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Florida Adoption Intervention Statute: Balancing the Constitutional Rights of the Parents with the Best Interest of the Dependent Child

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**FLORIDA ADOPTION INTERVENTION
STATUTE: BALANCING THE
CONSTITUTIONAL RIGHTS OF THE PARENTS
WITH THE BEST INTERESTS OF THE
DEPENDENT CHILD**

*Taylor Smith**

*The Honorable Patricia Stowbridge***

In 2003, the Florida Legislature took a dynamic, and rather controversial step, when it created a statutory process requiring a dramatic increase in the level of cooperation between the dependency system and private adoption entities.¹ When parents choose to participate in a private adoption of their child, who is in the custody of the Florida Department of Children and Families (DCF), rather than participate in reunification through the dependency process, the statutory process not only permits them to do so, but also empowers them to be an active participant.² Section 63.082(6) of the Florida Statutes quickly became known as the “Adoption Intervention Statute.” The statute required the dependency court to permit a private adoption entity to “intervene” in the dependency case as a “party in interest” when a parent had executed a valid adoption consent in favor of the adoption entity and had selected a prospective adoptive family with an approved home study.³

Although initially it was not necessarily embraced by either DCF or the dependency courts, the appellate courts interpreted the statute early on to require the dependency system to respect the rights of the parents and

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¹H.B. 835, 105th Reg. Sess. (Fla. 2012).

²FLA. STAT. § 63.022(5) (2014).

³Fla. Stat. § 63.082(6)(a)–(b); The Florida Senate, Review Of Section 63.082(6), *F.S., Intervention By Private Adoption Entities In The Adoption of Certain Children In The Custody Of The Department Of Children And Families*, Interim Report 2010–104, October 2009, <http://centerforchildwelfare.fmhi.usf.edu/kb/FlPerformance/LegisCommittee-Adoption2009.pdf>.

the private adoption entities selected by the parents.⁴ The early cases dealt primarily with statutory interpretation and analysis of legislative intent; they did not delve deeply into the constitutional dimensions that undergird the statutory scheme. An amendment to the statute in 2012 brought sharply into focus that this is not simply an issue of an adoption entity having a “sufficient interest in the outcome of the litigation” to permit their involvement, but rather it identified a balancing of the fundamental rights of the parent(s) against a compelling state interest in the protection of “at risk” children.⁵ The 2012 amendment substantially altered the Intervention Statute by identifying the process as a “right” of the parent; the dependency court and DCF were required to advise the parent(s) of this “right” prior to filing a petition seeking a termination of parental rights.⁶ Thus, the discussion is less about the cost savings to the State of Florida realized by moving children more quickly into permanency through the resources of private adoption entities, and more about utilizing a “least restrictive means” approach to protecting children in Florida.⁷

There are numerous benefits that can inure to children when they receive a forever family that is stable and committed to their welfare, but this can be difficult to achieve when the child’s biological parents are not willing to cooperate. The challenge, from a policy perspective, has been to create opportunities for reunification when appropriate, while simultaneously removing the legal and practical barriers to permanency for those families for whom reunification is not the best option. A critical component of the permanency objective is to create a process unhindered by the inherent hostility that parents have toward the “system” and toward those authority figures who removed the child from the parents in the first place. The private sector offers parents the opportunity to proactively participate in the permanency decision with a measure of control that the dependency system cannot provide. The parents do not view the private adoption entities in the same negative manner, but rather as advocates for the parents’ rights in the permanency planning for the child.

In most circumstances, the identification and establishment of fundamental constitutional rights of the parents, and the societal commitment to the best interest of the child, run on parallel tracks with a common objective that benefits the family. In the case of dependent children, however, these concepts are on an inevitable collision course.

⁴*Adoption Miracles, LLC v. S.C.W.* (In the Interest of S.N.W.), 912 So. 2d 368, 370 (Fla. Dist. Ct. App. 2005).

⁵See Fla. Stat. § 63.082(6)(b) (2014); H.B. 1163, 114th Reg. Sess. (Fla. 2012).

⁶*Id.* at § 63.082(6)(g).

⁷See generally *id.* at § 63.082(6) (2014).

Balancing these interests when they come into conflict requires a deep understanding of both human dynamics and legal principles.

CONSTITUTIONAL BACKGROUND OF PARENTAL RIGHTS

The United States Supreme Court first recognized a fundamental right of a parent to the “care, custody and management” of their child in the case of *Meyer v. Nebraska*.⁸ The recognition of fundamental rights under the Due Process Clause of the United States Constitution had been limited to:

[F]reedom from bodily restraint . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁹

The *Meyer* case deals with an attempt by the State of Nebraska to prohibit foreign language education to grade school children and outlined a concept of “liberty” under the Fourteenth Amendment’s Due Process Clause, which was significantly more expansive than previous interpretations.¹⁰ Prior to the *Meyer* case, and, to some extent still promulgated in the *Meyer* case, children were culturally identified as being the “property” of the parents.¹¹ Coming before the high court at a point in history when the recognition of individual rights and individual determination was enjoying unprecedented popularity, the case was a timely step in the direction of recognizing the family unit as a protected zone which should remain free from unnecessary intrusion by the state.¹² The *Meyer* case was not about the “rights” of children, or even uniquely about the “best interest of the children,” but was essentially about the rights of parents to control their children.¹³

Two years later, in the case of *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, the United States Supreme Court declared an Oregon statute unconstitutional, which required children to attend public

⁸See *Meyer v. Neb.*, 43 S. Ct. 625 (1923).

⁹*Id.* at 399.

¹⁰*Id.* at 397.

¹¹*Id.* at 401

¹²*Id.* at 401-03.

¹³*Id.* at 401.

school and forbid their attendance at private schools.¹⁴ Taking the concepts of the Meyer case a step further, the United States Supreme Court clarified that this fundamental right of parents not only extended to what they chose to teach their children, but it also extended to the manner in which their children would be educated.¹⁵ In *Meyer*, the United States Supreme Court prevented the prosecution of parents or teachers who were educating children within the public school system.¹⁶ In this environment, the State could still maintain significant control over the content of the education, but the *Pierce* case clarified that these parental rights now prevented the State from holding children's education captive within the State controlled school system.¹⁷ Private education gave parents far greater control over the content of their children's education.¹⁸ These two cases together cleared the way for our modern recognition of a substantive due process right to "the care, custody and management" of children.¹⁹

Seventy-five years later, the United States Supreme Court issued its landmark decision in the case of *Troxel v. Granville*.²⁰ In *Troxel*, the high court was asked to consider whether a Washington statute permitting "any person" to petition for visitation rights with a child "at any time" upon an argument to the state superior courts that visitation would be in the "best interests of the child" was constitutionally permissible.²¹

In the tragic fact pattern, paternal grandparents, Jennifer and Gary Troxel, petitioned for visitation with their two young granddaughters after their son committed suicide and the children's mother decided to limit their contact.²² Although initially successful under the Washington statute, the Troxels' visitation with their granddaughters was suspended on appeal, and the Washington Supreme Court concluded that the Washington statute violated the United States Constitution.²³ The Washington Supreme Court stated, "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."²⁴

The United States Supreme Court affirmed the decision of the Washington Supreme Court but issued a lengthy decision that included

¹⁴*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530.

¹⁵*Id.* at 534-35.

¹⁶*See Meyer*, 262 U.S. at 396-97, 402.

¹⁷*Pierce*, 268 U.S. at 534-35.

¹⁸*Id.* at 534.

¹⁹*See id.*; *see also Meyer*, 262 U.S. at 390.

²⁰*See Troxel v. Granville*, 530 U.S. 57 (2000).

²¹*Id.* at 60.

²²*Id.* at 60-61.

²³*Id.* at 62-63.

²⁴*See id.* at 63.

two concurring opinions and three separate dissenting opinions.²⁵ Although the diversity of opinions reflects the complexity of the issues presented, all of the justices acknowledged and supported the historical development of the recognition of substantive due process rights of parents.²⁶ The plurality decision of the United States Supreme Court made it clear that the decisions of the mother were consistent with her fundamental substantive due process rights.²⁷ Therefore, the State can only infringe upon these rights when a compelling state interest is invoked, and even then, the infringement will be subject to strict scrutiny by the Court and a requirement that the infringement be the least restrictive means to accomplish that compelling interest.²⁸ Since the Washington statute could not withstand this analysis, it was determined to be constitutionally infirm.²⁹

The *Troxel* case dealt with an indisputably “fit” parent, in which no allegation of abuse, abandonment or neglect had been made, but the constitutional framework establishes the appropriate analysis for the consideration of the boundaries of parental rights in the context of dependency proceedings.³⁰ In a least restrictive means analysis, one must be careful to remember that the dependency system legitimately exists solely for the purpose of protecting the child from abuse, abandonment or neglect.³¹ It is not appropriate for the state to countermand the decisions of the parent that resolve the risk to the child in an appropriate manner simply because the Court, the child welfare case manager, or the child’s Guardian ad Litem, believe that a different permanency plan would be a better option for the child.³² That approach violates the least restrictive means test.³³

²⁵See *id.* at 57.

²⁶See *Troxel*, 530 U.S. at 57.

²⁷*Id.* at 65.

²⁸*Id.* at 72–73.

²⁹*Id.* at 73.

³⁰*Id.* at 68.

³¹See *Padgett v. Dep’t of Health & Rehabilitative Servs*, 577 So. 2d 565 (Fla. 1991).

³²See *id.*

³³See *Padgett*, 577 So. 2d at 565 (the termination of parental rights must be the least restrictive means of protecting the children from harm); see also *In re K.C.C.*, 750 So. 2d 38 (Fla. 2d D.C.A. 1999); see also *In the Interest of D.A.H.*, 390 So. 2d 379 (Fla. 5th D.C.A. 1980) (holding “When the State undertakes to permanently deprive a natural parent of the right to rear her children, the courts should zealously protect the rights of the parent and insure that this drastic action strictly conforms to the legislative guidelines.”) See also *N.S. v. Department of Children & Families*, 36 So. 3d 776, 778 (Fla.3d D.C.A. 2010) (holding, “. . . DCF must proceed in a narrowly tailored manner and must prove that, in addition to the statutory requirements for termination of parental rights, that termination is the least restrictive means of protecting the child from serious harm.”)

In 2004, a pair of decisions from the Florida Supreme Court, *Florida Department of Children and Families v. F.L.* and *B.C. v. Florida Department of Children and Families*, reiterated the proper constitutional analysis to be applied when contemplating a potential termination of parental rights in a juvenile dependency proceeding.³⁴ Dependency cases present a special challenge to this constitutional analysis because of the natural tendency to question whether these principles should apply in the same manner to parents who have been accused of, or have been found to be guilty of, abuse, abandonment or neglect of their children. Both of the above mentioned Florida Supreme Court cases acknowledged the existence of the parents' "fundamental liberty interest," and focused on the state's obligation to employ the "least restrictive means" to accomplish its goal of protecting the child from harm.³⁵ The Florida Supreme Court in *B.C.* lays out the precedent for how to analyze termination of parental rights on grounds that the parent will be incarcerated for a period of time that would constitute a substantial portion of the period of time before the child turns eighteen.³⁶ The Court acknowledged that because parents have a fundamental liberty interest in determining the care and upbringing of their children, the termination of parental rights must be the least restrictive means to protect the child from serious harm.³⁷ For the termination to be the least restrictive, the Court may take into account prior incarceration time, but *requiring* the court to consider past incarceration would be inconsistent with the constitutional rights of the parent.³⁸ Thus, the appropriate consideration is not whether the parent's total incarceration period would constitute a substantial period of time before the child's eighteenth birthday, but whether from the time the Termination of Parental Rights Petition is filed to the child's eighteenth birthday constitutes such a substantial period of time.³⁹ In *F.L.*, the Florida Supreme Court rejected the argument that when the State petitions to terminate parental rights on grounds that the parent has had their parental rights terminated to another child in the past that there is a rebuttable presumption in which the parent must show that past conduct cannot predict the current child is at a substantial risk of harm.⁴⁰ The Court stated that petitioning to terminate parental rights based on a parent's past termination of parental rights is constitutional, however, it would be unconstitutional to shift the State's

³⁴See *Fla. Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 603 (Fla. 2004); see also *B.C. v. Fla. Department of Children & Families*, 887 So. 2d 1046, 1050 (Fla. 2004).

³⁵*Id.*

³⁶*B.C.*, 887 So. 2d at 1052.

³⁷*Id.* at 1050.

³⁸*Id.* at 1052.

³⁹*Id.*

⁴⁰*F.L.*, 880 So. 2d at 609.

burden of proving the risk of harm to the child onto the parent to disprove any potential harm to the child.⁴¹ These cases are consistent with the premise that a parent's right to the upbringing of their child is always a fundamental right and that right must be fairly balanced with the State's interest in the welfare of children.

The *Troxel* court acknowledged a "presumption that fit parents act in the best interests of their children," but what about "unfit" parents, or "questionably fit" parents?⁴² The analysis may be more complex in these cases, but in the earlier United States Supreme Court decision of *Santosky v. Kramer*, the Court made clear that a parent's fundamental liberty interest in determining the care and upbringing of a child "does not evaporate simply because they have not been model parents."⁴³ Also, because of the implication of these constitutional rights, an adjudication of dependency will not necessarily support a termination of parental rights if this is not the least restrictive means to protect the child from harm.⁴⁴

HISTORY OF THE CHILD WELFARE SYSTEM AND THE DEVELOPMENT OF THE BEST INTEREST OF THE CHILD STANDARD

In 1875, the first organization dedicated to the protection of children was established in New York.⁴⁵ This non-governmental agency, the New York Society for the Prevention of Cruelty to Children, was dedicated to raising awareness of child abuse and advocating privately for the protection of endangered children.⁴⁶ Private organizations worked tirelessly to assist children.⁴⁷ Unfortunately they were limited in authority to truly assist any but the most obvious and egregious cases.⁴⁸ By the middle part of the twentieth century, however, child welfare was primarily handled by government agencies.⁴⁹ A series of federal laws both funded the governmental agencies, and clarified their role in protecting children from harm.⁵⁰ These developments rapidly increased the authority and

⁴¹ *Id.*

⁴² *Troxel*, 530 U.S. at 68.

⁴³ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁴⁴ *See* L.M.C. v. DCF Servs. (In the Interest of O.C.), 934 So. 2d 623 (Fla. Dist. St. App. 2006); *See also* B.C. v. Fla. DCF, 887 So. 2d 1046 (Fla. 2004); *See also* Fla. DCF v. F.L., 880 So. 2d 602 (Fla. 2004).

⁴⁵ John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 449 (2008).

⁴⁶ *Id.* at 452.

⁴⁷ *Id.* at 452.

⁴⁸ *Id.* at 452.

⁴⁹ *Id.* at 452.

⁵⁰ *Id.* at 453.

effectiveness of the intervention on behalf of abused, abandoned, and neglected children.⁵¹

Simultaneous with the development of child welfare laws and increased governmental involvement in child protection, came the transition from orphanages to foster care as the primary system for caring for the children.⁵² Implementation of these laws, which eventually included mandatory child abuse reporting, resulted in dramatic increases in the scope and responsibility of state child welfare systems but also caused a dramatic increase in the number of families impacted by the mandates.⁵³ The resulting crisis of an overwhelmed system has generated an active dialogue that continues to the present day, over ways to properly address the best interests of the child without either endangering the child through improper reunification, or irreparably damaging the family by the unnecessary intrusion into their lives. Rising numbers of children, disproportionately African-American children; physically or mentally handicapped children; and older children have languished for years in the state foster care systems, requiring political and moral incentives to create and increase permanency options for the children.⁵⁴

The passage of the Adoption Assistance and Child Welfare Act of 1980, directed state child welfare systems to step up efforts to reunite families and develop programs designed to avoid removal of children from the care of their parents.⁵⁵ Arguably, the law was nominally effective in reducing the number of children in out-of-home care, but the resulting tragedies from vulnerable children being placed back into the care of abusive parents created a whole new set of problems for state child welfare agencies to deal with. Conversely, attempts to move children quickly to permanency within the child welfare system through termination of parental rights has placed the agencies on a collision course with the courts and with the constitutional rights of the parents. The system has struggled internally to find solutions, and some have begun to question if the "solution" does not need to come from somewhere else.

FLORIDA STATUTE § 63.082(6)

Jeanne T. Tate, a board certified adoption attorney with an extensive background in the area of adoption law, has been an active advocate for

⁵¹ *Id.*

⁵² Myers, *supra* note 48, at 456.

⁵³ *Id.*

⁵⁴ *Id.* at 458.

⁵⁵ See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, §94, Stat. 500 (1980).

improvement in Florida's intervention statute.⁵⁶ In an interview with Ms. Tate, she stated that prior to 2003, efforts to effectuate a cooperative relationship between private adoption entities and the Florida Department of Children and Families ("DCF") had been largely unsuccessful.⁵⁷ Although there were frequent discussions about attempting to find ways to bring the private entities' waiting families together with the lengthy list of Florida's waiting children, there were fundamental flaws in the approach, which virtually ensured that no progress would be made.⁵⁸ Private adoption agencies and attorneys, with qualified families anxious for a solution to the sometimes-lengthy wait for a child to adopt, were

⁵⁶Jeanne T. Tate is the current managing partner of the Law Office of Jeanne T. Tate, PA. She has reached the heights of professional excellence and has been AV rated by Martindale Hubbell. Ms. Tate has extensive experience in adoption law; she is a board certified adoption attorney where, throughout her career, she has placed over 2,000 children into loving homes. Ms. Tate is a member of the American Academy of Adoption Attorneys and The Florida Adoption Council and has been active in interstate compact adoptions. She works closely with adoption agencies to provide a full range of services to birth parents and adoptive families and owns her own adoption agency, Heart of Adoptions, Inc. She also founded Heart of Adoptions Alliance, Inc., a non-profit 501(c)(3) COA accredited agency. Jeanne has appeared on national and local television on the subject of adoption and lobbies extensively in this area.

Ms. Tate has been recognized as an Angel in Adoption by the Congressional Coalition on Adoption and has consistently been named as one of The Best Lawyers in America, Florida's Legal Elite and Florida Super Lawyers. She has been a member of the Florida Bar Adoption Law Certification Committee (2010-2015) and Hillsborough County's Local Planning Committee for Florida's Five Year Plan for the Promotion of Adoption and Support of Adoptive Families (2009), and various other organizations. She currently maintains membership in the American Academy of Adoption Attorneys, Florida Adoption Council, and the Florida Association of Adoption Professionals, as well as many others.

Jeanne graduated with high honors in 1978 from the University of Florida with a B.S.s degree in Journalism, and, in 1981, she graduated with honors from the University Of Florida College Of Law. Ms. Tate has received an outstanding number of prestigious honors and awards including The Tobias Simon Pro Bono Award bestowed by the Florida Supreme Court, Best Lawyers' 2013 Tampa Family Law Lawyer of the Year, 2012 HCBA Jimmy Kynes Pro Bono Service award, Super Lawyers Top 50 Women Attorneys in Florida 2012, 2013, and 2015, 2010 ABA Solo and Small Firm Lifetime Achievement Award; 2010 U.S. News – Top Tier Best Lawyers "Best Law Firms"; 2010 Tampa Bay Parenting Magazine Extraordinary Woman; Guardian Angel, Voiced for Children (2009); Tampa Bay Business Journal Business Woman of the Year (2009); HAWL Achievement Award (2009), Small Business Leader of the Year by the Tampa Chamber of Commerce (2006), Hillsborough County's Pro Bono Firm Award (2006) and the Florida Adoption Council's Lifetime Achievement Award (2004). Ms. Tate's professional affiliations include the following: United States Supreme Court, Florida Bar; Hillsborough County Bar Association; Florida Association of Women Lawyers, Bay Area Volunteer Lawyers Program; Athena Society and the Hillsborough County Association for Women Lawyers.

⁵⁷Telephone Interview with Jeanne T. Tate, Managing Partner, Jeanne T. Tate, P.A. (June 28, 2016).

⁵⁸*Id.*

initially open to the idea of a cooperative arrangement.⁵⁹ The agencies and attorneys quickly realized, however, that the state child welfare agency's concept was that qualified families would simply be referred to DCF to adopt those children for whom DCF was unable to locate a suitable adoptive family.⁶⁰ Typically, these were older children with behavioral challenges or larger sibling groups, and the private adoption agencies and attorneys had few families possessing the requisite skill set and/or commitment to handle these children.⁶¹ Essentially, the families who were interested in adopting these types of children likely had contacted DCF to begin with, as they would have been the best source for these referrals.⁶² When the private entities requested to discuss providing families for younger children and children without identifiable behavioral challenges, they were advised that DCF "didn't need" families for these children.⁶³ This approach effectively ended the initial discussions regarding cooperation between the state and the private sector until a new paradigm could be created.⁶⁴

That new approach came with the passage of Florida Statute § 63.082(6) in 2003. Instead of continuing the attempts to convince the private sector to meet the needs of the public child welfare agency, the new statute was predicated on the controversial idea that DCF would be required to cooperate with the private adoption agencies and attorneys whenever the parents of a dependent child chose to have their child removed from the child welfare system and placed into a private adoptive home.⁶⁵ Although far removed from the original concept of cooperation suggested by DCF, for a number of reasons, the new approach quickly caught on and became popular with both the birth parents and the prospective adoptive parents. Eventually, DCF and the juvenile courts began to pass from acceptance to embracing the process created in the statute.

Behind the design of the new "cooperation" was a set of assumptions and principles that, once considered, rendered the revolutionary approach far more logical than it might at first have appeared, to wit . . .

A. Parents often view DCF as "the enemy";

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jeanne T. Tate, *supra* note 56.

⁶⁵ Fla. Stat. § 63.082(6) (2003).

- B. Parents typically view the private adoption agency or attorney, they chose to work with, as truly advocating for their child's best interest;
- C. Adoptive parents tend to view DCF as unresponsive and steeped in bureaucracy;
- D. Adoptive parents typically view the private adoption agency or attorney, they chose to work with, as advocating for their best interests;
- E. Delays inherent in the dependency system often result in children spending an unreasonable length of time without permanency;
- F. Private adoption is able to create permanency quickly;
- G. Some parents genuinely believe that adoption is the best outcome for their child, but they would never voluntarily surrender their child to DCF (see subparagraph A above);
- H. The fact that a parent has failed to meet acceptable standards of care for their child does not automatically equate to that parent being incapable of making an appropriate permanency plan for their child in an adoptive home;
- I. Having the opportunity to select an adoptive family, and negotiate for ongoing pictures and letters about their child's progress, empowers a parent to actively participate in a permanency plan for their child;
- J. Private adoption agencies and attorneys are fully qualified to evaluate prospective families, educate and train families to meet the needs of the children they might adopt, and provide both legal processing and post placement support, all at little or no cost to the taxpayers.⁶⁶

This is not to say that individual cases will not have challenges, and not every intervention case will go forward without questions or concerns relative to the best interest of the child, but the 2003 statute marked a turning point in the manner in which the State of Florida balances the rights of the parents with the needs of the child.⁶⁷ It was a remarkable case of "thinking outside the box" and has enabled many children to move beyond involvement in the dependency system into a forever family.

⁶⁶Jeanne T. Tate, *supra* note 56.

⁶⁷Jeanne T. Tate, *supra* note 56.

DEFINING FLORIDA STATUTE § 63.082(6)

The intervention statute created a new dynamic in the dependency system and the initial responses from DCF and the juvenile courts were not always positive. Although, the statute clearly directed that the private adoption entity is permitted to intervene as a “party in interest” when a parent executed an adoption consent for the adoption entity and selected a qualified prospective adoptive family, judges sometimes balked at the idea and exercised discretion to deny the request.⁶⁸ In 2005, the Second District Court of Appeal issued a decision that ended this debate and clarified that the statute required that the trial court grant the intervention whenever the identified conditions were met; the decision was not a discretionary call for the court.⁶⁹ The court in *Adoption Miracles* rather bluntly pointed out that the statutory language directing that the adoption entity “shall be permitted to intervene” meant exactly that, and the court was not at liberty to deny the request to intervene when the consents were properly executed and a qualified family was chosen.⁷⁰

Not long after the *Adoption Miracles* case, Florida appellate courts were called upon to deal with a scenario where a parent chose to participate in a private adoption through the intervention statute, but after the consent was executed and the intervention was granted, the selected family withdrew from the adoption plan.⁷¹ In *C.G. v. Guardian Ad Litem Program*, the appellate court was asked to determine the responsibility of the private adoption entity and the status of the consent of the parent.⁷² Since there was no evidence of fraud or duress in the execution of the original adoption consent and the consent had the effect of surrendering the child to the private adoption entity, the appellate court determined that the consent remained valid, binding, and enforceable, and the adoption entity continued to be responsible for the child.⁷³ The result of this determination was that the adoption entity was presented with limited options in the absence of an appropriate replacement family.

One of those options, and the only one that was reasonably available in this case, was to transfer the valid consent, and all authority over the child, to DCF.⁷⁴ This outcome was, without a doubt, a difficult resolution for a process designed to allow parents to actively participate in the selection of a permanent adoptive home for the child, but it provided some

⁶⁸ *Id.*

⁶⁹ *In re S.N.W.*, 912 So. 2d 368 (Fla. Dist. Ct. App. 2005).

⁷⁰ *Id.*

⁷¹ *C.G. v. Guardian Ad Litem Program*, 920 So. 2d 854, 855 (Fla. 4th D.C.A. 2006).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

guidance to all involved for future cases that might involve similar challenges. Certainly, private adoption entities will now be decidedly more cautious in accepting consents on older children or special needs children, which could have a chilling effect on participation in the intervention process.⁷⁵ In addition, private adoption entities must now warn parents of the risk that they might lose the right to contest the termination of their parental rights by DCF if the arrangement with the selected family falls through.⁷⁶ The *C.G.* case presents some concerning risks for parents seeking to proceed with a private adoption, but it is, thus far, the only case creating potential pitfalls for the parents exercising their rights under the intervention statute.

By 2012, the Intervention Statute was widely implemented throughout the State, and many of the original difficulties had been resolved or greatly diminished.⁷⁷ With no reported cases of any intervention children being returned to the care of the state, and with significant numbers of dependent children finding permanency with qualified families chosen by their parents, the statute began to catch the attention of Florida legislators. Not only was the process providing safe and loving homes more quickly, but the state was also saving enormous amounts of money.⁷⁸ Since the intervention process operates from consents, as opposed to involuntary termination proceedings, the legal expenses for trials, appeals and court appointed counsel were dramatically reduced or eliminated for these cases.⁷⁹ Additionally, in most intervention cases, the adoptive parents did not seek the ongoing financial assistance provided by the Florida Adoption Assistance Act, which is typically available to children adopted out of foster care.⁸⁰ Most importantly, the ability to participate in the intervention process enabled many parents to become appropriately proactive in the permanency decisions affecting their children.⁸¹ Instead of simply reacting to the decisions of DCF with anger and a sense of victimization, the parents make important decisions for the best interest of their child with the help of the adoption entity with whom they chose to work.⁸² Often, the parents are able to meet the

⁷⁵Jeanne T. Tate, *supra* note 56.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Intervention is a Win Win Option!*, Hope For Families, <http://www.adoptioninterventionflorida.org/resources/intervention-is-a-win-win-option>.

⁷⁹Jeanne T. Tate, *supra* note 56.

⁸⁰Jeanne T. Tate, *supra* note 56.

⁸¹*Intervention is a Win Win Option!*, Hope For Families, <http://www.adoptioninterventionflorida.org/resources/intervention-is-a-win-win-option>; see also *Intervention*, Heart Of Adoptions, Inc., <http://heartofadoptions.com/interventions> (2016).

⁸²Jeanne T. Tate, *supra* note 56.

prospective adoptive parents, and they can negotiate for pictures, letters, and, in some cases, even ongoing contact with the child.⁸³

While this sounds like a win for all of the parties involved—the state, the parents, the prospective adoptive parents, and the child—some problems have continued to interfere with the statute’s potential. The most significant impediment statewide had to do with the lack of information and/or misinformation provided to the parents whose children were taken into custody by the State.⁸⁴ Many parents reported never having been told that they could participate in a private adoption while others were affirmatively told that they would “not be allowed” to participate in a private adoption.⁸⁵ In a variety of different ways, the intervention process was treated as a privilege rather than a right by many in positions of authority within the dependency system.⁸⁶ It was treated as an option that DCF, and sometimes the Guardian ad Litem, could fight and avoid if they wanted to.⁸⁷

Provisions in the statute ensuring court oversight of the child’s best interest have been interpreted, on many occasions, as allowing for a “custody case” between the placement selected by the parent or parents the placement preferred by DCF, the Guardian ad Litem appointed for the child, or the Court.⁸⁸ By providing inadequate or untimely information about intervention, the courts have been faced with a dilemma regarding the best interests of the children. Even a parent acting very diligently, once the correct and complete information was provided, could be confronted with concerns that the child may currently be in a stable, pre-adoptive home, and moving the child again could be destabilizing and detrimental. Although a valid concern, the lack of any functional statutory notice requirement coupled with a generalized resistance on the part of DCF to allow parents alleged to be guilty of abuse, abandonment or neglect, to determine permanency options, often resulted in parents not being able to take advantage of the process. This issue, along with some generalized confusion about the proper procedure for the courts to follow in implementing an intervention process, required a statutory

⁸³Hope For Families, *supra* note 73; *see also* *Intervention*, Heart Of Adoptions, Inc., <http://heartofadoptions.com/interventions> (2016).

⁸⁴Jeanne T. Tate, *supra* note 56.

⁸⁵Jeanne T. Tate, *supra* note 56; *see also* THE FLORIDA SENATE, INTERIM REPORT, S. 2010-104 (2009), http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-104cf.pdf (“DCF and its community-based providers (CBC) are reported to object to the intervention and slow the private adoption process”).

⁸⁶Jeanne T. Tate, *supra* note 56.

⁸⁷*Id.*

⁸⁸Fla. Stat. Ann. § 63.082(6)(b) (West 2013).

adjustment.⁸⁹As a result, amendments to the statute were proposed and passed in 2012.⁹⁰

The most significant change proposed in the 2012 statute was the clear identification of the intervention option as a “right” and the specific requirement that both DCF and the juvenile court advise the parents of their rights prior to the filing of a Petition to Terminate Parental Rights.⁹¹ This change, at first blush, seems to be a relatively minor procedural adjustment but, in reality, ushers in a brand new dialogue. The concept of “intervention,” initially created to facilitate cooperation between DCF and private adoption entities in the hopes of locating families for waiting children, has now become a statute about balancing the parent’s constitutional rights with the state’s compelling interest in protecting the child from abuse, abandonment, or neglect.⁹² Florida Statute § 63.082(6) has itself become the Florida legislature’s identification of the “least restrictive means” to accomplish that goal.⁹³

However, the fight does not end there. Even with the progress made since 2003, intervention continued to be a slow change.⁹⁴ There still existed the problem that parents were not being told of their right to participate in the permanency of their child through an intervention proceeding.⁹⁵ Effective July 1, 2016, the Florida Legislature amended the intervention statute to remedy issues that continue to occur. The main focus of the change was for a parent’s right to intervention to be shouted loud and proud, early and often.⁹⁶

To encourage intervention earlier in a case, Section 63.082(6)(g) now requires the trial court to provide written notice of the right to participate in a private adoption three times: at the arraignment hearing, in the case plan approval order, and in the order changing the permanency goal to adoption.⁹⁷ Prior to the 2016 amendment, the court was only required to advise the parent of the option to participate in a private adoption plan once it was so far along in the case that reunification was no longer a viable option and the department was proceeding to terminate the parental rights to the child.⁹⁸ However, providing a parent with sufficient notice was not the only goal of the 2016 amendment.

⁸⁹H.B. 1163, 114th Sess. (Fla. 2012).

⁹⁰FLA. STAT. ANN. § 63.082 (West 2012).

⁹¹FLA. STAT. ANN. § 63.082(6)(g) (West 2012).

⁹²FLA. STAT. ANN. § 63.082 (West 2013).

⁹³FLA. STAT. ANN. § 63.082(6)(b)(West 2013).

⁹⁴Jeanne T. Tate, *supra* note 56.

⁹⁵Jeanne T. Tate, *supra* note 56.

⁹⁶Jeanne T. Tate, *supra* note 56.

⁹⁷FLA. STAT. ANN. § 63.082(6)(g) (West 2016).

⁹⁸FLA. STAT. ANN. § 63.082(6)(g) (West 2013).

A major change the Guardian ad Litem Program (GALP) advocated for was the standard by which the court should determine changing the child's placement when a parent signs a valid consent.⁹⁹ A huge impetus for this change was the shock that arose after *In re Adoption of K.A.G.*¹⁰⁰ In 2014, Florida's Fifth District Court of Appeals was faced with a situation where a father, charged with murdering the child's mother, executed a consent prior to the termination of his rights for the adoption of the child directed to the paternal grandmother.¹⁰¹ There was a knee-jerk reaction that boiled down to total shock that a man who was charged with murder could use the statutes to take the child out of the maternal aunt's care and place the child in his own mother's care.¹⁰² The Court ultimately held that the intervention statute was inapplicable in this case because the child was not in the custody of the department but the case raised a number of questions about how the language of the statute might need to be improved or modified.¹⁰³ The 2016 amendment lessens the ambiguity of the previous language in 63.082(6)(a) by dictating that intervention applies to cases in which the child is in DCF's custody or under the department's supervision, thereby solidifying a parent's right to a private adoption.¹⁰⁴

However, even though the court in *K.A.G.* found the intervention statute inapplicable, the fear still existed that a parent charged with egregious conduct in another case could potentially intervene and decide where to place the child. Therefore, the statute was further amended to allow the court to consider whether the change of placement is in the best interests of the child, instead of only requiring the determination of whether the placement is "appropriate."¹⁰⁵ Section 63.082(6)(e) lists all the relevant factors the court must consider in making this determination and allows the court to consider certain factors that they could not before—including the recommendation of the GALP and whether the parent has acted with egregious behavior.¹⁰⁶

⁹⁹Jeanne T. Tate, *supra* note 56.

¹⁰⁰Jeanne T. Tate, *supra* note 56.

¹⁰¹See *In re Adoption of K.A.G.*, 152 So. 3d 1271 (Fla. Dist. Ct. App. 2014).

¹⁰²Jeanne T. Tate, *supra* note 56.

¹⁰³*K.A.G.*, 152 So. 3d at 1275.

¹⁰⁴FLA. STAT. ANN. § 63.082(6)(a) (West 2016).

¹⁰⁵Compare Fla. Stat. Ann. § 63.082(6)(c) (West 2013), and Fla. Stat. Ann. § 63.082(6)(c) (West 2016).

¹⁰⁶Compare Fla. Stat. Ann. § 63.082(6)(e) (West 2013), and Fla. Stat. Ann. § 63.082(6)(e) (West 2016).

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

1. The permanency offered;

GOING FORWARD

To be fair, none of this involves new concepts, but rather it is about getting back to basics. When private individuals first banded together to try and help abused children, it is highly doubtful that any of them ever envisioned anything along the lines of our current government-operated child welfare agencies. The early efforts struggled with an inability to successfully intervene in circumstances that were detrimental to children. Because of the rights of the parents, oftentimes too little could be done to protect the children. Over a century later, much has changed. Children can be protected by the state and parents today struggle to maintain authority over their children in the face of large powerful child welfare agencies. In this pendulum swing, the sense of an appropriate balance, consistent with constitutional principles, appears to have been lost. Florida Statute § 63.082(6) is, therefore, not revolutionary or cutting edge, but rather reflects the need to return to a more balanced approach to these conflicting rights. Neither extreme is an ideal that we, as a society, should accept. We cannot abandon children to be abused or neglected while we stand by unable to provide assistance to relieve the suffering of our most vulnerable citizens. We also, however, cannot condone a situation where parents have no rights and all decisions regarding the best interests of a child are made by the state with little or no limitations on that authority. It is difficult to argue that permitting parents to participate in permanency planning for their child is an appropriate balancing of these interests, but theories are often easier than on the ground realities.

When the dependency court is faced with a parent who wants to exercise their right to participate in permanency planning, but the parent's preferred plan appears to be detrimental to the child's best interest, how should this conflict be resolved? How "detrimental" does it have to be before we deny the parent's constitutional rights? A little or a lot? And who determines what is "detrimental"? What if one parent wants the child to stay where he or she currently is living, but the other parent wants the

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

child placed elsewhere? What if a parent wants to participate in the selection of a permanent adoptive home for the child, and executes a consent in accordance with Florida Statute § 63.082(6), but the parent is accused of having engaged in behavior extremely harmful to the child? Should we still grant consideration to that parent's desire? What if the parent's selection of a permanency option for the child appears to be collusive in order to allow that parent to acquire access to the child again in the future, which could expose the child to future abuse or neglect? These are just some of the many concerns that improper balancing could leave unresolved. Florida Statute § 63.082(6) presents an opportunity to achieve a functional balance. Yet these types of issues will need to be resolved case by case, and until these questions are answered by the courts, we will not be able to predict the level of success that the statute will ultimately have or the impact the private adoption entities will be able to have in the dependency arena.