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Hindering Permanency, One Ineffective Assistance of Counsel Claim at a Time

*Michael Andriano, Esq.**

Introduction

The termination of parental rights (TPR) is the death sentence to a parent-child relationship.¹ At stake—the end of the right to maintain what will often be the most important relationship in a person’s life.² In July 2015, the Florida Supreme Court finally recognized a right to effective assistance of counsel for parents in TPR proceedings and formulated a standard to determine counsel’s effectiveness, as well as a procedure for the parents to bring claims of ineffectiveness.³ The standard promulgated is properly in line with the heightened concerns of the best interests of the child. Yet, the new procedure endangers Florida’s children by significantly delaying permanency because of the recognized right to effective assistance of counsel; therefore, an attorney’s competence is more paramount now than ever. Without the establishment of proper competency guidelines or dependency trainings, Florida’s attorneys are disadvantaged and subject to numerous claims of providing ineffective assistance of counsel. The increasing volume of these claims will lead to delays in permanency for children. Further, without the remedy of a direct appeal, there is a substantial risk that Florida’s children will face periods of uncertainty, unnecessarily being kept in impermanent placements.

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¹See also *In re K.S.*, 515 P.2d 130, 133 (Colo. App. Ct. 1973) (“The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.”); *In re Adoption of T.M.F.*, 537 A.2d 1035, 1052 (Pa. Super. Ct. 1990) (Beck, J., concurring) (quoting *In re Coast*, 561 A.2d 762, 778 (Pa. Super. Ct. 1989) (Tamilia, J., concurring)).

²*In re Adoption of T.M.F.*, 537 A.2d at 1052 (Beck, J., concurring).

³The ruling was handed down in the case of *J.B. v. Fla. Dep’t. of Children & Families*, 170 So. 3d 780, 790 (Fla. 2015).

In taking an in-depth look at the nature of the constitutional right to effective assistance of counsel, this article urges Florida to adopt guidelines and standards of competency for dependency attorneys to abide by in order to provide effective representation, so as to not delay permanency for Florida's children. Further, this article will urge Florida to adopt a direct appeal procedure for ineffective assistance of counsel claims in place of the interim procedure. If Florida does not adopt guidelines, standards, and a direct appeal procedure, the newly established procedure risks prolonging impermanent placements for Florida's children. This will be done by looking at the procedures followed by other states handling such claims and their standards of representation attorneys must follow. If there is effective representation from the outset, there is a minimal chance that the parent will be in a position to file an ineffective assistance of counsel claim, thereby keeping with the statutory goals of achieving permanency for Florida's children with swiftness.

Termination of Parental Rights Proceedings in Florida

The goal in a TPR proceeding is to get the child into a healthy environment and, preferably, to find adoptive parents.⁴ "It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child."⁵ However, state interference in the domestic relations of its citizens has always been a necessary, but mostly unhappy precept of our nation. While Florida courts have recognized the right of parents to the care and custody of their children, that right is not absolute, but is instead subject to the overriding principle that the ultimate welfare or best interest of the child that must prevail.⁶ Children require secure, stable, long-term, and continuous relationships with their parents or foster parents and are entitled to an environment free of physical and emotional violence.⁷ The State has a compelling interest to protect all of its citizens, especially its youth, against the clear threat of abuse, neglect, and death.⁸ Children have a right to grow up in a wholesome and healthful environment.⁹ If parents are unable or

⁴See generally FLA. STAT. § 39.802 (2015), § 39.806 (2015). See also *E.T. v. State*, 930 So. 2d 721, 727 (Fla. Dist. Ct. App. 2006).

⁵*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (Scalia, J., dissenting).

⁶*Padgett v. Dep't of Health & Rehabilitative Servs.*, 557 So. 2d 565, 571. (Fla. 1991).

⁷*Id.* See also *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 513 (1982).

⁸ *Id.*

⁹See generally FLA. STAT. § 39.001(1)(a) (2015); *State ex rel. Juvenile Dep't. of Multnomah Cnty. v. Geist*, 796 P.2d 1193, 1202 (Or. 1990).

unwilling to rehabilitate themselves within a reasonable amount of time so they can provide such an environment, the best interests of the child generally will require a TPR.¹⁰ However, a termination determination cannot be based on a single act or omission, but rather, requires an analysis of the totality of the circumstances.¹¹

All proceedings seeking a TPR order must be initiated by the filing of a petition by the Department of Children and Families (DCF), the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes they are true.¹² Section 39.802 of the Florida Statutes details the specific allegations and facts that must be included in the TPR petition.¹³ Section 39.806 of the Florida Statutes details the basis upon which one can petition to have a parent's rights terminated.¹⁴ These grounds mainly include egregious conduct towards the child or the threat of future egregious conduct.¹⁵ Essentially, parental conduct that threatens the well-being of a child that is not likely to be cured by rehabilitative services will serve as a ground for TPR.¹⁶

The dependency court process usually begins with a report to the child abuse hotline alleging child abuse, neglect, or abandonment.¹⁷ As a result of the report, a child protective investigator or county sheriff visits the child's home to determine whether the child's living environment is unsafe.¹⁸ If the living environment is considered unsafe, and the child is in need of court protection, the child may be removed from the home or a petition filed for dependency or shelter.¹⁹ If a child is removed, a shelter

¹⁰See generally FLA. STAT. § 39.806 (2015); *State ex rel. Juvenile Dep't. of Multnomah Cnty. v. Geist*, 796 P.2d 1193, 1202 (Or. 1990).

¹¹*W.R. v. Dep't of Children & Family Servs.*, 896 So. 2d 911 (Fla. Dist. Ct. App. 2005).

¹²FLA. STAT. § 39.802 (2015).

¹³*Id.* at (4)(a)-(d):

(4) A petition for termination of parental rights filed under this chapter must contain facts supporting the following allegations:

(a) That at least one of the grounds listed in s. 39.806 has been met.

(b) That the parents of the child were informed of their right to counsel at all hearings that they attended and that a dispositional order adjudicating the child dependent was entered in any prior dependency proceeding relied upon in offering a parent a case plan as described in s. 39.806.

(c) That the manifest best interests of the child, in accordance with s. 39.810, would be served by the granting of the petition.

(d) That the parents of the child will be informed of the availability of private placement of the child with an adoption entity, as defined in s. 63.032.

¹⁴FLA. STAT. § 39.806 (2015).

¹⁵*Id.*

¹⁶*Id.*

¹⁷Office of Court Improvement, *A Caregiver's Guide to Dependency Court* (2015).

¹⁸*Id.*

¹⁹*Id.*

petition must be filed immediately thereafter.²⁰ The child's parents are then entitled to a hearing, before the child is removed, where the judge determines whether probable cause exists to place or keep the child in shelter status pending further investigation of the incident.²¹

During the time the State has custody of the child, the court will order the State to provide certain services for the parents.²² These services may include psychological counseling, substance-abuse treatment, parenting classes, homemaker assistance, and other services to remedy the problem that led to the child's removal from the home.²³ It is the State's responsibility to ensure factors impeding the ability of caregivers to fulfill their responsibilities are identified through the dependency process and appropriate recommendations and services to address those problems are considered in any judicial or non-judicial proceeding.²⁴ The purpose and ultimate goal of these services is to facilitate the reunification of the family.²⁵ In keeping with this goal, the department must show it has made a good faith effort to rehabilitate the parent(s) and reunite the family.²⁶

However, reasonable efforts to preserve and reunify families are not required if the court has determined certain harmful events have or will continue to occur.²⁷ Some of these events include: abandonment of the child; egregious conduct by the parent(s) that demonstrates the continuing involvement of the parent in the child's life that threatens their well-being as a whole; and incarceration of one or both parents.²⁸ The State must meet its burden of showing by clear and convincing evidence in order for the court to make a determination to permanently deprive a parent of the custody of their child.²⁹ The Florida Supreme Court has defined clear and convincing evidence as an:

Intermediate level of proof that entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.³⁰

²⁰ *Id.*

²¹ *Id.*

²² CALKINS, *infra* note 60, at 182.

²³ *Id.*

²⁴ FLA. STAT. § 39.001(7) (2015).

²⁵ FLA. STAT. § 39.621(2)(a) (2015).

²⁶ Padgett, *supra* note 6.

²⁷ FLA. STAT. § 39.806(2) (2015).

²⁸ *Id.* at (1)(b)-(d), (1)(f)-(m).

²⁹ Padgett, 577 So. 2d at 571; *Torres v. Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957); *W.R.*, 896 So. 2d at 914.

³⁰ *In Re Baby E.A.W.*, 658 So. 2d 961 (Fla. 1995).

Implicit in this standard is the basic requirement that, under ordinary circumstances, the State must show the parent abused, neglected, or abandoned a child.³¹ The trial judge has the duty of finding facts and resolving any conflicts in the evidence.³²

The Supreme Court also requires clear and convincing evidence in TPR proceedings and for good reason. In *Santosky v. Kramer*, the Court held that before a state may sever the rights of parents to their child, due process requires that the State support its allegations by at least clear and convincing evidence.³³ The Court noted, “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.”³⁴ Further, the Court stated this standard of proof is consistent with the two state interests at stake – a “*parens patriae*” interest in preserving and promoting the child’s welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings.³⁵ Essentially, requiring this elevated standard of proof helps to eliminate the risk that a judge might decide to deprive a parent based solely on a few isolated incidents of abnormal conduct or “idiosyncratic behavior.”³⁶

Further, the state has the burden of demonstrating the TPR is the least restrictive means of protecting the child from serious harm.³⁷ The least restrictive means test, in this context, is not intended to preserve the parental bond at the cost of the child’s future.³⁸ Rather, it simply requires that those measures short of termination should be utilized if such measures can permit the safe reestablishment of the parent-child bond.³⁹ Least restrictive means test indicates that there cannot be a less constraining method for the state to achieve its purpose.⁴⁰ If the court can think of another method for the state to meet its goals that is less restrictive than the TPR, the state’s petition will fail.⁴¹ Essentially applying strict scrutiny, the court requires the state action be justified by a compelling governmental purpose, necessary and narrowly tailored to achieve that

³¹Padgett, *supra* note 6.

³²*E.A.W.*, 658 So. 2d at 967.

³³455 U.S. 745, 768-69.

³⁴*Id.* at 769.

³⁵*Id.* at 766-67.

³⁶*Id.* at 764.

³⁷*L.B. v. Dep’t. of Children & Families*, 835 So. 2d 1189, 1195 (Fla. 1st DCA 2002); *Padgett*, 577 So. 2d at 571.

³⁸*L.B.*, 835 So. 2d at 1195.

³⁹*Id.*

⁴⁰*See generally D.M.T. v. T.M.H.*, 129 So. 3d 320, 339-40 (Fla. 2013).

⁴¹*Id.* at 340.

purpose, and the least restrictive means used to achieve that purpose.⁴² The rationale for the state having to meet such a high burden subject to the highest level of judicial scrutiny is, not only due to the fact that there is an infringement on a fundamental right, but more importantly, because the state is seeking to end this fundamental right forever.⁴³ “Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby reduce the chances that inappropriate terminations will be ordered.”⁴⁴

THE CONSTITUTIONAL RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

The constitutional right to counsel in TPR proceedings is based on the recognition that there is a constitutionally protected interest in “preserving the family and raising one’s children.”⁴⁵ Parental rights have long been held to be one of the most precious of the unenumerated fundamental rights and liberty interests. Far more precious than property rights, parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men and to be more significant and priceless than liberties, which derive merely from shifting economic arrangements.⁴⁶ Freedom of personal choice in matters of family life has long been viewed as a fundamental liberty interest protected by the Fourteenth Amendment.⁴⁷ It should follow then that due process requires parents have a right to counsel in all TPR proceedings to protect this precious liberty interest.

However, the Supreme Court has refused to recognize that this right is required. In *Lassiter v. Department of Social Services*, the Court held that the Federal Due Process clause does not require appointed counsel in every state-initiated TPR proceeding.⁴⁸ Instead, it required trial courts to

⁴²*Id.* at 339 (“We subject statutes that interfere with an individual’s fundamental rights to strict scrutiny analysis, which requires the State to prove that the legislation furthers a compelling governmental interest through the least intrusive means.”).

⁴³*Id.* at 339-40 (the Constitution provides heightened protection against government interference with certain fundamental rights and liberty interests).

⁴⁴*Santosky*, 455 U.S. at 764-65.

⁴⁵*S.B. v. Dep’t. of Children & Families*, 851 So. 2d 689, 692 (Fla. 2003). *See also Padgett*, 577 So. 2d at 570 (recognizing a constitutionally protected fundamental liberty interest in parents raising their children “free from the heavy hand of government paternalism”).

⁴⁶*Lassiter v. Dep’t. of Social Services*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting).

⁴⁷*Id.* *See also Santosky*, 455 U.S. at 753; *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁴⁸452 U.S. at 31-32 (holding that appointment of counsel in all TPR proceedings is not a due process requirement under the United States Constitution).

evaluate the need for counsel on a case-by-case basis.⁴⁹ The Court balanced the competing interests in determining whether an indigent parent was entitled to appointment of counsel in TPR proceedings.⁵⁰ Those interests were the parent's interest in accuracy and justice, the government's interest in the child's welfare and cost avoidance, and the risk of erroneously depriving a parent of a child.⁵¹ The Court noted in previous cases the right to counsel was found "only where the litigant may lose his physical liberty if he loses the litigation," and concluded that there is a presumption that a litigant has a right to counsel only when he may be deprived of his physical liberty.⁵² The Court stated it was only determining the minimum due process standard under the federal constitution and that many states may have higher standards based on wise public policy.⁵³ This is odd, seeing how the Court has repeatedly accorded a high degree of constitutional respect to a natural parent's interest in raising their children.⁵⁴ Fortunately, Florida can constitutionally provide more protections for its citizens than the United States Constitution can.⁵⁵ These added protections stem from Article I, § 9 of Florida's Constitution – the Due Process Clause.⁵⁶

The Florida Supreme Court long ago in *D.B.* addressed the question of whether state provision of counsel to indigent parents in dependency and TPR proceedings was necessary for fundamental fairness.⁵⁷ In a 1980 appeal of an order terminating parental rights under Chapter 39, the Florida Supreme Court held that an indigent parent has a right, under the Due Process Clause of the Constitutions of the United States and Florida, to appointed counsel in proceedings involving the permanent TPR to a child, or when the proceedings may lead to criminal child abuse charges.⁵⁸ However, where there is no threat of permanent termination of parental custody, the right to counsel in dependency proceedings should be determined on a case-by-case basis.⁵⁹

⁴⁹ *Id.*

⁵⁰ *Id.* at 31.

⁵¹ *Id.*

⁵² *Id.* at 25-27.

⁵³ *Lassiter*, 452 U.S. at 33-34.

⁵⁴ *Lassiter*, 452 U.S. at 38-39 (Blackmun, J., dissenting). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972); *Pierce*, 268 U.S. at 534-35.

⁵⁵ *M.E.K. v. R.L.K.*, 921 So. 2d 787, 790 (Fla. 5th DCA 2006) (In the area of termination of parental rights, the Florida due process clause provides higher due process standards than the federal due process clause).

⁵⁶ FLA. CONST. art. 1, § 9 Due Process: "No person shall be deprived of life, liberty or property without due process of law . . ."

⁵⁷ *In the Interest of D.B.*, 385 So. 2d 83, 90 (Fla. 1980).

⁵⁸ *Id.*

⁵⁹ *Id.* at 91.

Because the Supreme Court has not declared that the Federal Due process Clause requires the appointment of counsel in every TPR case, even in subsequent cases after *Lassiter*, the rights of indigent parents remain at risk.⁶⁰ This is because states may repeal their statutory authority for counsel or withdraw funding for court-appointed counsel.⁶¹ However, contrary to the holding of *Lassiter*, Florida's Supreme Court has consistently continued to confirm that *D.B.* stands for the proposition that a constitutional right to appointed counsel arises when the proceeding can result in a permanent loss of parental rights.⁶² Additionally, the Florida Constitution contains a separate privacy protection stating an individual has the right to be let alone and free from governmental intrusion into the person's private life.⁶³ The Florida Supreme Court has interpreted this provision to provide greater protection than is afforded by the Federal Constitution and to include specific protection against state interference in parents' fundamental right to raise their children, except in cases where the child is threatened with harm.⁶⁴ However, independent of Florida's Due Process Clause and the Right to Privacy Clause, in 1995 the Florida Legislature codified a statutory law providing that parents have a right to counsel in both dependency and TPR proceedings.⁶⁵

As the Florida Supreme Court has eloquently stated: "It is a basic tenet of our society and law that individuals have the fundamental constitutionally protected rights to procreate and to be a parent to their children."⁶⁶ These constitutional rights are recognized by both the Florida

⁶⁰Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 192 (2004).

⁶¹*Id.*

⁶²*J.B.*, 170 So. 3d at 790-91; *In the Interest of E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992); *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992); *In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989).

⁶³FLA. CONST. art. 1, § 23 Right of Privacy: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . ."

⁶⁴*D.M.T.*, 129 So. 3d at 335. *See also Beagle v. Beagle*, 678 So. 2d 1271, 1275-76 (Fla. 1996) (recognizing that parents' fundamental right to raise their children is protected by Florida's state constitutional right to privacy).

⁶⁵FLA. STAT. § 39.013 (2015). Procedures and jurisdiction; right to counsel: [P]arents must be informed by the court of their right to counsel in dependency proceedings at each stage of the dependency proceedings. Parents who are unable to afford counsel must be appointed counsel.

. . .

(9)(a) At each stage of the proceedings under this chapter, the court shall advise the parents of the right to counsel. The court shall appoint counsel for indigent parents. The court shall ascertain whether the right to counsel is understood. When right to counsel is waived, the court shall determine whether the waiver is knowing and intelligent. The court shall enter its findings in writing with respect to the appointment or waiver of counsel for indigent parents or the waiver of counsel by nonindigent parents.

⁶⁶*D.M.T.*, 129 So. 3d at 334. *See also J.B.*, 170 So. 3d at 789.

Constitution and the United States Constitution, as the interest of parents in the care, custody, and control of their children are perhaps the oldest of the fundamental liberty interests recognized in American law.⁶⁷ This fundamental liberty interest is especially implicated in TPR proceedings because the state is seeking not merely to infringe that fundamental liberty interest, but to end it. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.⁶⁸ Parents still retain a vital interest in preventing the irretrievable destruction of their family life and, therefore, have a more critical need for protections of their parental rights.⁶⁹

The State of Florida has recognized the sanctity of the biological connection between parent and child and the fundamental right to be a parent.⁷⁰ Because of this recognition, Florida has afforded substantial protections to the fundamental liberty interest of parents and chosen to employ the highest standards of due process to its citizens.⁷¹ “For the value of protecting our liberty from deprivation by the State without due process of law is priceless.”⁷²

THE ATTENDANT RECOGNIZED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES

The New Right to Effective Assistance of Counsel

Before July 2015, the Florida Supreme Court, while recognizing a right to counsel in TPR proceedings, never expressly recognized a clear right to the effective assistance of that counsel.⁷³ Further, there was not a proper procedure established by the court or legislature for vindicating an

⁶⁷*D.M.T.*, 129 So. 3d at 334; *Troxel v. Granville*, 530 U.S. 57, 65 (2000). See also *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that procreation is one of the basic civil rights of man and is fundamental to the very existence and survival of the race); *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966 (Fla. 1995) (“The United States Supreme Court has held that natural parents have a fundamental liberty interest in the care, custody, and management of their children.” (citing *Santosky*, 455 U.S. at 753)).

⁶⁸*Padgett*, 577 So. 2d at 570 (citing *Santosky*, 455 U.S. at 753-54).

⁶⁹ *Id.*

⁷⁰*D.M.T.*, 129 So. 3d at 327 (“The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.”) (quoting *Lehr v. Robertson*, 463 U.S. 248, 256 (1983)).

⁷¹*D.M.T.*, 129 So. 3d at 334-35.

⁷²*Lassiter*, 452 U.S. at 60 (Stevens, J., dissenting).

⁷³*J.B.*, 170 So. 3d at 785.

ineffective assistance of counsel claim in TPR proceedings.⁷⁴ Numerous Florida District Courts of Appeals previously held that parents have a right to effective counsel and subsequently certified the question to the Florida Supreme Court on separate occasions, expressing a need for a procedure to enforce that right.⁷⁵ The Florida Supreme Court declined jurisdiction and instead referred the issue to both the Juvenile Court Rules Committee and the Appellate Court Rules Committee.⁷⁶ Both committees, however, declined to address the issue of a proper procedure for ineffective assistance of counsel claims absent a clear recognition by the court of a right to the effective assistance of counsel.⁷⁷ Thus, Florida courts for many years were left without guidance on this issue.

In *J.B.*, the Florida Supreme Court expressly recognized the right of counsel to indigent parents under the Florida Constitution in TPR proceedings includes the attendant constitutional right to effective assistance of counsel and requires a means of vindicating that right.⁷⁸ In establishing this right, the court has acknowledged the importance of the fundamental rights at issue.⁷⁹ “A fair trial is necessary to protect the basic parental interest at stake and to achieve a result upon which everyone can rely.”⁸⁰ In an effort to reduce the risk of erroneous deprivation of parent’s rights, the trial court should inquire throughout the course of the TPR proceedings if the parents are satisfied with the performance of their attorney.⁸¹ Further, the trial court should take all necessary steps to remedy any perceived problem regarding the lawyer’s representation.⁸² In recognizing this right, the court was cognizant of the important interest Florida’s children have in reaching permanency and timely disposition of these claims is paramount.⁸³

⁷⁴ *Id.*

⁷⁵ *In re E.K.*, 33 So. 3d 125, 127 (Fla. 2d DCA 2010) (“Although the [Florida] supreme court has not explicitly said so, it appears that a parent who is entitled to appointed counsel in a termination of parental rights proceeding is implicitly entitled to effective assistance of counsel.”); *E.T.*, 930 So. 2d at 722 (“A constitutional right to counsel means effective counsel; otherwise, the right is meaningless.”); *In re M.R.*, 565 So. 2d 371, 372 (Fla. 1st DCA 1990) (“Consequently, we hold that such counsel must provide services which are sufficient to provide meaningful assistance.”).

⁷⁶ *J.B.*, 170 So. 3d at 790.

⁷⁷ *Id.*

⁷⁸ *Id.* at 785, 790.

⁷⁹ *Id.* at 789.

⁸⁰ Calkins, *supra*, at 229.

⁸¹ CALKINS, *supra*, at 229; *see also J.B.*, 170 So. 3d at 799 (Pariente, J., concurring).

⁸² *J.B.*, 170 So. 3d at 799 (Pariente, J., concurring).

⁸³ *Id.* at 793.

The New Standard for Determining Counsel's Effectiveness

The *J.B.* court further established the appropriate standard for determining counsel's effectiveness.⁸⁴ The court noted the constitutional right to counsel afforded to parents in TPR proceedings is not derived from the Sixth Amendment to the United States Constitution, which guarantees counsel to criminal defendants.⁸⁵ Instead, as discussed previously, the right to counsel is derived from the due process clause of Florida's Constitution.⁸⁶ This distinction between the origins of the right to counsel was necessary to make a final determination on the exact standard to be applied in determining effectiveness of counsel in TPR proceedings.⁸⁷

The court analyzed two standards that have been used by courts in different jurisdictions to answer the inquiry of what standard applies to a determination of the effectiveness of counsel in TPR proceedings: the *Strickland* standard, which applies to ineffective assistance of counsel claims in criminal cases, and the fundamental fairness standard, announced in *Geist*.⁸⁸ Under *Strickland*, the defendant must establish counsel's performance was deficient by showing counsel made errors so serious that counsel was not functioning adequately as guaranteed by the Sixth Amendment, and as a result of those errors the defendant was prejudiced and deprived of a fair trial.⁸⁹ Prejudice under the *Strickland* standard is established if confidence in the outcome is undermined.⁹⁰ Under *Geist*, the fundamental fairness standard requires not only that a parent show that trial counsel was inadequate, but also that any inadequacy prejudiced them to the extent the parent was denied a fair trial and, therefore, the circuit court's decision is called into serious question.⁹¹ "Fundamental fairness requires that appointed counsel exercise professional skill and judgment."⁹² However, reversal is not warranted if the reviewing court finds the proceeding was fundamentally fair and that even with competent counsel, the result inevitably would have been the same.⁹³

⁸⁴*Id.* at 792.

⁸⁵*Id.* at 790.

⁸⁶*Id.* at 791.

⁸⁷Anthony C. Musto, *Potato, Potahto: Whether Ineffective Assistance or Due Process, An Effective Rule is Overdue in Termination of Parental Rights Cases in Florida*, 21 St. Thomas L.Rev. 231, 243 (2009) ("It seems logical that if the right to counsel in a particular situation arises from due process, the issue of whether some act or omission of counsel rendered a proceeding unfair should be deemed to be one of due process.").

⁸⁸*Strickland v. Washington*, 466 U.S. 668 (1984); *Geist*, 796 P.2d at 1193.

⁸⁹*J.B.*, 170 So. 3d at 791 (quoting *Strickland*, 466 U.S. at 687).

⁹⁰*Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986).

⁹¹*Geist*, 796 P.2d at 1204.

⁹²*Id.* at 1203.

⁹³*Id.* at 1204.

The court in *J.B.* acknowledged that there are substantial, important differences in the purposes of criminal as opposed to TPR proceedings.⁹⁴ Most significant is that the liberty interests at stake in criminal cases are simply not equivalent to that involved in custody cases involving children.⁹⁵ In criminal proceedings, the paramount interest is protecting the rights of the accused, including the right to counsel.⁹⁶ However, dependency and TPR cases have a significant interest in the child having a prompt and permanent resolution of his or her custody status.⁹⁷ The consideration given to the child in reaching permanency without undue delay is substantially heightened because of the harm that results when there is uncertainty in a child's placement.⁹⁸ Therefore, challenging counsel's effectiveness in TPR proceedings is different from the traditional attack on criminal judgments because the same rights or liberty interests are not involved.⁹⁹ Additionally, the same standard of proof is not involved.¹⁰⁰ Further, the role of the judge is not the same, the timeframes involved are different, and it does not involve the same parties.¹⁰¹ Therefore, the court concluded that imposing the *Strickland* standard would be improper and laid out a new standard including several elements to be met.

The new standard for determining ineffective assistance of counsel claims includes the following elements: a strong presumption the attorney representing a parent, as a professional subject to the standards of the legal profession, has provided reasonable, professional assistance.¹⁰² To overcome that presumption and obtain relief, a parent must identify specific errors of commission or of omission made by their counsel that under the totality of the circumstances, evidence a deficiency in the exercise of reasonable, professional judgment in the case.¹⁰³ The parent must establish that, cumulatively, this deficient representation so prejudiced the outcome of the TPR proceeding that but for counsel's deficient representation the parent's rights would not have been

⁹⁴*J.B.*, 170 So. 3d at 792.

⁹⁵*E.T.*, 930 So. 2d at 726.

⁹⁶*L.W. v. Dep't. of Children & Families*, 812 So. 2d 551, 559 (Fla. Dist. Ct. App. 2002) (Wolf, J., concurring).

⁹⁷*RGB*, 229 P.3d at 1091.

⁹⁸*J.B.*, 170 So. 3d at 792.

⁹⁹*Id.* (quoting *E.T.*, 930 So. 2d at 726).

¹⁰⁰*J.B.*, 170 So. 3d at 792; *E.T.*, 930 So. 2d at 726 (Noting the standard of proof in termination proceedings is clear and convincing evidence as opposed to beyond a reasonable doubt in as criminal cases).

¹⁰¹*Id.*

¹⁰²*Id.* at 792.

¹⁰³*Id.*

terminated.¹⁰⁴ If the parent establishes the result of the TPR proceeding would have been different absent the attorney's deficient performance, the order terminating parental rights should be vacated, and the case returned to the circuit court for further proceedings.¹⁰⁵ This requires a showing of prejudice that goes beyond the *Strickland* requirement that confidence in the outcome is undermined.¹⁰⁶

With the new right to effective assistance of counsel, the court properly promulgated a standard that was mindful of the best interests of the child.¹⁰⁷ Requiring a strong showing of ineffectiveness makes it difficult for a parent to succeed on their claim, thereby reducing the risk of the termination order being reversed, further delaying the permanent placement of the child.¹⁰⁸ By all means, if counsel is severely deficient, then the parent is entitled to a new trial in comporting with due process demands.¹⁰⁹ However, "a child who has been placed in foster care pursuant to a dependency proceeding (or permanently placed after a TPR) should not have to face potential disruption years after the dependency decision has been made."¹¹⁰ The new standard sufficiently limits the potential for years of litigation and instability by requiring the parent to show a clear lack of competence, which had a detriment on the outcome of the case.¹¹¹

The Interim Procedure for Bringing Ineffective Assistance of Counsel Claims

In developing a new procedure for parents to bring ineffective assistance of counsel claims, the court noted that post-TPR proceedings must assure a "prompt, short-lived process for adjudicating the claims regarding termination of parental rights orders."¹¹² The process must proceed to a resolution within a strictly limited timeframe.¹¹³ In that same breath, however, the Florida Supreme Court sets out an interim procedure that bears a risk of further delaying permanency for Florida's children.

The interim procedure sets out responsibilities three-fold: actions to be taken by the parents, actions to be taken by the circuit court, and actions to be taken by counsel.¹¹⁴ Claims of ineffective assistance of counsel first

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 792-93.

¹⁰⁷*J.B.*, 170 So. 3d at 793.

¹⁰⁸*Id.* at 792-93.

¹⁰⁹*Id.* at 793.

¹¹⁰*L.W.*, 812 So. 2d at 559 (Wolf, J., concurring).

¹¹¹*J.B.*, 170 So. 3d at 792-93

¹¹²*Id.* at 794.

¹¹³*Id.* at 793.

¹¹⁴*Id.* at 794.

must be raised by the parent and ruled on by the trial court.¹¹⁵ Indigent parents, without the assistance of appointed counsel, must file a motion in the circuit court claiming ineffective assistance of trial counsel in the TPR proceeding.¹¹⁶ The parent shall have twenty days after the termination judgment issues in which to file a motion in the trial court.¹¹⁷ In the motion, the parent must identify specific acts or omissions in trial counsel's representation of the parent during the TPR proceedings that the parent alleges constituted a failure to provide reasonable, professional assistance.¹¹⁸ The parent must explain how the errors or omissions prejudiced the parent's case in the termination proceeding to such an extent that the result would have been different absent the deficient performance.¹¹⁹

The circuit court shall orally inform the parents of: the right to appeal the order entered at the conclusion of the termination of parental rights proceedings to the district court; the right to file a motion in the circuit court alleging that appointed counsel provided constitutionally ineffective assistance if the court enters a judgment terminating parental rights; and a written order terminating parental rights shall include a brief statement informing the parents of the right to effective assistance and a brief explanation of the procedure for filing such a claim.¹²⁰ The trial court shall promptly review the ineffective assistance motion and order compilation of the record regarding the TPR proceedings on an expedited basis.¹²¹ The trial court shall conduct proceedings, including an evidentiary hearing if necessary, to determine whether the motion should be granted or denied.¹²² The court shall render an order within twenty-five days after the motion alleging ineffective assistance was filed or the motion shall be deemed denied.¹²³

Further, counsel of record cannot continue representation if a parent chooses to file a motion claiming ineffective assistance of counsel.¹²⁴ Counsel must discuss appellate remedies and determine whether the parent wants to appeal the TPR order.¹²⁵ If the parent wants to appeal the order, then counsel must inquire whether the parent intends to file a motion

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*J.B.*, 170 So. 3d at 794.

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.* at 795.

¹²²*Id.*

¹²³*J.B.*, 170 So. 3d at 795.

¹²⁴*Id.* at 794.

¹²⁵*Id.* at 795.

claiming ineffective assistance of counsel and immediately seek withdrawal on this basis.¹²⁶ New counsel will be appointed for any appeal from the TPR order and from the disposition of the ineffective assistance of counsel motion.¹²⁷ The parent is entitled to appointed counsel with regard to the termination in both the trial and appellate court, but not in any trial court proceeding regarding a motion alleging ineffective assistance of counsel.¹²⁸

The court then assigns the task of creating a permanent process, subject to approval by the court, to a special committee consisting of people with relevant expertise from related areas.¹²⁹ The proposed rules developed by this committee were ordered to be submitted to the court by or on November 30, 2015.¹³⁰ However, as of the writing of this article, the Florida Supreme Court has not issued a final opinion approving the creation of a permanent process for parents to bring ineffective assistance of counsel claims. Florida's children are left to deal with the interim procedure, risking the delay of their final placements.

FLORIDA SHOULD ADOPT THE DIRECT APPEAL PROCEDURE FOR
PARENTS TO BRING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Florida's juvenile statutes define its purpose as the protection of children and the recognition that most families desire to be competent caregivers and providers for their children. The primary goal in a dependency proceeding is to protect the child; it is not to punish the parent.¹³¹ Of paramount concern are the best interests of the child, including a determination of their permanency goals, health, and safety.¹³² The goal is to address the concerns of the child in the most economic, effective, obvious, and direct manner.¹³³ The impact that abuse, abandonment, or neglect has on the victimized child, siblings, family structure, and inevitably on all citizens of the state has caused the legislature to determine that the prevention of child abuse, abandonment, and neglect shall be a priority of the State of Florida.¹³⁴ Since time is of the essence for permanency of children in the dependency system, a parent asserting an ineffective assistance of counsel claim should be raised on

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*J.B.*, 170 So. 3d at 795.

¹³⁰*Id.*

¹³¹FLA. STAT. § 39.001(1)(a) and (b) (2015).

¹³²*Id.* § 39.621(5). *See also* FLA. STAT. § 39.001(1)(b)1 (2015).

¹³³FLA. STAT. § 39.001(1)(b)3 (2015).

¹³⁴FLA. STAT. § 39.001(8) (2015).

direct appeal.¹³⁵ Requiring the parent to first bring the claim in the trial court risks unduly delaying permanency for Florida's children.

Florida statutorily calls for an expedited review of any appeal of an order terminating parental rights.¹³⁶ Florida Statute § 39.815(1) requires that the District Court of Appeals shall give an appeal from an order terminating parental rights priority in docketing and shall render a decision on the appeal as expeditiously as possible. Further, Florida Rule of Appellate Procedure 9.146 specifies the special procedures and time limitations applicable to appeals from final orders in TPR proceedings.¹³⁷ Although the court in *J.B.* was mindful of the expedited review in the appellate courts, it created an unnecessary, extra step of first bringing the claim in the trial courts. Oddly, the court did not discuss the direct appeal procedure or address the possibility of implementing it.

This omission may be due to the fact that the Florida appellate courts have rejected attempts to assert ineffectiveness of counsel on direct appeal.¹³⁸ The reason the courts have rejected the use of a direct appeal procedure is because they feel the record on appeal may be insufficient to establish viable claims.¹³⁹ "Even claims based on counsel's actions sometimes require evidentiary hearings to determine whether counsel acted reasonably in the context of the litigation."¹⁴⁰ However, while their concerns are valid, a direct appeal procedure would be more expeditious than first requiring a post-judgment motion. A direct appeal would be faster because Florida already expedites appeals from TPR orders in its statutes and appellate procedure rules. Therefore, there is no risk that an appeal would be in limbo in the appellate court, taking months or years to resolve.

Numerous other state courts have decided that employing a direct appeal procedure is the most expeditious and effective way to bring ineffective assistance of counsel claims in TPR proceedings. For example, the Oregon Supreme Court has held that direct appeal is the best procedure for bringing claims of ineffective assistance of counsel.¹⁴¹ The court went on to hold that the record on appeal was sufficient to decide the issue without remand to the trial court; however, the appellate court should

¹³⁵FLA. STAT. § 39.621(1) (2015).

¹³⁶FLA. STAT. § 39.815(1) (2015).

¹³⁷*J.B.*, 170 So. 3d at 794. See also Fla.R.App.P. Rule 9.146(g) (2015).

¹³⁸*In re E.K.*, 33 So. 3d 125, 127 (Fla. 2d DCA 2010); *T.R. v. Dep't. of Children & Family Servs.*, 33 Fla. L. Weekly D2757 (Fla. 2d DCA 2008); *L.H. v. Dep't. of Children & Families*, 995 So. 2d 583 (Fla. 5th DCA 2008); *E.T.*, 903 So. 2d 721; *L.W.*, 812 So. 2d 551.

¹³⁹*E.T.*, 903 So. 2d at 728; *L.W.*, 812 So. 2d at 557.

¹⁴⁰*E.T.*, 903 So. 2d at 730 (Stevenson, C.J., concurring in part and dissenting in part).

¹⁴¹*Geist*, 796 P.2d at 1201.

decide whether remand is necessary for an evidentiary hearing.¹⁴² The Pennsylvania Superior Court, on many occasions, has also held that direct appeal is the proper procedure to bring ineffective assistance of counsel claims.¹⁴³ In one case, the court held that direct appeal is the best procedure because it eliminates any additional procedural steps and additional hearings.¹⁴⁴ The New Mexico Court of Appeals also held that a parent's claim that he or she has been denied effective assistance of counsel may be raised on direct appeal.¹⁴⁵ The court also stated that it may sometimes be appropriate for the appellate court to remand a case to the trial court to hold an evidentiary hearing.¹⁴⁶ Additionally, the New Jersey Supreme Court held that a direct appeal is likely to be faster than a post-judgment motion.¹⁴⁷ The court stated that a direct appeal has the time limits imposed by the statutes and rules governing appeals in New Jersey.¹⁴⁸ The court felt that a direct appeal was the most expeditious procedure, and that in many cases, the issue will be resolvable on the appeal record alone.¹⁴⁹

The Florida Supreme Court should have established direct appeal as the proper procedure for parents to bring ineffective assistance of counsel claims, as opposed to bringing a post-judgment motion in the trial court. Although the court established a time limit to bring the post-judgment motion, this procedure still requires an additional hearing to be held in the trial court, thereby delaying a final resolution in the case because if the motion is granted, the parents will then appeal.¹⁵⁰ To the extent that many claims of ineffectiveness will be denied in the trial court and then appealed, this process will be lengthier than one allowing the ineffectiveness claim on direct appeal.¹⁵¹ Requiring the parent to file the

¹⁴²*Id.* at 1204.

¹⁴³*In re S.W.*, 781 A.2d 1247 (Pa. Super. Ct. 2001); *In re S.M.*, 614 A.2d 312 (Pa. Super. Ct. 1992); *In r Adoption of T.M.F.*, 573 A.2d 1035 (Pa. Super. Ct. 1990); *Matter of J.P.*, 573 A.2d 1057 (Pa. Super. Ct. 1990).

¹⁴⁴*T.M.F.*, 573 A.2d at 1044.

¹⁴⁵*Matter of Parental Rights of James W.H.*, 849 P.2d 1079, 1081 (N.M. Ct. App. 1993).

¹⁴⁶*Id.*

¹⁴⁷*DYFS v. B.R.*, 929 A.2d 1034, 1039 (N.J. 2007).

¹⁴⁸*Id.* See also N.J.R.A.R.2:9-1(c) (2015) (If the appellate court determines there to be a genuine issue of material fact on the issue of counsel's representation it may remand the case to the trial judge for an accelerated hearing to be completed within 30 days); 1A N.J. Prac., Court Rules Annotated R.2:10-6 (2015) (The issue of ineffective assistance of counsel shall be raised on direct appeal. If the appellate court determines there to be a genuine issue of material fact on the issue of counsel's representation it may remand the case to the trial judge and proceed in accordance with R. 2:9-1(c)).

¹⁴⁹*B.R.*, 929 A.2d at 1040.

¹⁵⁰*J.B.*, 170 So. 3d at 794 (A parent shall have twenty days after the termination judgment issues within which to file a motion in the trial court alleging claims of ineffective assistance of counsel).

¹⁵¹ CALKINS, *supra* note 60, at 209.

motion on their own without appointed counsel further risks a delay in holding an appropriate hearing.¹⁵² As a former judge has stated, “While it is possible for a court to design and implement a process that includes a trial court hearing for the purpose of factual findings, realistic judges know that it is easier said than done.”¹⁵³

Additionally, the risk of the indigent parent improperly filing the motion is substantial because the majority of these parents are uneducated and may not be literate to write a motion on their own and then file it with the court properly on their own.¹⁵⁴ Most importantly, they may not be in the correct mental state to even formulate a motion and then argue it in front of the trial judge who just terminated their parental rights to their child, leading to unnecessary continuances of the evidentiary hearing.¹⁵⁵ The emotional toll that severing the parent-child relationship has on the parent is overwhelming and with the combination of these factors, permanency for Florida’s children will be delayed by the uncounseled parent’s inability to adequately represent themselves.¹⁵⁶

Moreover, indigent parents are entitled to appointed counsel when they appeal an order terminating their parental rights. Therefore, it would be sufficient to simply allow them to include a claim for ineffective assistance of counsel on direct appeal, if applicable, since they will have an attorney provided for them regardless. Since the Court has set such a heightened standard for a parent to meet in determining effectiveness of counsel, the question of whether the parents had a fair hearing and effective representation can, in most circumstances, be determined by the record. If a parent sets forth vague, unspecific, and general arguments that their counsel was ineffective, then the appellate court can easily make a ruling on those facts. If a parent were to raise arguments and present a substantial question concerning issues other than those adjudicated at the termination proceeding, then a remand would be proper.¹⁵⁷ Only in extreme circumstances should the appellate court remand the case to the trial for an evidentiary hearing to be completed within a set timeframe. In keeping with the goals that the child’s best interests are always paramount, the most persuasive reason for direct appeal is that, in most cases, it will consume the least amount of time, thereby stabilizing the circumstances of the child.¹⁵⁸

¹⁵²*J.B.*, 170 So. 3d at 794 (Indigent parents without the assistance of appointed counsel must file a motion in the trial court claiming ineffective assistance of counsel).

¹⁵³*CALKINS*, *supra* note 60, at 209.

¹⁵⁴*Id.* at 185.

¹⁵⁵*Lassiter*, 452 U.S. at 30.

¹⁵⁶*Id.*

¹⁵⁷*Geist*, 796 P.2d at 1204.

¹⁵⁸*B.R.*, 929 A.2d at 1039. (quoting *CALKINS*, *supra*, at 207).

FLORIDA SHOULD ADOPT PERFORMANCE STANDARDS FOR ATTORNEYS
REPRESENTING PARENTS IN TERMINATION OF PARENTAL RIGHTS
PROCEEDINGS

Representation by counsel means more than just having a warm body with ‘J.D.’ credentials sitting next to a parent during termination of parental rights proceedings.¹⁵⁹ The importance of having an effective and competent attorney representing parents is paramount because in almost all TPR cases, the parents are indigent. This means that the parents are appointed free counsel by the court or provided counsel through the public defender. The parents likely have little education, have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation, unable to help prepare their case.¹⁶⁰ Two organizations in Florida have stated that the “level of practice in dependency and termination proceedings is abysmal, and parents and children suffer because of it.”¹⁶¹ Having spent some time in the dependency courtroom observing these types of cases, I can attest that most attorneys need more guidance and training in dependency law. Therefore, to reduce the risk of ineffective assistance of counsel claims being filed and further delaying permanency, Florida should adopt guidelines regarding standards of representation to ensure the highest competency in their dependency attorneys.

There are two states that stand out in their standards of representation for dependency attorneys: California and Louisiana. California, by court rule, requires the trial courts to have standards of experience and education that attorneys must meet to be eligible for court appointment in child-dependency proceedings.¹⁶² California defines “competent counsel” as one who is a member of good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs.¹⁶³ This court rule requires attorneys to have a minimum of eight hours of training or education in dependency law or to have demonstrated sufficient

¹⁵⁹*James W.H.*, 849 P.2d at 1080.

¹⁶⁰*Lassiter*, 452 U.S. at 30.

¹⁶¹*J.B.*, 170 So. 3d at 800 (Pariente, J., concurring) (quoting Amicus Curiae Brief of Florida’s Children First & Univ. of Miami Sch. of Law Children & Youth Law Clinics at 10-11).

¹⁶²*CALKINS*, *supra*, at 184. *See also* Cal. Rules of Ct. 5.660 (2015).

¹⁶³Cal. Rules of Ct. 5.660(d)(1) (2015).

experience in dependency proceedings.¹⁶⁴ The attorney training must include: an overview of dependency law and related statutes and cases and information on child development, child abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts.¹⁶⁵ Every three years the attorneys are to complete eight hours of education in dependency proceedings.¹⁶⁶ The court may also require evidence of the competency of any attorney appointed to represent a party in a dependency proceeding.¹⁶⁷

Louisiana, by administrative code, has trial court performance standards for attorneys representing parents in dependency proceedings. While these standards are not criteria for the judicial evaluation of alleged misconduct of defense counsel, they are guidelines for attorneys to follow that remind them of what their duties are.¹⁶⁸ These standards concentrate more on professionalism and adequate representation, serving several purposes. First and foremost, the standards are intended to encourage public defenders and appointed counsel to perform to a high standard of representation and to promote professionalism in the representation of parents in dependency proceedings.¹⁶⁹ The standards are also intended to alert defense counsel to courses of action to be taken in each case to ensure that the client receives the best representation possible.¹⁷⁰ The code requires counsel to be familiar with the substantive juvenile law and the procedure utilized in dependency proceedings and to stay abreast of changes and developments in the law.¹⁷¹ It further requires that prior to agreeing to undertake representation of a parent in a TPR proceeding, counsel shall have sufficient experience or training to provide effective representation.¹⁷² Lastly, the code puts forth specific standards for counsel to meet or exceed in TPR proceedings.¹⁷³ These standards include how to properly: prepare for the hearing by having the appropriate listed documentation, prepare for challenging the prosecution/agency's case, prepare for cross-examination by following the listed actions, prepare for voir dire examination of witnesses, prepare for the presentation of a

¹⁶⁴*Id.* 5.660(d)(3)(A).

¹⁶⁵*Id.* 5.660(d)(3)(A)(i)-(ii).

¹⁶⁶*Id.* 5.660(d)(3)(B).

¹⁶⁷*Id.* 5.660(d)(2).

¹⁶⁸LA. ADMIN CODE. tit. 22, pt. XV, § 1101(D) (2015).

¹⁶⁹*Id.* § 1101(A).

¹⁷⁰*Id.* § 1101(B).

¹⁷¹*Id.* § 1107(A).

¹⁷²*Id.* § 1107(B).

¹⁷³LA. ADMIN CODE. tit. 22, pt. XV, § 1145(B) (2015).

defense by following the listed actions, and prepare and present an overall defense strategy.¹⁷⁴

The Florida Supreme Court in *J.B.* should have additionally tasked the special committee to develop professional standards of representation and training for dependency attorneys. Florida Bar Rule of Professional Conduct 4-1.1 states that “competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation,” and “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.” In order to meet this professionalism requirement, similar to California attorneys, Florida attorneys in the field of dependency law should have to complete some specified minimum hours of training each year. Because the trial courts already have an extensive role in overseeing dependency proceedings, they should periodically require the attorneys to submit evidence of their competency in the field of dependency law in order to be available for appointment. Because the entire dependency process is governed by one statutory scheme, Florida Statutes Chapter 39, each stage of the proceedings is part of a whole system of law. These standards would also serve as reminders for dependency attorneys, guiding them in every step of the dependency process, helping them effectively and competently represent the parents. Therefore, requiring attorneys to complete trainings in dependency law and having guidelines to follow will ensure effective representation from the beginning, reducing the risk of ineffective assistance of counsel claims being filed, further delaying permanency for Florida’s children.

The purpose of having standards of representations is not to burden Florida’s dependency attorneys with more duties, but to protect them from the filing of meritless ineffective assistance of counsel claims from the parents they represent. Further, it is also a protection for the parents who are at risk of losing the rights to their child indefinitely. Most importantly, it protects the children from having to wait longer to be placed into a permanent living situation because an attorney incompetently handled the proceeding the first time. For “nowhere is timeliness more important than in a dependency proceeding where a delay of months may seem like forever to a young child.”¹⁷⁵

¹⁷⁴*Id.* § 1145(B)(1)(a)(i)-(xi), (B)(3)(a), (B)(3)(d)(i)-(xi), (B)(3)(e), (B)(4)(c)(i)-(vii), (B)(4)(a).

¹⁷⁵*In re Kristin H.*, 54 Cal. Rptr. 2d 722, 741 (Cal. Ct. App. 1996).

CONCLUSION

TPR involves a unique kind of deprivation involving the authority of the State to permanently destroy legal recognition of the parental relationship.¹⁷⁶ Surely there can be few losses more grievous than the abrogation of that relationship.¹⁷⁷ Because of the delicate interest at stake and the severity of a deprivation of that interest in TPR proceedings, it is essential that parents are represented adequately by competent counsel; the United States and Florida Constitutions grant them that right. However, vindicating that right should not come at the expense of children left in dependency limbo. Timely disposition of TPR ineffective assistance of counsel claims is essential in light of the harm to the child that results when permanency is unduly delayed.¹⁷⁸ Finality in the resolution of TPR cases should be achieved as expeditiously as possible, consistent with due process.¹⁷⁹ The way to achieve finality in the most expeditious way is to allow parents to bring ineffective assistance of counsel claims on direct appeal. This will safeguard the permanency of the child by reducing the risk of prolonging the case at the trial court level through post-judgment motions.

Competent legal counsel has and always will be demanded in our legal system. There is no substitute for competent counsel, because counsel's primary responsibility has always been to ferret out all the facts of a case and bring them to the attention of the trial judge.¹⁸⁰ Unless counsel for parents in TPR proceedings are held to a minimum level of competence through training and education requirements, the parent's right to counsel would be nothing more than a right to be accompanied into court by an individual who may be utterly incapable of defending his client's interests.¹⁸¹ In reality, the majority of dependency attorneys are very competent and provide effective representation to the parents. However, the few should not be overlooked because the majority prevail. Every effort should be made to ensure that every attorney practicing dependency law is held to the same requirements and standards. This standard is the only way to safeguard against unduly delaying permanency for Florida's children. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home" under the care of his parents or foster parents, especially

¹⁷⁶*M.E.K.*, 921 So. 2d at 791 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996)).

¹⁷⁷*Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting).

¹⁷⁸*J.B.*, 170 So. 3d at 793.

¹⁷⁹*Geist*, 796 P.2d at 1200.

¹⁸⁰*Price*, 573 A.2d at 1069 (Montemuro, J., concurring and dissenting).

¹⁸¹*T.M.F.*, 573 A.2d at 1053 (Beck, J., concurring).

when such uncertainty is prolonged.¹⁸² Requiring dependency attorneys to adhere to educational trainings and standards of representation are the only ways to safeguard against unduly delaying permanency for Florida's children. The welfare of our youth cannot be forsaken – Florida's children are simply too important.¹⁸³

¹⁸² *Lehman*, 458 U.S. at 513.

¹⁸³ *S.M. v. Florida Dep't of Children & Families*, 202 So. 3d 769, 784 (Fla. 2016) (quoting *Padgett*, 577 So. 2d at 571).

