child's Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings

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I. INTRODUCTION

The legal system is no place for a child, but children are there aplenty. The best the law can do is ensure that they are not alone. In Florida, the law requires children to have at least one adult representative, usually a guardian ad litem, to protect them and represent their interests in court. Together, the guardian ad litem and the attorney who represents the guardian have fought many battles in Florida's juvenile courts—most notably those involving termination of parental rights. One battle involved a challenge to the constitutionality of the guardian ad litem's role in pressing for termination of parental rights. In this case the court upheld the guardian's role, however, if the guardian ad litem's independent pursuit of termination of parental rights is someday found to be in violation of the separation of powers doctrine, or is deemed

1. Literally, guardian "for the suit." "The name guardian ad litem has been applied widely in most jurisdictions to identify the independent advocate for the child in child protection proceedings." DONALD N. DUQUETTE, ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS 5 (1990). Throughout this comment, the term "guardian" will be used interchangeably with the term "guardian ad litem," unless specifically indicated.


3. This is a legal proceeding permanently freeing a child from his or her parents' custody, so that the child can be adopted by others without the parents' written consent.

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unethical because of an inherent conflict of interest, then children risk deprivation of meaningful access to the courts and the denial of their constitutional right to be free from physical or mental abuse.\(^4\)

The use of a guardian ad litem to represent a child’s interests in court dates at least as far back as the Roman Empire.\(^5\) Guardians exist today, in large part, because the Federal Child Abuse Prevention and Treatment Act\(^6\) requires states to enact legislation providing for the appointment of a guardian ad litem in abuse and neglect proceedings in order to receive certain federal funds.\(^7\) The federal law states that the guardian ad litem should represent the child’s best interests, but does not specify who should represent the child in that capacity, nor does it define the guardian’s role and responsibilities.\(^8\) The precise role of an independent advocate for the child evolved from the common law. Over the past two decades, a variety of legislative initiatives have codified this role. As a result, there is little consistency among the states as to who should serve as the guardian, what the guardian’s responsibilities are, and how the guardian should be selected.

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7. The Act provides: “[T]hat in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings.” Id. § 5106a(b)(6). As of 1976, neither the Act nor the rules and regulations that implement it differentiate between a criminal court proceeding and a juvenile court proceeding. Fraser, supra note 2, at 16.

In Florida, the legislature has mandated the appointment of a guardian ad litem to represent the best interest of the child in any civil or criminal judicial proceeding involving child abuse or neglect. FLA. STAT. § 415.508 (1993); see also FLA. R. JUV. P. 8.215 (“The court shall appoint a guardian ad litem to represent the child in any proceeding as required by law.”).

Florida defines abuse and neglect as follows:

(2) “Abuse” means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.

(37) “Neglect” occurs when the parent . . . deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to live in an environment when such deprivation or environment causes the child’s physical, mental, or emotional health to be significantly impaired . . . .

FLA. STAT. §§ 39.01(2), (37) (1993).

For a further discussion of how other states define child abuse, see Fraser, supra note 2, at 19-20. Many states define a child as a person under the age of 18. E.g., FLA. STAT. § 39.01(7) (1993).

8. In the 1994 reauthorization of the Act, Congress continued the requirement for the appointment of a guardian ad litem to represent the child in child protection proceedings but remained silent on the representative’s duties. 42 U.S.C. § 5106a(b)(6) (Supp. 1994).
and how conflicts should be resolved. As society becomes more complex and the burdens on juvenile courts grow, questions regarding the scope, role, and responsibilities of the guardian ad litem require resolution.

This Comment examines whether this court-appointed special advocate may independently file for and pursue termination of parental rights without violating the separation of powers doctrine. It also examines the guardian’s relationship to the judiciary and explores whether the guardian’s training in a judicially administered program makes it unethical for a guardian to independently litigate a termination proceeding before a judge in juvenile court.

These issues have risen to the forefront in Florida in the wake of Simms v. Department of Health & Rehabilitative Services, a case recently decided by the Third District Court of Appeal. In Simms, the Department of Health & Rehabilitative Services ("HRS"), consented to have the guardian’s attorneys act on behalf of the State at the termination hearing. The mother’s rights were terminated after the trial court found clear and convincing evidence of abuse, neglect, and failure to comply with a case plan. On appeal, the mother argued that the opposing lawyers violated Florida’s separation of powers doctrine by representing the guardian, a judicial officer, in a judicial proceeding without the presence of the State. The Third District Court of Appeal took particular interest in this issue and during oral argument ordered a rehearing. On rehearing en banc, the court specifically considered whether any statutory or nonstatutory authorization for a guardian ad litem or court-appointed officer to bring, maintain, or prosecute a proceeding for termination of parental rights violated the separation of powers require-

10. 641 So. 2d 957 (Fla. 3d DCA) (en banc), rev. denied, 649 So. 2d 820 (Fla. 1994).
11. Id. at 960.
12. HRS was first alerted to a problem involving Samantha and Benjamin Simms in 1986 after they failed to return to the hospital for a follow-up visit for their daughter P’s post-natal jaundice. When they finally brought the baby to the emergency room a few days later, P. was dehydrated, extremely jaundiced, and required hospitalization. P. was taken into HRS custody and adjudicated dependent, but later returned to her parents under HRS supervision. P. was later brought to the hospital at nine weeks of age with vaginal and rectal bleeding and diagnosed as malnourished. In early 1987, the Simms’ older daughter, 21-month-old M., fell from a balcony and fractured her skull. The emergency room physician concluded the parents were guilty of “gross neglect.” A month later, P. was back in the hospital with a spiral leg fracture that was indicative of an intentional injury. The doctors refused to release the children to the parents, and on Mar. 27, 1987, the parents were taken into HRS custody. The Simms agreed to a case plan. Despite three revisions over five years, they failed to comply. HRS and the guardian filed and successfully pursued a joint petition to terminate parental rights. Prior to trial, the father voluntarily relinquished his rights to the children and the case proceeded against the mother only.
Part II of this Comment briefly summarizes the legal history of the parent-child relationship. It examines the constitutional rights parents have in the care, custody, and management of their children and outlines the circumstances under which the state may suspend those rights. Part III examines the “dependency” process, a process which starts with state intervention to protect a child alleged to have been neglected, abused, or abandoned, and which may ultimately lead to the termination of parental rights. It explores the safeguards and procedures that are taken toward the legislatively endorsed goal that children live in a permanent and safe home environment and how Florida law incorporates that goal. Part IV examines both the roles of HRS and the guardian in child protection proceedings and, specifically, the guardian’s relation to the Guardian ad Litem Program. It analyzes the termination of parental rights proceedings as “quasi-prosecutorial” and finds that the guardian ad litem and HRS both have the statutory and common law authority to litigate termination of parental rights. Finally, Part V concludes that the guardian’s role as an independent advocate for a child in termination proceedings does not violate the separation of powers doctrine, but there is a serious potential for conflict of interest under the Model Rules of Professional Conduct.

II. PARENTS, THE STATE, AND CHILDREN

From the earliest comprehensive set of statutory enactments in 2150 B.C. until 1874, the doctrine of parental absolutism flourished.

13. Before rehearing, the parties filed supplemental briefs. Concerned about the far-reaching effects of this case on child advocacy, many amici curiae filed briefs. The Nineteenth Judicial Circuit Guardian Ad Litem Program filed an amicus curiae brief, joined by the First, Second, Fifth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Eighteenth and Twentieth Judicial Circuits. Also filing amici briefs were the Juvenile Justice Attorneys Association with Legal Services of Greater Miami, the State of Florida, the Department of Legal Affairs, and the Florida Chapter of the American Academy of Matrimonial Lawyers.


16. Finally, in 1874 the state, its citizens, and the court seemed to take active cognizance of the fact that a child did have the right of not being severely beaten and cruelly and inhumanely treated. It was the dramatic case of Marvellen that signalled: (1) that children do have a right of not being cruelly and inhumanely treated; (2) the advent of and impetus for a number of privately funded charities whose task it was to protect children; and (3) the beginning of an era that would see every state adopt neglect statutes to protect children.
Laws emphasized the powers of the parent. In particular, the child had no status in the family or as an individual until the father accepted the child. Children were economic units which could be sold or exchanged freely. Infanticide of unwanted children was a common practice. Early English law was generally no different. However, beginning in the late twelfth century and continuing through the thirteenth, the law emancipated children from parental control at the age of majority and gave them the right to own property before reaching that age. In connection with the right to own property, children also received the remarkable right to sue and be sued. Court action was initiated by a court-appointed “next friend” or an action was defended by a court-appointed “guardian ad litem.” In many cases, however, the court neither appointed a “next friend” nor a “guardian ad litem.” Rather, the court itself assumed total responsibility for the protection of the child’s interest.

The last seventy years have seen the slow erosion of the doctrine of parental absolutism and the emergence of the concept of presumptive parental rights. American society functions under the assumption that parents will act in their child’s best interests and that the child’s interests and those of the parents are the same. Our legal system is premised on this conviction. Case law has greatly limited state interference in child care-related issues. In fact, the United States Supreme Court places strong emphasis on family unity and autonomy, ruling consistently to protect family privacy and internal decision making. This philosophy reflects the view that children benefit from a continuous intimate relationship with their parents, and that, generally, parents are in a better position than outsiders to make decisions regarding their children’s wel-

Id. at 324-5.
18. Once attaining majority, a child could bring an action against his custodian for mismanagement of money or property that belonged to him. I William Blackstone, Commentaries *462-63.
20. See Fraser, supra note 2, at 26.
21. Id. at 17-18.
25. The individual family unit “offer[s] children protection and nurture, and introduces them to the demands and prohibitions as well as to the promises and opportunities of society.” See Joseph Goldstein et al., Before the Best Interest of the Child 7-9 (1979). It instills
The primacy of familial autonomy has protected the decision-making authority rights of parents to this day. Although children’s rights are now recognized, parental autonomy still prevails in most circumstances.

This premise does not maintain, however, that parental control is absolute. Circumstances occur where protecting the child’s welfare becomes a more compelling interest than preserving family autonomy. This happens when the parent-child relationship deteriorates to a point where the child’s welfare is compromised. One expert describes a child’s rights as negative legal rights because they come into being when parental behavior drops below a minimal community standard.

Values, fosters religious and political beliefs, and provides a vehicle to develop in a child the knowledge, education, and experience that will enable him to become a productive citizen. See generally Moore, 431 U.S. at 503-04 (recognizing constitutional protection of family relationships because of their important role in our history and tradition as a nation); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that “liberty” includes the right to establish a home and bring up children). Contemporary cases, like Griswold v. Connecticut, 381 U.S. 479 (1965), suggest a concept of family autonomy, with emphasis on the importance of family integrity. Since Griswold, family autonomy has sometimes been characterized as a fundamental, constitutionally protected right. Drawn from language in that case as well as earlier cases, it is a personal right to be free from state interference—for parents and children, separately and mutually—which arises from the intimate family relationship. See also Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (limiting state’s exercise of its parens patriae powers over family life and recognizing that children are not mere creatures of the state); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). Cf. Parham v. J.R., 442 U.S. 584 (1979) (permitting parents validly to consent to child’s commitment to state mental institution).

Insulation from state interference has never been considered absolute. When other societal values are at stake, important competing state interests have overridden the authority of the parent. Decisions such as Wisconsin v. Yoder, 406 U.S. 205, 231-32 (1972) (education), Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination), and Bellotti v. Baird, 443 U.S. 622 (1979) (abortion) are examples of areas where the Supreme Court has been willing to overcome parental autonomy in support of other values deemed important by the state.

Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (state has “urgent interest in the welfare of the child”); In re W.D.N., 443 So. 2d 493 (Fla. 2d DCA 1984). Before intervening in family life to promote and protect the child’s welfare, the state must show that the parents are either unfit, unable, or unwilling to care for the child adequately. Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Stanley v. Illinois, 405 U.S. 645 (1972). However, “the only limitation on the [rule of parental privilege is that as between the parent and the child,] the ultimate welfare of the child itself must be controlling.” Padgett v. Department of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991) (quoting Sparks v. Reeves, 92 So.2d 18, 20 (Fla. 1957)).

Brian Fraser testified at committee hearings on the Child Abuse Prevention and Treatment Act of 1974, and is credited with securing the bill’s requirement of guardian ad litem
ent is said to owe a duty of support to the child. If a parent fails to provide adequate food, clothing, or shelter, he or she violates this duty of care and support. The child is then said to be neglected, and the jurisdiction of the juvenile court may be invoked. Only after parents so grossly abuse their rights of care, custody, and control does the state intervene and delineate a child’s rights. If the state chooses to intervene, however, it must rebut the presumption that favors parental rights.

In an effort to define the parent-child relationship more exactly, and to insure the protection of minors’ rights, the doctrine of parens patriae introduced the state into the relationship. Traditionally, the state’s parens patriae power refers to its role as protector of those incapable of assuring their own welfare. This doctrine allows the state, in limited circumstances, to intervene in family life and remove children from the custody of their parents. To intervene, the state must show an immediate and pressing danger to the child or to the state’s interests. Our legal system’s long-standing preference for decentralized decisionmaking in areas concerning family matters has tempered the implementation of the parens patriae doctrine and has governed the state’s authority to intervene in family life.

Presumptive parental autonomy is premised on the theory that “any person who is biologically capable of becoming a parent can become a

appointments. He was then staff attorney for the National Center for Prevention of Child Abuse and Neglect. He has written many articles on this issue some of which are cited throughout this Comment.


This doctrine originally conceived in England, was formally adopted by the American legal system. Noted specifically in 1839 in the case of Ex Parte Crouse (“... rights guaranteed to the parent are granted by the grace of the state...”), and specifically delineated in the case of Finley vs. Finley (... the responsibility to do what is best for the interests of the child), it became firmly entrenched in the case of Prince vs. Massachusetts (... parents may make martyrs of themselves but they are not free to make martyrs of their children...).

Fraser, supra note 15, at 326 (footnotes omitted).


34. “The right to the integrity of the family is among the most fundamental rights.” Carlson v. State, 378 So. 2d 868, 869 (Fla. 2d DCA 1979); see In re T.W., 551 So. 2d 1186, 1194 (Fla. 1989) (finding that the Florida Constitution requires the presence of a compelling state interest to interfere in family unity). The parens patriae theory has been strongly criticized as a justification for the existence of juvenile courts. The United States Supreme Court has found the constitutional, theoretical, and historical underpinnings of the doctrine to be highly debatable. E.g., In re Gault, 387 U.S. 1, 16 (1967).
good parent, and that parents want and will act in their child’s best interests.” However, current child abuse statistics indicate otherwise. In 1991, for example, states received and referred for investigation 1.8 million reports of alleged child abuse and neglect involving an estimated 2.7 million children. The American Bar Association (“ABA”) estimates that a child is abused or neglected in this country every forty-seven seconds and that forty children are killed or wounded by gunfire every day. These figures suggest a crisis which not only jeopardizes the future of every abused or neglected child, but the future of the entire nation. This crisis has caused much concern.

Indeed, it has become increasingly clear that child abuse and neglect are social problems with long-term consequences. As a result, states continue to refine and improve laws to protect children, while enhancing their service systems to insure that abused and neglected children and their families receive the help they need. The legal system

35. Fraser, supra note 2, at 17.
38. See American Bar Association, America’s Children At Risk: A National Agenda for Legal Action (1993) (discussing a recent study on the unmet legal needs of children and their families); Robert W. Page, Family Courts: An Effective Judicial Approach, 44 Juv. & Fam. Ct. J. 1 (1993); see also Florida Children’s Campaign Offers Facts, Guardian Ad Litem Gazette (Dade County Guardian Ad Litem Program, Miami, Fla.) June 1994, at 1 (urging all political leaders to support a special session of the Florida Legislature to address the prevention and early intervention needs of Florida’s children); Jerri A. Blair, Gregory K. and Emerging Children’s Rights, Trial, June 1993, at 22 (“The U.S. Advisory Board on Child Abuse and Neglect recently reported that . . . the country’s lack of attention to the problems of child abuse and neglect constitutes a social, financial, and moral disaster.”).

The Florida Supreme Court, in In re Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909, 911 (Fla. 1989), emphasized that steps should be taken to improve the juvenile process in Florida. The court indicated that those steps should include efforts to:

[R]evise and update the Rules of Juvenile Procedure, amend the Rules of Judicial Administration, make changes in the Judicial Council of Florida, commission a study by the Judicial Council, increase the educational opportunities for judges and lawyers in juvenile matters, and increase the scope of the Guardian Ad Litem Program.

Id. Robert Benjamin would argue that these efforts miss the mark by focusing on the traditional legal approach to child abuse, an approach he believes splinters and transforms the problem for legal purposes and often furthers the breakdown of the family and harm to children. Mr. Benjamin contends that “effective management of child abuse and neglect matters requires an approach to problem solving that incorporates both the needs and protection of children and the maintenance of the integrity of the family system.” Robert D. Benjamin, Mediative Strategies in the Management of Child Sexual Abuse Matters, 29 Family & Conciliation Cts. Rev. 221, 223 (1991).

39. Rebecca H. Heartz, Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness, 27 Fam. L.Q. 327, 330 (1993). In Florida, the “[s]taff of the House Aging and Human Services Committee conducted statewide focus group interviews with HRS staff, parents, foster care parents, guardians ad litem and judges for a two-
has also become increasingly aware that children's interests in protection proceedings may be in direct conflict with their parents or the state and, therefore, these children should be entitled to independent representation.\textsuperscript{40}

### III. Protecting Children and the Need for Permanency

**Juvenile Dependency Proceedings in Florida**

Beginning about 1962, child abuse was formally identified as an observable, clinical condition and recognized as a serious, widespread threat to children's lives.\textsuperscript{41} Individual states also began to enact mandatory child abuse reporting statutes. Florida's mandatory reporting law was enacted in 1963.\textsuperscript{42} Once an initial complaint is made, the juvenile dependency legal process is triggered. An HRS protective investigator conducts an investigation and makes an assessment as to the child's safety. If the child is found to be in immediate danger, the investigator takes involuntary temporary custody of the child and places him...
or her with a relative, if possible, or in an HRS shelter home. At the hearing the court determines whether placement in a shelter is in the best interest of the child, whether there is probable cause that the child is dependent and thus in need of the state’s protection, and whether HRS has made reasonable efforts to prevent the removal of the child from the home. If the court finds that it is not in the child’s best interest to be placed in a shelter, the child will be returned to his or her parents immediately. If the statutory burden is met, the child will remained sheltered. At this point, the court may appoint a guardian ad litem.

Guardians ad litem are special guardians appointed by the court for the limited purpose of representing the interests and rights of their wards in the proceedings that gave rise to their appointment. In Florida, they are lay volunteers who are trained in the workings of the juvenile just-

43. Removal from the home and placement in shelter care is not considered until everything possible has been done to meet the child’s needs in her own home. Department of Health and Rehabilitative Services, HRS Manual: Foster Care for Dependent Children, HRSM 175-12, at 1-1 (1991) [hereinafter HRS Manual]. Shelter homes are licensed private family homes which receive children on an emergency basis from HRS. Fla. Admin. Code Ann. Rule 10M-6.015(3) (1993). It is designed as strictly a temporary arrangement (statutorily no longer than two months) until further legal proceedings determine whether a child will be returned home or moved into a foster home. Fla. Stat. § 39.402(9), (10) (1993). Foster homes, also licensed private residences, are also temporary (statutorily no longer than one year), but they are designed to provide substitute care for children who await rehabilitation of the situation which caused them to be removed from the custody of their natural parents. Fla. Admin. Code Ann. Rule 10M-6.015(1) (1993).

45. Id. § 39.402(8)(b).
46. According to the HRS Manual:
   The purpose of foster care is to: a) Provide a child with a substitute family-like experience while away from his own family; b) Ensure that a child’s rights to emotional, physical and educational nurturing are protected; and c) Provide adequate support services to a child’s family in order that the goal of reunification (or an equally appropriate permanent placement) will be reached as quickly as possible.


47. Fla. Stat. § 39.402(8)(a) (1993) (requiring the appointment of a guardian ad litem at the shelter hearing “unless the court finds that such representation is unnecessary”).

48. Guardians are usually dismissed from an appointment by the court when court intervention ends. Fla. Stat. § 39.465(2)(b)(3) (1993). “Guardians ad litem differ from general guardians in that they are not responsible for the general care and supervision of either the person or the estate of their ward or both.” Regina T. Makaitis, Comment, Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem, 12 Creighton L. Rev. 234, 234 (1978). The guardian ad litem, due to the limited nature of the appointment, is generally not governed by the law of guardianship. Note, Guardians Ad Litem, 45 Iowa L. Rev. 376, 376 (1960).

49. In the early stages of implementing the guardian ad litem requirements of the Child Abuse
tice system, educated about child abuse and neglect issues, family dynamics, and community resources. In this capacity, they are also taught interview and negotiation skills. "Guardians . . . are officers of the court, who receive powers from the order of appointment to represent the best interests of the child." The responsibilities of a guardian include conducting an independent investigation, reporting to the court the wishes of the child, offering recommendations for actions which are in the best interests of the child, and protecting the child from the harmful effects of being entangled in the adversarial process. The guardian ad litem is thus critical to the state's parens patriae function.

The best interest principle, underlying all juvenile proceedings,

Prevention and Treatment Act, when a guardian was appointed, it was usually an attorney. However, there was dissatisfaction among judges with the quality of attorney representation and lack of direction among attorneys as to what they should do in fulfillment of the guardian ad litem role. Duquette, supra note 1, at 7.

It was against this backdrop that Judge David Soukup, in 1977, began using trained lay volunteers in his Seattle court to fulfill the [guardian ad litem] role. The volunteers' activities are monitored by a professional staff and attorneys are generally present to represent the volunteer in the courtroom. The concept was both successful and replicable such that it became a national movement known as Court Appointed Special Advocates (CASA). By 1991 this movement grew to include 454 programs in 49 states serving 91,000 children.


Hoffenberg et al., supra note 49, at 21.

FLA. STAT. § 39.465(2)(b) (1993). See also Foerster, supra note 2, at 16-18. For a more thorough discussion of the guardian ad litem's role, see part III.


Florida law relies on the best interests of the child to resolve the conflict between the rights of the child and those of the natural parents. Section 39.4612 of the Florida Statutes sets


53. Florida law relies on the best interests of the child to resolve the conflict between the rights of the child and those of the natural parents. Section 39.4612 of the Florida Statutes sets
mandates that the child's well-being—not the parents’, the family’s, or the child care agency’s—must be paramount once justifiable state inter-

forth with specificity some of the relevant factors that may be considered by the court in determining the manifest best interests of the child:

(1) 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.

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

(3) 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.

(4) 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.

(5) 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.

(6) 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.

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

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

(9) 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.

(10) The recommendations for the child provided by the child’s guardian ad litem or legal representative.

(11) Any suitable permanent custody arrangement with a relative of the child.

FLA. STAT. § 39.4612 (Supp. 1994); see also Marshall A. Levin, Guardian Ad Litem in a Family Court, 34 Md. L. Rev. 341, 362-65 (1974) ("[T]he primary responsibility of the guardian ad litem is to accurately present the true needs of the child and, thereby establish the 'best interest' test as a suitable formulation for ensuring a child's welfare.").

The best interests standard is not without opponents. The standard has been criticized for being indeterminate, unjust, and self-defeating. See Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. Chi. L. Rev. 1, 11-12 (1987) (arguing that the standard suffers from these defects). See also Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law & Contemp. Probs., Summer 1975, at 263 (citing a study finding little agreement among some child welfare professionals regarding appropriate custody arrangements in the best interests of the child). The Supreme Court “more than once has adverted to the fact that the ‘best interests of the child’ standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.” Lassiter v. Department of Social Servs., 452 U.S. 18, 45 n.13, reh’g denied, 453 U.S. 927 (1981). Courts determining custody possess “unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” Santosky v. Kramer, 455 U.S. 745, 762-63 (1982) (footnotes omitted); see also Mark Strasser, Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies, 60 Tenn. L. Rev. 135, 174-77 (1992).
vention has been established. The goal of the best interest standard is to assure each child membership in a family with at least one parent who wants him or her. Furthermore, this goal assures for each child and that child’s parents an opportunity to maintain or reestablish ties to each other. If the state demonstrates that, within one year, reunification cannot provide a child with the minimum requirements for a safe, stable home, the law encourages adoption over foster care as a long-term solution.

After initially investigating a report of child abuse, neglect, or abandonment, the law requires HRS to conduct a more thorough investigation to determine whether court action is necessary. If it appears that there has been actual maltreatment, HRS files a dependency petition. A dependency proceeding is a civil action in which a circuit court determines whether the person who is responsible for a child is adequately providing for that child’s welfare. If HRS chooses not to file a petition, any person who has knowledge of such maltreatment, including the guardian on the case, may proceed with court action if that person believes it is in the best interest of the child.

Once HRS, or another party, files a petition in juvenile court, the child, for all practical purposes, becomes a ward of the court. The court thus has the responsibility to protect that child’s safety and interests. This places judges in the somewhat awkward position of protecting the

54. Goldstein et al., supra note 25, at 4-6.
55. Fla. Stat. § 39.45(2) (Supp. 1994). According to the statute, the legislature intends that:

[E]ach child be assured the care, guidance, and control in a permanent home which will serve the best interests of the child’s moral, emotional, mental, and physical welfare and that such home preferably be the child’s own home or, if that is not possible, an adoptive home [and] that permanent placement with the biological or adoptive family be achieved as soon as possible for every child in foster care and that no child remain in foster care longer than one year.

Id.

56. Fla. Stat. § 309.403(2)(a) (1993). A reported case could be handled nonjudicially, for example, when parents voluntarily agree to counseling or HRS decides that the complaint of abuse is unfounded. Id. § 309.403(2)(b).

57. A petition is a simple document which states the name of the child, the nature of the maltreatment, and the alleged abuser. Based on the 1990 amendment to section 39.01(10), dependency may be based on allegations against a custodial parent, eliminating the requirement of allegations against both parents. In re L.S., 592 So. 2d 802 (Fla. 4th DCA 1992).


60. Fla. Stat. § 39.404(1) (1993). This section provides that “[a]ll 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.” Id.

child’s interests, and, at the same time, weighing both sides of the argument and reaching a fair decision. If judges actively advocate for the child, they lose their impartiality. To resolve this dilemma, judges may transfer their obligation to protect the child’s interests by appointing a guardian ad litem. This appointment does not negate the court’s responsibility to the child; instead, it allows the court to fulfill that responsibility in a less compromising manner. Through the appointment, the guardian ad litem assumes the role of an officer of the court, who is responsible to both the child and the court.

The court then holds an arraignment hearing, in which the parents admit to, consent to, or deny the allegations in the petition. The court also determines whether the parties are represented by counsel or are entitled to appointed representation. If the parents admit to the facts in the petition alleging dependency, the court then proceeds to a dispositional hearing. If they deny the allegations, an adjudicatory hearing must be conducted.

A judge conducts an adjudicatory hearing, without a jury, to determine whether the allegations of the petition are supported by a preponderance of the evidence. If the guardian and HRS do not agree on a resolution of the case, the guardian may be represented by an attorney,

62. Id.
63. Id.
64. Id. Donald C. Bross, Helping Prevent the Abused Child From Becoming a Grownup Abuser, The Judges’ J., Fall 1985, at 11, 14-15.
65. After a petition is filed, an arraignment must take place within 14 days after the child is detained pursuant to court order, FLA. STAT. § 39.408(1)(a), or within a reasonable time if the child remains at home. Id.
66. Throughout a dependency proceeding the parent or custodian of the child has a right to counsel. FLA. R. Juv. P. 8.320(a)(1). Upon request, the court must appoint counsel to insolvent persons, provided they are entitled to counsel under other Florida law. Id. at R. 8.320(a)(2). The court also must ascertain whether the parent or custodian understands the right to counsel. Id. at R. 8.320(a)(3).
67. If the child is in custody, the adjudicatory hearing must be held within seven days from the date of the arraignment. FLA. STAT. § 39.408(1)(a) (Supp. 1994). However, even if this seven-day period has not yet expired, the child must be released from the state shelter after 21 days have elapsed from the time the child first was taken into custody unless an order of adjudication has been entered, or a continuance has been granted. FLA. STAT. § 39.402(9) (1994). Every month in Dade County, between 90 and 120 shelter hearings are conducted, an infusion that has pushed to 3000 the number of children in foster care. Because of this volume, the 21-day rule is rarely followed. Interview with Helen Stone, State of Florida Guardian Ad Litem Program Attorney, Eleventh Judicial Circuit, in Miami, Fla. (Mar. 5, 1994). A guardian can seek a continuance by motion filed with the court, especially where there is evidence the child would be endangered if released to the parents. In re Unknown P., 546 So. 2d 21, 23 (Fla. 3d DCA 1989).
68. FLA. STAT. § 39.408(2)(b) (Supp. 1994); FLA. R. Juv. P. 8.330(a); Moore v. State, 452 So. 2d 1059, 1060 (Fla. 3d DCA 1984); In re R.H., 516 So. 2d 324 (Fla. 2d DCA 1987).
GUARDIAN AD LITEM

Counsel also represents the parents. Witnesses may testify and be cross-examined, and the rules of evidence used in civil cases apply. Florida law defines "abuse" as "any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired," and "neglect" as depriving a child of "necessary food, clothing, shelter, or medical treatment or permitting a child to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired." HRS must, therefore, prove serious impairment to the child.

If, at the close of the petitioners' case, the court finds insufficient evidence to warrant a finding of dependency, it may dismiss the petition. The child is then returned to the parents. Should the court find that the allegations of the petition are supported by a preponderance of the evidence, it must make a finding of dependency. The case is then scheduled for disposition.

The next stage in the dependency proceeding is the dispositional hearing, at which time the court determines where the child should be placed pending resolution of the family's problems and determines the services to be provided to the child and family. At this hearing, the court may consider any evidence helpful in determining the proper dis-

69. GUARDIAN AD LITEM PROGRAM, STATE COURTS ADMINISTRATOR, IN THE CHILDREN'S BEST INTERESTS, A MANUAL FOR PRO BONO ATTORNEYS WHO ASSIST GUARDIANS AD LITEM 6-6 (1991) [hereinafter PRO BONO MANUAL].

70. The court is required to appoint counsel for indigent parents where permanent termination or child abuse charges might result. In re D.B., 385 So. 2d 83, 91 (Fla. 1980).


72. FLA. STAT. § 39.01(2) (1993).

73. Id. § 39.01(7).

74. FLA. R. JUV. P. 8.330(f); In re C.C., 556 So. 2d 416 (Fla. Dist. Ct. App. 1989) (finding single incident in which mother struck, shook, and intimidated two-year-old insufficient to show dependency).

75. FLA. R. JUV. P. 8.330(g).

76. The dispositional hearing can be held at any reasonable time, but the statutes expressly provide that the child cannot be held in a shelter for more than thirty days after the entry of an order of adjudication. FLA. STAT. § 39.402(10) (Supp. 1994). Thus, as a practical matter, all disposition hearings are held within this time limit. PRO BONO MANUAL, supra note 69, at 5-24.

77. The court places the child under the protective supervision of HRS in the child's own home or in the temporary legal custody of an adult relative or an adult nonrelative approved by the court who is willing to care for the child. FLA. STAT. § 39.41(4). The court may also commit the child to a licensed foster home willing to receive the child, id. § 39.41(7), to the temporary legal custody of HRS, id. § 39.41(8), or to an independent living arrangement for a child 16 years of age or older. Id. § 39.41(10).

The court can impose any reasonable restrictions it deems proper. Protective supervision must continue until the court terminates it or the child reaches the age of 18, whichever occurs first. FLA. STAT. § 39.41(3) (Supp. 1994).
Florida law requires HRS to prepare a predisposition report. This report assesses the risks and benefits of returning the child home, including all the reports and recommendations from the professionals and agencies that have provided services to the family. It also determines the availability and appropriateness of prevention and reunification efforts made by the department. The HRS predisposition report then recommends specific actions.

In most jurisdictions, the disposition hearing focuses on developing a case plan that sets forth the actions to be taken by the parents, the agency, and other professionals to achieve the goal of rehabilitation of the family unit. The purpose of the plan is to quickly assure the safe return of the child to the parents, or if this is not possible, the termination of parental rights and the placement of the child with HRS or a licensed child-placement agency to find a permanent adoptive home. When a case plan is agreed upon, all parties sign it and retain a copy.

78. FLA. R. JUV. P. 8.340(a).
79. FLA. STAT. § 39.408(3) (1993). Guardians routinely prepare a predisposition report as well. The guardian's report includes a statement of the child's wishes and of what the guardian believes is in the best interest of the child. Predisposition reports cover the child's needs and include recommendations which usually address such issues as whether visitation with parents should be supervised or unsupervised, therapeutic treatment for children and parents, referral for evaluation for special school programs, medical screening or treatment, psychological evaluations, and drug or alcohol dependency treatment for parents. The weight given to the child's wishes depends on the age of the child and his or her wishes. The expressed preference of a child of sufficient intelligence, understanding, and experience is given more weight than that of younger children (unless the younger child expresses terror at the proposition of being placed in the custody of a certain person), especially if the child is old enough and threatens to run away. Usually, judges seriously consider the guardian's recommendations because they know that the guardian ad litem typically takes one case at a time and therefore has devoted considerably more time than HRS to the fact-finding and social aspects of the case. Interview with Cindy Lerner, State of Florida Guardian Ad Litem Program attorney, Eleventh Judicial Circuit, in Miami, Fla. (Aug. 17, 1994).
80. FLA. STAT. § 39.408(3)(a) (Supp. 1994). HRS must report on what services were provided and whether they were sufficient to meet the needs of the child and family. The report recommends what services should be continued and must explain why needed services have not been provided, if any. Id. If placement outside the home is recommended, the report must state the specific length of time before custody by the parent will be reconsidered. Id. § 39.408(3)(b). In re K.S., 558 So. 2d 158 (Fla. 1st DCA 1990).
81. By law, HRS must offer a case plan within thirty days of the disposition hearing. FLA. STAT. § 39.451(4)(a) (1993). The case plan is written in layman's terms by the agency responsible for placement in conference with parents, foster parents, the child, and the guardian ad litem. The plan is a contract under which the parent(s) and HRS must participate in certain HRS sponsored programs, such as substance abuse programs or classes on parenting skills. One court has described the case plan as embodying the standards the parent must meet to obtain a legitimate expectation of reconciliation with the child, as well as the standard by which the decision to terminate parental rights will be judged if the parents fail. In re A.B., 444 So. 2d 981 (Fla. 1st DCA 1983).
82. FLA. STAT. § 39.451(1).
83. Id. § 39.451(4)(d). If the parents are unwilling to participate in the development of a case.
The court enters an order approving or modifying the plan and it then becomes an order of the court.

Parents are typically given up to one year in which to "substantially comply" with the plan. The time period can be extended when good cause is shown. Every six months the court reviews the case plan to determine whether it has been properly implemented and whether it is achieving the desired effect. Central to the review is whether any additional actions should be taken by the parent or agency to correct the conditions that caused the child to be removed from the home. The review hearing also determines whether all parties are complying with their designated tasks and responsibilities and whether the risks to the child have been ameliorated to the extent that the child can be returned home safely.

According to Florida law, the case plan expires no later than eighteen months after the date the child was first removed from the home, unless it is extended. Unless efforts to rehabilitate the family are successful, the eighteenth month judicial review hearing formally marks the point at which HRS shifts its focus from rehabilitation and reunification of the family to finding a stable and secure permanent home for the child. The institution of these eighteen month reviews is based on two
fundamental beliefs. First, the law must make the child’s needs paramount. Second, permanency in relationships is critical to the child’s developmental needs.90

In extreme cases, the end result of the dependency process is the filing of a petition to terminate parental rights.91 Although state action whether maintaining the continuity of present arrangements is in the child’s best interest, as well as the likelihood that the child will enter into a more stable and permanent family relationship through the termination of parental rights and duties. FLA. STAT. § 39.4612(6), (7). Finally, the court considers evidence of a parent’s failure to comply with a case plan in conjunction with the evidence of abuse or neglect. See In re J.L.C., 501 So. 2d 92 (Fla. 1st DCA 1987); Spankie v. Department of Health and Rehabilitative Servs., 505 So. 2d 1357, 1358 (Fla. 5th DCA 1987) (terminating mother’s parental rights based on finding of failure to comply with performance agreement and a history of physical and emotional abuse inflicted on the child by the mother).

90. After years of study and debate about the nation’s child welfare and foster care system, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act). 42 U.S.C. § 675 (1980); DUQUETTE, supra note 1, at 95. Congress wanted to encourage states to adopt legal reforms which would reduce the number of children placed in foster care by protecting children at home with their natural parents if at all possible. S. REP. NO. 336, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 1450. The intention of the law was to ensure that when a child was removed from the biological family, the rehabilitative services were focused on the family in a fairly short period of time (less than 18 months) so that the child could quickly return to the biological family, if possible. For a sobering look at “foster care drift”, see Marsha Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV. 423 (1983). Studies show that the loss or absence of a continuous, permanent relationship with a parental figure is associated with higher rates of juvenile delinquency and psychological disturbance. Id. at 424. Congress conditioned state eligibility for federal foster care funds on the state’s enactment of certain procedures. Among the federal requirements of the Child Welfare Act is that the state hold a permanency planning hearing (in Florida, a judicial review), after a child has been in foster care for 18 months. These reforms were drawn from the psychoanalytic theories presented by the renowned trio Joseph Goldstein, Anna Freud, and Albert Solnit in their 1973 book, Beyond the Best Interests of the Child. See id. at 446-47. For a discussion of evidence that undermines their theses, see Garrison, supra, at 457. Most states, by statute, court rule, or administrative procedure, have adopted the federal procedures. Florida legislation stresses the need to find a permanent solution within definite time frames. FLA. STAT. § 39.45 (Supp. 1994). Despite the good intentions of legislators, the federal goal of 18 months (never mind Florida’s 12 month goal) is an impossible dream.

In 1990, a Miami attorney representing six Dade County foster children charged HRS with routinely failing to comply with the 18 month limit. The statistics provided for the lawsuit showed that 81% of the children in foster care remained there over 18 months, spending an average of 28.8 months in the system. To settle the lawsuit, a one-time allocation of $36 million was injected into the foster care system. The author questions if this is nothing more than a band-aid. See In re Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909, 909-10 (Fla. 1989) (“[T]he courts, the Department of HRS, the guardians ad litem, and others, the dependency system is simply unable to dispose of these cases within the statutory time limits for processing children through emergency shelter and foster homes.”); William Cooper Jr., Settlement Reached on Foster Care, PALM BEACH POST, Jan. 11, 1992, at 1A.

91. A petition to terminate parental rights cannot be filed if the failure to comply with the case plan was due to the lack of financial resources of the parents or the failure of the department to make reasonable efforts to reunify the family. FLA. STAT. § 39.494(1)(e) (Supp. 1994). A termination petition may also be filed prior to expiration of a case plan if a parent engages in conduct toward a child that demonstrates that the continuing involvement of the parent in the parent-child relationship threatens the life or well-being of the child, irrespective of the provision of services. Id. § 39.494(1)(c). A termination petition may also be filed (without first having filed
to terminate parental rights represents perhaps the most drastic legal intrusion into the sanctity of family life. Florida law recognizes that the ultimate welfare of the child must take precedence.

Similar to the dependency petition filing process, any person who has knowledge of abuse, neglect, or abandonment may file a termination petition. Furthermore, if a guardian ad litem has not previously been appointed, the court must appoint one when a termination petition is filed. In a termination proceeding, the petitioner must prove three things: first, that the original allegations of maltreatment satisfy the higher standard of clear and convincing evidence; second, that the parents failed to comply substantially with the case plan; and third, that termination is in the best interests of the child. HRS must also plead and prove that it employed diligent efforts to rehabilitate the parents. Expedited termination proceedings, which permit the filing of a petition

a dependency petition) when a parent engages in (or fails to prevent) egregious conduct that endangers the life, health, or safety of a child. Id. § 39.494(1)(d). Egregious abuse is defined as "conduct of the parent or parents that is deplorable, flagrant, or outrageous by a normal standard of conduct." Id. § 39.494(1)(d)(2). A termination petition may also be filed if the parents voluntarily relinquish custody of their child to HRS or to a licensed child-placing agency, id. § 39.494(1)(a), or when the identity or whereabouts of the parent(s) are unknown and cannot be ascertained by diligent search within 60 days. Id. § 39.464(1)(b). See generally Garrison, supra note 90. Garrison persuasively argues that although the child's need for permanence may justify depriving her parents of the right to regain custody, forever prohibiting visitation with the child's natural parent generally does the child more harm than good.

2. "An order of termination of parental rights . . . permanently deprive[s] the parents or legal guardian of any right to the child." FLA. STAT. § 39.469(2)(b) (1993). The effect is to sever completely and irrevocably both the parent's right to ever regain custody and the right ever to visit or communicate with the child again.

93. See, e.g, FLA. STAT. § 39.001(1)(b). On the other hand, a recent article in a Miami newspaper notes that:

Some child advocates now argue that the standard used to terminate parental rights (i.e., abuse, neglect, or abandonment) should be broadened to address the issue of who is best suited to raise a child. "My own view is that parents don't have rights to a child," says William Gladstone, a retired juvenile court judge. "They have obligations, and if they meet those obligations, then they have the privilege of children."


94. FLA. STAT. § 39.464(1) (Supp. 1994). In 1994, the Florida Legislature engaged in a major revision of Chapter 39, Florida Statutes. One notable change is that § 39.461 no longer mandates that a termination petition be filed by an HRS attorney or by any other person with knowledge; instead, the statute now specifically grants this power to the guardian ad litem, courts had accepted termination petitions filed by guardians even before the statutory revision. See Norris v. Spencer, 568 So. 2d 1316, 1317 (Fla. 5th DCA 1990) (court-appointed guardian of a minor child had standing to file a petition for termination of parental rights); In re C.B., 561, 666 So. 2d 663 (Fla. 5th DCA 1990) (court-appointed guardian, without participation of HRS, could initiate and litigate a petition for termination of parental rights); In re J.M., 560 So. 2d 343 (Fla. 4th DCA 1990) (maternal grandparents had right to file and pursue a petition for dependency without consent of HRS); Kingsley v. Kingsley, 623 So. 2d 780, 783 (Fla. 5th DCA 1993).

95. See part IV, for a thorough examination of the termination process and the roles of HRS and the guardian.
without having to prove dependency or failure to comply with a case plan, are available in three limited situations: voluntary relinquishment, abandonment for sixty days, or egregious conduct. If the grounds for termination are not proven by clear and convincing evidence, but grounds for dependency have been established, the court must deny the termination petition and enter an order either placing or continuing the child in foster care under a case plan, or returning the child to the parents. If the judge orders the parents' rights terminated, HRS or a licensed child-placement agency obtains permanent legal custody of the child. The child then is freed for adoption and eventually may be placed in a permanent adoptive home or some other long-term arrangement.

IV. HRS, THE GUARDIAN AD LITEM, AND THE GUARDIAN AD LITEM PROGRAM

The state acts as parens patriae through its legislative, executive and judicial branches. Its executive function is performed by the Department of Health & Rehabilitative Services. The legislature established HRS to "prevent[] or remedy[] the neglect, abuse, or exploitation of children and of adults unable to protect their own interests" and "to integrat[e] the delivery of all health, social, and rehabilitative services." HRS's primary obligations are to insure the safety of children, to help the family to prevent its break-up, and to reunite the family if the child has already been removed. HRS usually takes legal custody of a child no matter who files or argues the dependency or termination petition. If HRS's diligent efforts to keep a child in the natural parent's care fail, the agency's duty switches from trying to

97. See supra note 92 and accompanying text.
98. The court retains jurisdiction over a child returned to the parents for a period of at least six months. Fla. Stat. § 39.469(1)(a).
99. Id. § 39.469(2).
101. HRS is an administrative agency, which renders it a part of the executive branch, and is defined statutorily as "the principle administrative unit within the executive branch of state government." Fla. Stat. § 20.03(2) (1993).
103. Id.
105. When a child is first taken from the home, HRS takes temporary custody of the child. Id. at 1-5. It is responsible to for the day-to-day care of the child, including the provision of food and shelter, clothing, education, medical care, and emotional support. Id. at 1-9. When a parents' rights are terminated, HRS then takes permanent custody so that the child may be adopted.
repair the parent-child relationship to terminating it.\textsuperscript{106}

HRS has many other important considerations in the execution of its duties. While intervening to protect and promote a child’s well-being, the agency is still responsible for assisting the parents in exercising their legal rights and responsibilities.\textsuperscript{107} While HRS endeavors to reduce its administrative overload of dependency and termination proceedings, it also maintains an interest in lessening the financial burden of keeping children in state custody.\textsuperscript{108} It is no secret that social service agencies are inadequately funded.\textsuperscript{109} HRS in Florida is no exception. In Dade County alone, hundreds of children linger in foster care far beyond the statutorily permitted time limit because HRS does not have the budget to hire adequate staff to bring termination actions.\textsuperscript{110}

Like the executive branch, the judicial branch is also instilled with the state’s \textit{parens patriae} power. In Florida, and throughout the United States, courts of equity possess the inherent authority to protect children\textsuperscript{111} and to appoint guardians when legal proceedings affect children’s rights.\textsuperscript{112} Today in Florida, the legislature and the supreme court require judges in juvenile court to appoint guardians ad litem\textsuperscript{113} to repre-

\begin{thebibliography}{9}
\bibitem{107} HRS Manual, supra note 43, at 5-15.
\bibitem{109} \textit{E.g.}, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 834 n.35 (1977) (state agencies’ understaffing and underfunding tend to discourage family reunification).
\bibitem{110} See supra note 90 and accompanying text.
\bibitem{111} \textit{E.g.}, McRae v. McRae, 52 So. 2d 908 (Fla. 1951); Pollack v. Pollack, 31 So. 2d 253 (Fla. 1947). The common law considered minors to be wards of the court. \textit{E.g.}, Krivitsky v. Nye, 12 So. 2d 595 (Fla. 1943). Historically, the circuit court’s jurisdiction over a minor child encompassed broad discretion to consider and protect the child’s welfare. \textit{E.g.}, Riesner v. Riesner, 9 So. 2d 108 (Fla. 1942).
\bibitem{112} J. G. Woerner, \textit{A Treatise on the American Law of Guardianship} 51, 63-64 (1897).
\bibitem{113} FLA. STAT. § 415.508(1) provides in pertinent part that: “A guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse or neglect judicial proceeding, whether civil or criminal.” This statute has been through several
\end{thebibliography}
sent and protect children in abuse and neglect proceedings.114

To effectively implement this mandate, the legislature appropriated funds "to be administered through the State Courts System to provide guardian ad litem representation for children..."115 In 1982, the legislature appropriated funds through the State Court Administrator's Office for a statewide coordinated Guardian Ad Litem Program.116 In 1985, the Florida Supreme Court adopted written standards of operation to govern the administration of this program.117 Among other things, the standards provide for the chief judge of each judicial circuit to supervise the program and to mandate in-service training for volunteer guardians at least ten times annually.118 This program is part of the juvenile court administration structure. The project director is a department head in the court, answering directly to the chief judge of the circuit through the court programs director.

This administrative placement guarantees close cooperation

amendments, each one broadening the scope of the guardian's role. In 1988, the legislature clarified the guardian's role in criminal proceedings, see Fla. Stat. § 914.17 (1993), and in 1990, the legislature affirmed the role of the guardian ad litem in dissolution/custody cases. See supra note 2; Fla. R. Juv. P. 8.215(b) ("The court shall appoint a guardian ad litem to represent the child in any proceeding as required by law."); see also In re E.F. v. Department of Health & Rehabilitative Servs., 639 So. 2d 639, 643 (Fla. 2d DCA 1994) (holding the omission of a guardian ad litem in the termination proceeding did not rise to the level of fundamental error but certified the question to the supreme court as a matter of great public importance). Several states hold that failure to comply with the statute requiring the appointment of a guardian ad litem is reversible error. Id.; In re R.M. v. Steuben County Dep't of Public Welfare, 599 N.E.2d 227, 229 (Ind. Ct. App. 1992).

114. In Florida, the guardian serves in five major roles: (1) investigator on behalf of the child; (2) monitor of the agencies and persons who provide services to the child to ensure that court orders are carried out and that services are provided to the family; (3) protector of the child from the harmful effects of court proceedings; (4) spokesperson for the best interests of the child; and (5) reporter to the court presenting information and helping the court to determine the child's best interests. Hoffenberg et al., supra note 49, at 21-22; see also Fla. Stat. § 39.465(2) (Supp. 1994); Fla. R. Juv. P. 8.215(c).


116. Certain guardian program expenses are funded through local county court budgets.

117. See, e.g., Brevard County v. Lanford, 588 So. 2d 669, 670 (Fla. 5th DCA 1991) (discussing supreme court's minimal standards of operation).

118. The chief judge may designate a supervisor responsible for daily "administrative supervision of the program." The central state office is run under the auspices of the Office of the State Courts Administrator with the Supreme Court. The role of the Office of the State Courts Administrator is to monitor and evaluate the program in each judicial circuit. Supreme Court Administrative Order: Minimal Standards of Operation, State of Florida Guardian Ad Litem Program, (Feb. 7, 1985); Hoffenberg et al., supra note 49, at 20-21.
between the judges and program staff,119 and fosters a symbiotic120 relationship with the lay guardians. Judges also rely on these lay guardians, who are considered an arm of the court,121 to be the judges’ eyes and ears. This relationship confers significant credibility and validity to the guardian’s recommendations in the courtroom.

Still, the lay guardian is an independent volunteer citizen who works, not for a judge or program, but for the sheer satisfaction of “doing good.” Guardians have no special privileges.122 They are merely another party to the case, obligated to comply with all rules of evidence and procedure. The guardian’s relationship to the program is that of a student to a teacher.123 There is no doubt that this is an influential relationship. However, it is the independent guardian who has been properly trained in children’s issues from whom the judge wants to hear. The guardian program itself does not participate in any dependency or termination proceedings and does not make decisions for appointed guardians. Nor does the program appear in court to exercise any power or to represent any person.124 In practice, the judge appoints the program which then selects an appropriate guardian based on several criteria, including cultural compatibility and residential proximity.125

119. But cf. Jeff Schweers, Barkett Calls For Better Budgeting For Judiciary, FLA. B. NEWS, Feb. 1, 1993, at 16 (Chief Justice Barkett pointed out to the Senate Judiciary Committee the need to shift some programs, including the guardian program, out of the court budget because the courts have no control over the programs. She also questioned whether the program should remain within the courts’ purview, as there is an apparent conflict of interest in that relationship.). When the guardian program was first being developed, there was talk about having the program governed by HRS because it was not clear if the judicial branch was the proper place for this advocacy function. The debate continues. Telephone interview with Mignon Beranck, Deputy State Courts Administrator, Legal Affairs & Education Division of the Office of State Courts Administrator (Aug. 9, 1994).

120. Bross, supra note 64, at 15; Fraser, supra note 2, at 29.

121. See Shahood, supra note 2, at 14.


123. The program serves solely an administrative function. It trains volunteers and facilitates their appointment as guardians. The program has a full-time staff that, among other things, screens potential guardians, trains them, reviews their written recommendations to the court, and provides consultation. The staff also recruits and trains pro bono attorneys to represent the guardians. The Eleventh Circuit guardian program is the largest in the nation with approximately 650 lay guardians and 350 pro bono attorneys. Interview with Joni Goodman, State of Florida Guardian Ad Litem Program Director, Eleventh Judicial Circuit, in Miami, Fla. (Mar. 5, 1994). Though it is the largest program, there are only enough volunteers to accept about half of the abuse or neglect cases that come before the court. Id.

124. “[T]he guardian ad litem program is only a program, the implementation of an idea or plan . . . .” Department of Health & Rehabilitative Servs. v. Cole, 574 So. 2d 160, 163 ( Fla. 5th DCA 1990).

Although guardians act independently, the question has arisen whether they are members of the judicial branch. The nature of their role as surrogate protector of the best interests of the child and their appointment and training suggests that they are. The program is a part of the judicial branch, but it is unclear whether individual guardians should also be considered a part of the judiciary. If they are to be considered members of the judiciary because they are trained by the guardian program or because they are appointed by a judge, then their statutory authority to file a petition for dependency and their practice of pursuing termination of parental rights creates conflict of interest and separation of powers dilemmas. To clarify this issue requires a careful analysis of a termination of parental rights proceeding and the role, responsibilities, and duties of the guardian ad litem.

A termination proceeding does not comfortably fall within the usually understood parameters of either a civil or criminal case.\(^{126}\) It seems best characterized as "quasi-prosecutorial." Although the purpose of the action is expressly not to punish the person creating the condition of dependency,\(^{127}\) the complete and irrevocable termination of the rights of a natural parent to his or her child is undeniably a significant and intrusive exercise of state power. Because of this consequence, which necessarily entails the deprivation of certain liberties, the U.S. Supreme Court has held that due process requires the state to support its allegations by at least clear and convincing evidence. Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable doubt standard is not required, the Supreme Court adopted an intermediate burden of proof that strikes what it believes to be a fair balance between the rights of the individual and the

Goodman, State of Florida Guardian Ad Litem Program Director, Eleventh Judicial Circuit, in Miami, Fla. (Aug. 8, 1994). *But see Cole,* 574 So. 2d at 163 (trial court in dependency action cannot appoint program to designate guardian ad litem or indirectly delegate to program or its circuit director the judicial power to appoint the guardian, but should directly appoint guardian itself based on a list of qualified persons provided by the circuit director).

126. The United States Supreme Court, in *Santosky v. Kramer,* 455 U.S. 745, 762 (1982), has stated that "the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial" because of the following factors:

The Commissioner of Social Services *charges* the parents with permanent neglect.

They are served by *summons.* The factfinding hearing is conducted pursuant to *formal rules of evidence.* The State, the parents, and the child are all *represented by counsel.* . . . The attorneys *submit documentary evidence,* and *call witnesses who are subject to cross-examination.* . . . [T]he judge then determines whether the State *has proved the statutory elements* [by the proper *burden of proof*].

*Id.* (citations omitted) (emphasis added). Although this is state action, these elements are present in civil trials as well.

Another unique fact about the termination process in Florida is that indigent parents are held to have a constitutional right to counsel at state expense. This right derives not from the Sixth Amendment's right to counsel, but from the Fourteenth Amendment's guarantee of due process. Additionally, the compulsory nature of a termination is more like a criminal than a civil trial. For instance, if the parents fail to comply substantially with the case plan before the eighteenth month judicial review, HRS is mandated to file for termination of parental rights.

In contrast, a termination proceeding is civil in nature because anyone with knowledge can file a petition to terminate parental rights. Trial is without a jury and the adjudication focuses not on a person but a relationship. Liberty interests of the parents themselves are not at issue. Furthermore, the Supreme Court has held that the custodian of a child may not invoke the Fifth Amendment's privilege against self-incrimination to resist an order of the juvenile court to produce the child.

What seems to emerge from the statutes and common law is the idea that a termination proceeding is permissive state action based on the doctrine of *parens patriae* and that either the executive branch (i.e.,

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128. *Santosky*, 455 U.S. at 747-48. The Supreme Court held a clear and convincing evidence standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* at 768-70. The Florida Supreme Court, however, had adopted the "clear and convincing" standard long before the federal system. *Torres v. Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957).

129. The Florida Supreme Court recognized the important and fundamental interests at stake in termination of parental rights proceedings and has held "a constitutional right to counsel necessarily arises where the proceedings can result in permanent loss of parental custody. . . . [C]ounsel will always be required where permanent termination of custody might result." *In re D.B.*, 385 So. 2d 83, 87, 91 (Fla. 1980). *See also* FLA. R. Juv. P. 8.515. This is more protection than the United States Supreme Court requires in these cases. In *Lassiter*, the Court held that the appointment of counsel in termination proceedings may be determined by the state courts on a case-by-case basis. 452 U.S. at 31-32.

130. *In re D.B.*, 385 So. 2d at 89.


132. FLA. STAT. §§ 39.461, 39.464. The grant of this right-of-action to persons with knowledge has been held constitutional. *In re C.B.*, 561 So. 2d 663, 666 (Fla. 5th DCA 1990). Reversing a lower court decision finding section 39.461(1) unconstitutional, the court stated:

"We hold that the State has a sufficiently compelling interest in the welfare of children to authorize someone with knowledge of facts sufficient to terminate parental rights to bring that issue before a judge even if (particularly when) HRS does not agree. . . . [W]e think it appropriate to construe the term [any other person who has knowledge] to mean someone who is in a peculiar position so that such knowledge can be reasonably inferred; for example, the judge familiar with the file, the guardian or attorney . . . ."

*Id.* See also *Padgett v. Pettis*, 445 So. 2d 633, 635 (Fla. 1st DCA 1984), *dismissed*, 450 So. 2d 487 (Fla. 1984) (grandparents have standing to seek declaration of dependency under FLA. STAT. § 39.404).

HRS) or the judiciary (through the guardian and an attorney representing the guardian) may carry these actions forward. Although the law mandates HRS to pursue termination of parental rights under certain circumstances, it is unclear whether it is a required party or the only party permitted to litigate termination cases. Florida law requires that an attorney for HRS must represent the state in termination proceedings, but the Florida Rules of Juvenile Procedure establish that HRS is merely a discretionary party. The Florida Supreme Court has held that legal representation on behalf of HRS is required at every stage of juvenile dependency proceedings. In practice, children and their guardians have sought termination of parental rights without an HRS attorney present. In substance, however, HRS is a participant in the proceedings every time an HRS social worker testifies on behalf of the agency in favor of termination.

Prior to the Florida Supreme Court's administrative order in 1985 requiring the court to appoint guardians, the Fifth and Second District Courts of Appeal suggested that the primary responsibility for assuring a child's representation through the procurement of a guardian ad litem rested with HRS. The Supreme Court of Wisconsin has gone so far as to assert that the guardian ad litem is a "state actor" because its authority derives from the state's parens patriae power and is purely statutory.

134. See supra note 131.
135. Fla. Stat. § 39.014 (1993). The statute mandates that for dependency cases "an attorney for the [D]epartment of [Health and Rehabilitative Services] shall represent the state. The department may contract with outside counsel or the state attorney, pursuant to § 287.059, for legal representation..." Id.
136. Fla. R. Juv. P. 8.210(a)(b) "The terms 'party' and 'parties' shall include the petitioner, the child, the parent, the guardian ad litem where appointed, and the custodian. . . . The state attorney's office or the Department of Health and Rehabilitative Services may become a party upon notice to all other parties and the court." Id. (emphasis added).
137. In re Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989) (Overburdened by approximately 100,000 reports of abused and neglected children, HRS permitted lay counselors to engage in the practice of law by drafting legal documents and representing HRS in court in uncontested dependency proceedings.). See Fla. Stat. § 39.014 (1993) (HRS may contract with outside counsel or the state attorney for legal representation.).
138. E.g., Department of Health & Rehabilitative Servs. v. Kahn, 639 So. 2d 689, 690 (Fla. 5th DCA 1994) (HRS did not initiate or prosecute the termination proceedings; Kingsley v. Kingsley, 623 So. 2d 780, 783-84 (Fla. 5th DCA 1993) (child cannot petition court in his own name because he lacks requisite legal capacity, however, an adult person of reasonable judgment and integrity may conduct the litigation for the minor); see also Blair, supra note 38, at 22 ("The indifference and inaction of the Florida Department of Health and Rehabilitative Services (HRS) left Gregory Kingsley, then 11 years old, with no choice but to act for himself.").
140. In re M.P., 453 So. 2d 85, 87 (Fla. 5th DCA 1984), rev. denied, 472 So. 2d 732 (Fla. 1985); In re R.W., 409 So. 2d 1069, 1070 (Fla. 2d DCA 1981), rev. denied, 418 So. 2d 1279 (Fla. 1982).
141. In re L.W., 482 N.W.2d 60, 71 (Wis. 1992).
The guardian's duty is to assist those who are defenseless and who are of special concern to the government. Moreover, guardians ad litem are legally obligated to do everything within their power to insure a judgment that is in the child's best interest.

The statutes recognize that a protector of the "defenseless" must be an advocate. In particular, Florida law makes many references to the guardian's participation in proceedings as the representative of the child-party. In fact, in termination proceedings the guardian is a party and is entitled to receive all process and service. A guardian is represented by a program staff attorney or a pro bono attorney. An attorney is necessary to represent the guardian because, as a party, the guardian is entitled to present the case, examine and cross-examine witnesses, submit evidence, and prepare motions or petitions for relief or appeal from orders or judgments. The statute is silent, however, on whether guardians can independently litigate termination actions. In practice, attorneys for guardians have litigated such actions, concurrently representing both the guardian and HRS when their interests are aligned. In cases when HRS and the guardian both agree that termination of parental rights is in the best interest of the child, the question remains whether HRS can waive its presence in the courtroom without violating the separation of powers doctrine.

142. Bross, supra note 64, at 14.
143. Fraser, supra note 2, at 29; see also Bross, supra note 64, at 15.
144. Fla. Stat. § 39.01(71) (Supp. 1994) ("Party," for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding, means the parent of the child, the petitioner, the department, the guardian ad litem when one has been appointed, and the child."). See also Fla. R. Juv. P. 8.210(a).
146. The guardian ad litem is not an attorney for the child. Fla. R. Juv. P. 8.215(f).
147. E.g., In re M.S., 623 So. 2d 1239, 1240 (Fla. 2d DCA 1993) (upholding termination of parental rights where guardian ad litem "showed by clear and convincing evidence that the children had been adjudicated dependent"). See Nancy Neraas, Comment, The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington Experience, 58 Wash. L. Rev. 853, 863-64 (1983). The regulations implementing the Federal Child Abuse Prevention and Treatment Act prohibit the guardian from being the attorney responsible for presenting the evidence alleging child abuse or neglect. 45 C.F.R. § 1340.14(g) (1986); In re Christina D., 525 A.2d 1306 (R.I. 1987) (court-appointed guardian ad litem had standing to intervene in adoption proceedings); In re Jamie "T.T.", 599 N.Y.S. 2d 892, 893-94 (App. Div. 1993) (child in abuse proceeding entitled to effective assistance of counsel).
148. An agency having temporary legal custody of the child is not prevented, through its attorney, from waiving its presence at the termination hearing. In re L.H., 634 A.2d 1230, 1233-34 (D.C. 1993). Any party can waive its presence at a proceeding. Such a waiver, however, does not constitute a withdrawal from the action and the party remains bound by the proceeding. See Arrington v. Robertson, 114 F.2d 821, 823 (3d Cir. 1940).
V. Separation of Powers

Time and again the United States Supreme Court has reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. The Framers of the Federal Constitution viewed the separation of powers doctrine as the central guarantee of a just government. Similarly, Article II, Section 3 of the Florida Constitution provides: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” This mandate encompasses two fundamental prohibitions directed at constitutionally prescribed powers. First, no branch may encroach upon the power of another. Second, no branch may delegate its constitutional power to another branch.

The standard for determining whether one branch has unconstitutionally encroached on the power of another is whether a power appertains exclusively to one branch. A power appertains to a branch if it is expressly or explicitly granted in the Constitution. Florida’s Constitution is silent regarding the protection of children and therefore does not grant exclusive power over children’s welfare to any branch. Accordingly, even if a court-appointed guardian stands in the same shoes constitutionally as the statewide guardian program, there would

150. Id. at 697 (Scalia, J., dissenting).
151. The Florida legislature has declared that the State of Florida intends to have a policy that separates the powers among the executive, judicial, and legislative branches of the government. FLA. STAT. § 20.02 (1993). The statute indicates that:

(1) The state constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the legislature and of making policy recommendations to the legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.

Id.
152. FLA. CONST. art. II, § 3.
153. E.g., Chiles v. Children A, B, C, D, E and F, 589 So. 2d 260, 268-69 (Fla. 1991) (finding FLA. STAT. § 216.221(2) unconstitutional as a violation of the separation of powers because it delegated to the executive branch the legislature’s exclusive authority to appropriate state funds and make decisions regarding the purposes for which public funds may or may not be applied).
154. Chiles, 589 So. 2d at 264; cf. Broward County v. LaRose, 505 So. 2d 422, 423 (Fla. 1987) (holding that legislature can create agencies with quasi-judicial powers but it cannot authorize them to “exercise powers that are fundamentally judicial in nature”).
155. State ex rel. Young v. Duval County 79 So. 692 1698 (Fla. 1918).
156. Id.
only be a separation of powers issue if the power to bring, maintain, and
litigate termination of parental rights actions appertains exclusively to
the executive branch.

Florida law does not grant exclusive power over the rights of chil-
dren to any branch. HRS is an agency created by statute and it possesses
only those powers given to it by the legislature. HRS is not granted
exclusive power concerning the rights of children either in its enabling
act or in the statutory provisions relating to juveniles. Because
neither the Constitution nor the statutes award HRS exclusive power
over children, such powers are granted, if at all, by specific statute.
For example, in 1969 the legislature expressly granted HRS power over
children’s rights involved in dependency proceedings, and in 1987 the
legislature authorized HRS to perform duties involving termination of
parental rights. Neither statutory grant of power is exclusive.

The legislature has also given the judiciary important powers in
child welfare matters. Numerous statutory provisions vest power over
matters relating to children in the circuit courts. The legislative intent
embodied in these laws is “that the court and not the agency have pri-
mary responsibility in custody matters.” Statutes have also recog-
nized the court’s inherent jurisdiction over child welfare issues by
making it the court’s responsibility to appoint a guardian in cases
involving child abuse or neglect. Thus, the judiciary has both inher-
ent and statutory authority to take actions necessary to protect children’s
welfare. In addition, the executive branch, acting through HRS, also has
the statutory power to protect the welfare of children. The judicial and

158. See Department of Health & Rehabilitative Servs. v. Hollis, 439 So. 2d 947, 948 (Fla. 1st
DCA 1983).
159. Family Servs., 319 So. 2d at 76.
160. Ch. 69-268, § 1, LAWS OF Fla. (codified at FLA. STAT. § 409.145 (1969)).
161. Ch. 87-289, § 9, LAWS OF Fla. (codified at FLA. STAT § 39.461 (1987)).
162. See, e.g., FLA. STAT. § 39.46(2) (1993) (“circuit court shall have exclusive original
jurisdiction of a proceeding involving termination of parental rights”); id. § 39.462 (process for
termination of parental rights); id. § 39.465 (right to counsel and appointment of guardian ad
litem); id. § 39.466 (advisory hearing); and id. § 39.467(l) (“the Court shall consider the grounds
for termination and manifest best interest of the child.”). See also id. § 415.508(1) (appointment
of guardian ad litem for abused or neglected child).
163. Department of Health & Rehab. Servs. v. Brooke, 573 So. 2d 363, 369 (Fla. 1st DCA
1991) (clear legislative intent evidenced in Chapter 39 is “that the court and not the agency [HRS]
have primary responsibility in custody matters”) (citing Family Services v. State, 319 So. 2d 72,
75 (Fla. 1st DCA 1975).
164. Even without express statutory authority, courts have inherent jurisdiction to take those
actions that are necessary to protect a child’s welfare. E.g., Waters v. Waters, 578 So. 2d 874
(Fla. 2d DCA 1991); Department of Health & Rehabilitative Servs. v. Hollis, 429 So. 2d 947, 949
(Fla. 1st DCA 1983).
executive branches, therefore, have overlapping and often concurrent\textsuperscript{166} jurisdiction over children.\textsuperscript{167}

While the separation of powers principle prohibits any branch from usurping an exclusive power granted to another branch, the U.S. Supreme Court has never held that the U.S. Constitution requires the three branches of the federal government to "operate with absolute independence."\textsuperscript{168} However, under Florida law the application of this principle when the powers of the branches overlap has been the subject of much controversy.\textsuperscript{169} The Fifth District Court of Appeal determined that when such an overlap occurs with respect to child welfare issues, each branch may constitutionally proceed with its legislative mandate:

[A] number of Florida Statutes delegate power over matters relating to child custody and commitment proceedings to both HRS and to the circuit courts. When such an overlap of powers occurs, the legitimate exercise of powers of one branch, in this case the judiciary, cannot be said to violate the doctrine of separation of powers.\textsuperscript{170}

In addition to child custody matters, filing a termination petition appears to be a legitimate overlapping power,\textsuperscript{171} given to both HRS and the guardian ad litem.\textsuperscript{172} Florida law gives standing to bring a civil cause of action not only to the guardian, but to any person with knowledge of the facts.\textsuperscript{173} The fact that HRS may also maintain such an action does not mean that this provision invades a constitutionally prescribed

\textsuperscript{166} For example, both HRS and the guardian ad litem have been conferred with the authority to file petitions alleging child abuse with the court. \textit{FLA. STAT.} \textsection\textsection 39.461, 39.464 (Supp. 1994).

\textsuperscript{167} \textit{E.g., In re A.B.}, 444 So. 2d 981 (Fla. 1st DCA 1983); \textit{In re T.G.T.}, 433 So. 2d 11, 12 (Fla. 1st DCA 1983); \textit{In re J.R.T.}, 427 So. 2d 251, 252 (Fla. 5th DCA 1983).


\textsuperscript{169} Department of Health \& Rehabilitative Servs. \textit{v. Hollis}, 439 So. 2d 447, 948 (Fla. 1st DCA 1983). The existence of overlapping and often concurrent jurisdiction over children by the judiciary and executive branches has resulted in a number of cases involving the separation of powers clause. Several of these cases arose when the court exercised that power contrary to the wishes of HRS. \textit{See, e.g., In re J.S.}, 444 So. 2d 1148 (Fla. 5th DCA 1984) (ordering HRS to assist mother in instituting a paternity action against putative father to establish a duty of support not violative of separation of powers); \textit{Hollis}, 439 So. 2d at 948 (directing HRS to file a petition for permanent commitment of minor children did not violate separation of powers). \textit{See also In re C.B.}, 561 So. 2d 663 (Fla. 5th DCA 1990) (rejecting HRS's constitutional challenge to filing of petition to terminate parental rights by guardian with personal knowledge of facts); \textit{In re J.R.T.}, 427 So. 2d 251, 252 (Fla. 5th DCA 1983) (rejecting contention that court could not initiate proceedings for termination of parental rights).

\textsuperscript{170} \textit{Hollis}, 439 So. 2d at 948 (citations omitted).

\textsuperscript{171} \textit{See In re J.S.}, 444 So. 2d at 1150; \textit{Hollis}, 439 So. 2d at 948; \textit{In re C.B.}, 561 So. 2d at 666.

\textsuperscript{172} \textit{See FLA. STAT.} \textsection\textsection 39.461, 39.464 (Supp. 1993).

executive power or any power that is fundamentally and exclusively executive in nature. Even though authority in this area is overlapping and concurrent, the executive branch still retains sufficient mechanisms for control so there is no unlawful encroachment upon its role of insuring that the laws are faithfully executed. However, because HRS is the primary party responsible for terminating parental rights, problems arise when guardians, pursuant to their authority to protect children, take the lead in fulfilling the legislative goal of removing children from foster care by litigating termination cases. Because a termination proceeding is such a unique hybrid of criminal and civil elements, one could argue that the guardian is usurping the executive branch's exclusive function to charge and prosecute.

The Florida Supreme Court has expressly held that the judiciary may not interfere with the discretionary executive function of the prosecutor. The basic right protected by the separation of the powers of the judicial and executive branches is the right to an impartial hearing before an impartial tribunal. The Florida Supreme Court recognizes that "[t]he fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty." The risk of allowing the guardian to independently litigate a termination proceeding is that the judicial branch might unite with the executive branch and thereby endanger the court's ability to objectively weigh the evidence. Judges, now holding the judicial and executive powers, could enforce the law as they choose and "behave with all the violence of an oppressor." On the other hand, these matters are in juvenile court, and HRS is not the state attorney. To the contrary, a court may interfere with executive discretion and order HRS to perform its duty, if HRS has disregarded that duty.

174. Cf. Morrison v. Olson, 487 U.S. 654, 695 (1988) (in a federal context, holding independent counsel provisions of the Ethics in Government Act of 1978, which allows for a court-appointed counsel to investigate and prosecute certain high-ranking government officials for violations of federal criminal laws, did not work any judicial usurpation of properly executive functions). "[T]he power to appoint inferior officers such as independent counsel is not in itself an 'executive' function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the 'courts of Law.' " Id. at 695.

175. State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986).

176. See Ford v. Piper Aircraft Corp., 436 So. 2d 305, 307 (Fla. 5th DCA 1983).


179. Department of Health & Rehabilitative Servs. v. Kahn, 639 So. 2d 689 (Fla. 5th DCA
At least one court has held that allowing the guardian ad litem to initiate and pursue termination proceedings does not violate due process.\textsuperscript{180} The identity of the petitioner does not alter the basic procedures that govern the conduct of these proceedings. Unlike a criminal case in which a public prosecutor must disclose evidence favorable to the accused and refrain from prosecution in the absence of probable cause,\textsuperscript{181} HRS owes no special duties to the parents. When a guardian substitutes for HRS, none of the procedural protections are eliminated. The guardian is subject to, and must comply with, all the necessary rules applicable to all parties in termination proceedings.

Under Florida law, parents are represented by appointed counsel throughout the dependency and termination proceedings, a privilege the United States Supreme Court has held is not required in all cases.\textsuperscript{182} The parents are provided the opportunity to engage in full discovery, to receive notice of all matters and to be heard on any of the issues. As dictated by the United States Supreme Court, the grounds for termination must be proven by clear and convincing evidence.\textsuperscript{183} Unless the parents can demonstrate that some prejudice actually occurred, HRS's failure to appear should not destroy the kind of liberty contemplated by the constitutional mandate of separate powers and due process.\textsuperscript{184}

In Florida, as in many other states, guardians ad litem, represented by pro bono attorneys, routinely petition and litigate termination proceedings.\textsuperscript{185} Courts have consistently assumed that the statutory provi-

\textsuperscript{180} In Kahn, the court ordered HRS to have a staff meeting to determine whether to terminate parental rights or keep the child in long term relative placement. HRS moved to terminate supervision but the trial court denied the motion. The guardian ultimately petitioned to terminate parental rights and during litigation called an expert to testify. \textit{Id.} at 690. Even though HRS did not initiate or litigate the termination proceedings, the court held it liable for the expert's fee because HRS is responsible for providing protective services to children and the expert fee in this case was deemed a necessary cost incurred on behalf of the child. \textit{Id.} at 691.


\textsuperscript{182} Lassiter v. Department of Social Servs., 452 U.S. 18, 31-34 (1981) (court appointment of counsel for indigent parents is not always required in termination proceedings where parental rights are threatened). \textit{But see} FLA. STAT. § 39.465(1) (1993) (court appointment of counsel for indigent parents is required at each stage of the termination proceedings).


\textsuperscript{184} See \textit{In re} Pasco, 389 N.W.2d 188, 191 (Mich. Ct. App. 1986) ("There is no support in case law for the proposition that a prosecutor must be present at [a termination] hearing. ... In the absence of an affirmative showing of prejudice, ... the prosecutor's failure to appear [does not] constitute reversible error.").

\textsuperscript{185} In Florida, for instance, "based upon a combination of statistics ... approximately 200 termination of parental rights cases were handled by attorneys who represented both the guardian and HRS." Interview with Kathleen M. Smith, Esq., Managing Attorney, Put Something Back, Children's Pro Bono Project, in Miami, Fla. (Mar. 15, 1994). In D.C. Superior Court, almost all termination of parental rights proceedings over the past 12 years have been litigated by guardians ad litem. \textit{In re A.S.}, 118 Daily. Wash. L. Rep. 2221, n.1 (D.C. 1990).
sions which authorized guardians to *file* termination petitions also permitted them to *litigate* the petition. Before the *Simms* appeal, no one in Florida had questioned the guardian’s simultaneous actions on behalf of both the state and the child.

Florida law expressly authorizes a guardian *ad litem* to initiate proceedings for termination of parental rights by filing a petition. The logical interpretation of such statutory provisions is that the authorization also encompasses the right to finish what the guardian started in the child’s best interest—the maintenance and litigation of the termination petition. Statutes must be construed to avoid an interpretation which leads to absurd results. An interpretation of provisions authorizing only the filing of termination petitions, but not their litigation, seems senseless. A contrary interpretation is inconsistent with the best interests of children since it might easily deprive them of meaningful access to the courts.

The state’s interest is substantially served by the guardian’s pursuit of termination of parental rights. The primary function of the Adoption Assistance and Child Welfare Act of 1980 is to encourage stability in the lives of children who have been adjudicated dependent and to increase the opportunities for prompt adoptive placement for such children. Until now, HRS has been unable to shoulder its full burden under the stat-

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The Federal Rules of Civil Procedure also permit guardians *ad litem* to bring suit:

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

_FED. R. CIV. P. 17(c)._


187. _The D.C. Superior Court has held that a termination petition may be filed and the hearing litigated by a private attorney acting as guardian *ad litem* for a child without any active involvement on behalf of the state agency without violating due process or the separation of powers doctrine. In re *A.S.*, 118 Daily Wash. L. Rep. at 2228-29._

188. _FLA. STAT. §§ 39.461, 39.464 (Supp. 1994)._  

189. _Cf. Graham v. State, 372 So. 2d 1363, 1365 (Fla. 1979) (appointed public defenders are authorized to file federal habeas petitions arising from authorized representation, although not expressly sanctioned by statute). In 1979, _BLACK’S LAW DICTIONARY_ defined guardian *ad litem* as “a special guardian appointed by the court to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interest of the infant or incompetent in litigation.” _BLACK’S LAW DICTIONARY_ 635 (5th ed. 1979). However, in 1990, the definition was changed to, “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation,” thereby excluding the “prosecute or defend” language. _BLACK’S LAW DICTIONARY_ 706 (6th ed. 1990)._

190. _See, e.g., City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950); Drost v. Department of Envtl. Regulation, 559 So. 2d 1154, 1156 (Fla. 3d DCA 1989)._
The guardian’s ability to pursue termination of parental rights benefits HRS by facilitating necessary termination actions that might not otherwise occur because of HRS’s budgetary and bureaucratic limitations. Consequently, the guardian is in an ideal position to carry out the federal and state policies of quickly finding permanent placement for children in foster care.

As a result of the Simms decision, HRS and the guardian may be represented simultaneously by the same attorney. However, when an attorney attempts to represent both the state and the child, another question—one of conflicting interest—must be addressed. For example, is the attorney’s duty of loyalty and fidelity and the duty to exercise independent professional judgment compromised?

The Model Rules of Professional Conduct generally prohibit a lawyer from representing clients with conflicting interests unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and each client consents after consultation. The rule requires explanation of the “implications of the common representation and the advantages and risks involved.” In termination proceedings, an advocate’s options are limited. Consequently, the guardian will often have a position consistent with one of the parties and in opposition to the other.

In many cases, the guardian and HRS agree that termination is in the child’s best interests. When the interests of the child and the state are aligned and both HRS and the guardian consent to the dual representation, there may be no conflict problem. There are some pitfalls awaiting an attorney representing both HRS and the guardian, however, including the conflict between the duty to protect HRS from negligent exposure and the desire of the guardian to “make a case” against a parent. In addition, HRS’s duty as a minister of justice may require bringing forth evidence favoring the parent that would hurt the guardian’s case or the guardian may be tempted to overlook a failure by HRS to provide necessary services to the parents or child because this would expose the guardian’s failure to properly monitor HRS. These conflicts suggest that a court-appointed guardian should not represent HRS when the guardian’s attorney actively pursues termination of parental rights. Potential conflicts, however, do not violate the doctrine of separation of powers, nor do conflicts prohibit the guardian from independently pursuing the termination of parental rights.

The parents’ fundamental liberty interest in the care, custody, and

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191. See supra note 90.
192. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1994).
193. Id. at 1.7(b).
management of their children is subject to the overriding entitlement of children to an environment free of physical and emotional violence. Thus, guardians must continue to pursue termination after having petitioned for it in order to avoid creating a system in which the protection of a child's right to be free from abuse and neglect is at the sole discretion of a state agency. Maltreated children have the right to be free from such harm, and to obtain that freedom even if HRS is unwilling or unable to act. Because a child can often act only through a guardian ad litem, a limitation on the rights of a guardian is a limitation on the rights of a child.

The serious potential for these conflict of interest problems suggests that the legislature should make the Guardian Ad Litem Program an entity of the executive branch. Under such a regime, guardian attorneys would be analogous to state attorneys and public defenders. Alternatively, the legislature could place the guardian program in HRS, but this would only increase the load on an already overburdened system. The national trend toward developing family courts is an excellent model for improving the system to better deal with family problems, which rarely find satisfactory results in an adversarial atmosphere. However, the creation of ancillary support programs operating as a part of the court system further blurs the distinction between the executive and judicial functions.

VI. CONCLUSION

As society becomes increasingly more complex, the problems of maintaining order and justice become correspondingly complex. The ways by which we perceive and correct these problems are too often accomplished by patchwork and stopgap measures, continually reinventing the wheel so that the system can continue to limp along without much disruption to the principles upon which it was founded. The

195. Kingsley v. Kingsley, 623 So. 2d 780 (5th DCA 1993), rev. denied, 634 So. 2d 625 (Fla. 1994). The lesson from Kingsley is that if the state has failed to provide a remedy for a child, that child, if old and sophisticated enough to assert his or her wishes, may engage an adult representative to pursue a remedy. If the state fails to provide a remedy for a child too young or too timid to assert the right to be free from abuse, and the court-appointed guardian is constitutionally unable to protect these rights, these children have no remedy at law.
196. See generally Page, supra note 38.
197. Id. at 43. "In order for a family division to operate effectively, it needs: (1) court-connected mediation services; (2) home assessment services for custody cases; (3) sufficient staff to coordinate the family divisions operation; and (4) sufficient staff to operate enforcement of support services." Id. (quoting In re: Report of the Commission on Family Courts, 588 So. 2d 586 (Fla. 1991)).
trouble with this approach is that the problems always fold back upon themselves.

It does little good to keep “fixing” the legal procedures for the care of maltreated children if the root causes are not addressed. It is the very social and political foundations of society that must be corrected. These involve the economic and educational opportunities that are so frequently denied to that portion of society from which so many of the most severe and urgent cases of child maltreatment arise.

Such a social-political approach requires a revised conceptual model upon which the best interests of the child is based. This is not to suggest, however, that court-appointed guardians should stop representing children or litigating for termination of parental rights where needed. Until a more enlightened paradigm can be implemented, the guardian ad litem serves as the strongest safeguard for the rights of maltreated children.

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