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I. Introduction

The desire to protect and provide for our children is fundamental to our society, embedded in both our state and federal systems of law. Both systems of law have their own mechanisms by which they reach this end; however, when federal immigration protections are married to existing state dependency systems there are bound to be some complications. One unintended consequence is the current circuit split among the Florida District Courts of Appeal relating to one of the seven Florida dependency provisions.[1] At issue is the definition of a dependent child under section 39.01(15)(e), Florida Statutes, which includes a child the court finds "[t]o have no parent or legal custodians capable of providing supervision and care."[2]

The Florida District Courts of Appeals ("DCAs") have disagreed on the application of section (15)(e) in cases where the child has an adult providing for him or her, but the adult is not a parent or legal custodian. Certain Florida courts have expanded section 39.01(15)(e) of the Florida Statutes[3] to include caregivers, while others have stuck to its literal language.[4] This Note will explore: which interpretation of section (15)(e) is best supported by textual interpretation and legislative intent, the various legally recognized relationships between adults and children, and how this circuit split is intertwined with concerns regarding private dependency petitions filed by immigrant juveniles. The problems created by merging federal immigration law with Florida's existing state dependency system

* J.D., 2018, Florida State University School of Law; B.S., 2015, Florida State University.
[1]O.I.C.L. v. Dep't of Children & Families, 205 So. 3d 575, 576 (Fla. 2016).
[2]FLA. STAT. § 39.01(15) (2017).
[3]§ 39.01(15)(e).
[4]*See* L.T. v. Dep't of Children & Families, 48 So. 3d 928 (Fla. 5th DCA 2010); *see also* In re Y.V., 160 So. 3d 576, 578-79 (Fla. 1st DCA 2015).

are legitimate but can be assuaged in a number of ways by the courts, legislature, and even individual attorneys.

II. Survey of Florida Cases

Section 39.01(15)(e) is one of Florida's seven independent dependency provisions, defining a dependent child as one who has "no parent or legal custodians capable of providing supervision and care."[5] As stated above, the Florida District Courts of Appeal have disagreed in how to apply section (15)(e) of the Florida Statutes in cases where the child has an adult providing for him or her, but that adult is not a parent or legal custodian.

Previous courts have found children dependent because parents were simply not available—thus unable to provide supervision or care. For example, this sometimes happens if parents are incarcerated.[6] Some recent Florida cases have found that being cared for by an adult "caregiver" will preclude a finding of dependency, assuming the current caregiver is adequate.[7] In so reasoning, courts have focused on the "caregiver" term, defined as any "other person responsible for a child's welfare" under section 39.01(47) of the Florida Statutes.[8] This "caregiver" term does not appear in the statutory language of section 39.01(15)(e).

For example, the Third DCA recently reasoned that a godmother (who was not a legal guardian) qualified as an "other person responsible for a child's welfare" under section 39.01(47) of the Florida Statutes, thus preventing an adjudication of dependency under section (15)(e). [9] Similarly, in *O.I.C.L v. Department of Children & Families*, a child was being cared for by an uncle (who was not a legal guardian), and the Fourth DCA affirmed that the uncle's care also prevented adjudication of

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[5]§ 39.01(15)(e).
[6]*In re* T.S.M., 564 So. 2d 530 (Fla. 4th DCA 1990) (child was dependent due to having both parents in state prison); *see also* G.S. v. T.B., 969 So. 2d 1049 (Fla. 1st DCA 2007) (finding children were dependent due to being orphaned).
[7]*In re* B.R.C.M., 182 So. 3d 749, 752 (Fla. 3d DCA 2015), *decision quashed sub nom.* B.R.C.M. v. Florida Dep't of Children & Families, 42 Fla. L. Weekly S472 (Fla. Apr. 20, 2017); *see also* O.I.C.L. v. Dep't of Children & Families, 169 So. 3d 1244, 1248 (Fla. 4th DCA 2015); *In re* S.A.R.D., 182 So. 3d 897, 903 (Fla. 3d DCA 2016) (although section 39.01(15)(e) was not raised in the petition, the court considered the fact that he was being voluntarily and adequately taken care of, and brought up the section 39.01(47) definition of caregiver).
[8]*See* cases cited *supra* note 7.
[9]*B.R.C.M.*, 182 So. 3d at 752-54.

dependency.[10] The court stated the uncle, who was not a legal guardian, was capable of "capable of providing [both] supervision and care," repurposing the wording of section 39.01(15)(e).[11]

It should be noted, however, that the contours of this "circuit split" are muddled. Even the Fourth DCA agreed that a child was dependent under (15)(e) where the child lived with his girlfriend's parents who had no legal obligation to support him, and evidence was presented that the child's parents were deceased.[12] Additionally, in 2011 Judge Salter of the Third DCA wrote a majority opinion expressing that "T.J.'s aunt is not a 'parent or legal custodian capable of providing supervision and care' under section 39.01(15)(e). . . . T.J. has made a prima facie case that she is dependent."[13]

The First and Fifth DCAs, meanwhile, have stuck to the literal language of the provision. The Fifth DCA, following the statutory language nearly word for word, has stated that "a child is dependent if the child is an orphan and has no legal custodian. . . . [The child] was an orphan with no legal custodian and, therefore, he was dependent."[14] Along the same lines, the First DCA found that even if a responsible adult is available it does not prevent adjudication under section (15)(e). Due to the "lack of a legally compelled relationship between the children and their caretakers, they [are] not adequately protected from the harms Chapter 39 of the Florida Statutes is designed to prevent and remedy."[15]

III. Florida's Legislative Intent

A. Plain Meaning and Interpretive Canons

The Supreme Court has repeatedly held that "the starting point for interpreting a statute is the language of the statute itself."[16] The legislature explicitly sets out only two categories of caregivers in (15)(e): parents and legal custodians.[17] Starting with parents, the legislature defines a parent as follows:

> 'Parent' means a woman who gives birth to a child and a man whose consent to the adoption of the child would be required under

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[10] *O.I.C.L.*, 169 So. 3d at 1248.
[11] *Id*.
[12] F.L.M. v. Dep't of Children & Families, 912 So. 2d 1264, 1269 (Fla. 4th DCA 2005).
[13] *In re* T.J., 59 So. 3d 1187, 1190 (Fla. 3d DCA 2011).
[14] L.T. v. Dep't of Children & Families, 48 So. 3d 928 (Fla. 5th DCA 2010).
[15] *In re* Y.V., 160 So. 3d 576, 578-79 (Fla. 1st DCA 2015).
[16] CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).
[17] Fla. Stat. § 39.01(15)(e) (2017).

> s. 63.062(1). The term 'parent' also means legal father as defined in this section. If a child has been legally adopted, the term 'parent' means the adoptive mother or father of the child. For purposes of this chapter only, when the phrase 'parent or legal custodian' is used, it refers to rights or responsibilities of the parent and, only if there is no living parent with intact parental rights, to the rights or responsibilities of the legal custodian who has assumed the role of the parent.[18]

In regard to "legal custodians" or "legal guardians," as defined in section 39.01(34), Florida Statutes, the term "legal custody" means:

> [A] legal status created by a court which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to protect, nurture, guide, and discipline the child and to provide him or her with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care.[19]

A legal "permanent guardianship" means "a judicially created relationship between the child and caregiver which is intended to be permanent and self-sustaining and is provided pursuant to the procedures in chapter 744."[20]

By comparison, section 39.01(10), Florida Statutes broadly defines the term "caregiver" as "the parent, legal custodian, permanent guardian, adult household member, or other person responsible for a child's welfare as defined in subsection (47)."[21] Subsection 47 goes on to define "other person responsible for a child's welfare" to include:

> [T]he child's legal guardian or foster parent; an employee of any school, public or private child day care center, residential home, institution, facility, or agency; a law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice; or any other person legally responsible for the child's welfare in a residential setting; and includes an adult sitter or relative entrusted with a child's care.[22]

Considering the care, the legislature has taken to explicitly define "legal custody," "guardian," and "caregiver" outside of the list of dependency grounds, the terms "parent" or "legal custodian" in (15)(e)

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[18]§ 39.01(50).
[19]§ 39.01(34).
[20]§ 39.01(35).
[21]§ 39.01(10).
[22]§ 39.01(47).

alone are probably not ambiguous enough to warrant broader interpretation. Additionally, the legislature has taken care to elaborate on the joint phrase "parent or legal custodian" within the definition of "parent" which informs the court that consideration of a child's legal custodian should be secondary to that of a parent.[23] This provision does not elucidate whether the term "caregiver" fits into this phrase.

Ultimately, if lacking in ambiguity, the plain meaning of the text controls. The strict interpretation favored by the First and Fifth DCAs follows one of the most basic, interpretive canons, *expressio unius*—when a statute designates certain things, all omissions should be understood as exclusions.[24] Simply put, had the legislature intended to include the term "caregivers," it would have done so. This rule, however, should be applied within reason, and courts reject the application of the doctrine almost as often as it is used.[25] In determining if *expressio unis* should apply, "courts may consider whether there is reason to believe that the legislature considered and rejected alternatives," i.e. whether the exclusion was purposeful.[26]

Based on an overview of the statutory text alone, the legislature's exclusion of the term "caregiver" is more likely to be intentional than it is to be legislative oversight, although the argument is not overly robust. It is normally assumed that the legislature intends to be consistent and coherent (The Whole Act Rule).[27] Section (15)(a), the first dependency ground, lacks the term caregiver just like (15)(e), stating that a dependent child is one has "been abandoned, abused, or neglected by the child's parent[s] or legal custodians."[28] Section (15)(c) applies to situations where a child has already been sheltered, and "a case plan has expired and the

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[23]§ 39.01(50) ("[W]hen the phrase 'parent or legal custodian' is used, it refers to rights or responsibilities of the parent and, only if there is no living parent with intact parental rights, to the rights or responsibilities of the legal custodian who has assumed the role of the parent.").

[24]Boudette v. Barnette, 923 F.2d 754, 756-57 (9th Cir. 1991); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[25]HILLEL Y. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE, 208 (2014).

[26] *Id*.

[27]General interpretative principle known as the "Whole Act Rule" according to which "each term of provision of a statute should be viewed as part of a consistent and integrated whole." James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12-13 (2005). *In pari materia* ("on the same subject") cannon dictates that statutes should be read together. West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100-01 (1991). *See* FLA. STAT. § 1.04 (2017) (Statutory Construction).

[28]§ 39.01(15)(a).

parent or parents or legal custodians have failed to substantially comply with the requirements of the plan." Section (15)(f) follows suit by defining a dependent child as one found "to be at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians."

At first, this consistency in only singling out parents or legal custodians seems to strongly support the idea that the term caregiver does *not* belong in (15)(e), and thus *expressio unius* should apply. However, the last provision bucks the trend by defining a dependent child as one found "[t]o have been sexually exploited and to have no parent, legal custodian, *or responsible adult relative* currently known and capable of providing the necessary and appropriate supervision and care."[29] Additionally, upon further inspection, the legislature has been less consistent with terminology in the rest of the chapter than it was within the list of seven dependency grounds. As stated above, the full definition of abandonment includes the term caregiver ("in the absence of a parent or legal custodian, the caregiver"). Under the definition of "abuse," harm to the child can be perpetrated by "any person" while neglect can be "perpetrated by an" other person responsible for the child's welfare."

The lack of streamlined terminology severely weakens arguments on *either* side that the legislature was consistent in excluding *or* including the term caregiver in its dependency provisions. The legislature has used several different terms even in the same subsection of the act: "caregiver," "responsible adult relative," "other person responsible for the child's welfare," and "any person." Although these terms may arguably have a common meaning or purpose for being in the statute, because the statute uses different terms, the usual presumption is that different terms mean different things. Otherwise, the legislature would have used the same term. This presumption is an offshoot of the rule against surplusage—if these terms were all read to have the same meaning, it would mean the legislature has used meaningless, surplus language.[30] On the other hand, the fact that several of these broad, catchall category terms were included in *some* provisions lends itself to a tentative argument that the legislature considered, but chose not to, include any such *similar term* in (15)(e).

As a related note, it is important to distinguish cases in which a juvenile presented a (15)(e) argument in his private dependency petition, and those in which he did not. For example, in *S.H. v. Department of Children and Families*, the petitioner raised a single dependency ground: abandonment.[31] In this case, consideration of his caregiver—his uncle—

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[29]§ 39.01(15)(g) (emphasis added).
[30]LEVIN, *supra* note 25, at 210.
[31]880 So. 2d 1279, 1280 (Fla. 4th DCA 2004).

was appropriate to preclude adjudication because the statutory definition of abandonment in section 39.01(1) contains parents, legal custodians, and caregivers.

While there is no consistent usage, the legislature does frequently use the term caregiver or an equivalent term throughout Chapter 39 as a catchall.[32] The most apparent benefit the Legislature receives from using the word "caregiver" throughout the Florida Statutes is the fact the term *is* vague. The word "caregiver" is a general, layman's term that is often used as a placeholder, rather than having to repeatedly list parent, or legal guardian, or legal custodian, or permanent guardian, etc. For example, section 39.001(7) of Florida Statutes, which defines "parent, custodial, and guardian responsibilities," uses "caregiver" interchangeably with these terms instead of repeating the triad.[33]

There is an argument that the legislature's larger purpose in using the term "caregiver" throughout the Florida Statutes is to widen the net of children who can be adjudicated dependent. The legislature expanded potential adjudications, for example, by inserting the term "caregiver*"* into section 39.201(1)(a), which mandates reporting of child abuse, abandonment, or neglect by any "parent, legal custodian, caregiver, or other person responsible for the child's welfare . . . ."[34] Those abandoned by their "caregiver" or neglected by another "person responsible for the child's welfare" will still be adjudicated dependent.[35] Under these provisions, including the term "caregiver" (or similar term) consistently *expands* the net. The legislature's intent may ostensibly be to prevent a child from falling through the cracks of a legal technicality. Section (15)(e), however, is unique because it has negative phrasing ("to have *no*"). Including the term "caregiver" (or similar term), while consistent with the other provisions, has just the opposite effect because it *constricts* the net.

The circuit split, however, probably is best framed as a discussion of the absurd results doctrine, an equally established principal of statutory

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[32]*See* § 39.01(1) (Abandonment) and § 39.201(1)(a) (Mandatory Reporting).
[33]§ 39.001(7) ("Parents, custodians, and guardians are deemed by the state to be responsible for providing their children with sufficient support, guidance, and supervision. The state further recognizes that the ability of parents, custodians, and guardians to fulfill those responsibilities can be greatly impaired by economic, social, behavioral, emotional, and related problems. It is therefore the policy of the Legislature that it is the state's responsibility to ensure that factors impeding the ability of caregivers to fulfill their responsibilities are identified through the dependency process and that appropriate recommendations and services to address those problems are considered in any judicial or nonjudicial proceeding.")
[34]§ 39.201(1)(a).
[35]§§ 39.01(1), (30)(f).

interpretation.[36] Thus, terms such as *textualist* or *purposivist* are not quite right to describe the opposing sides of this circuit split—if due regard is given to the statutory text first, "then everyone is a textualist."[37] The divide comes from whether one considers the strict application of the language sufficiently absurd. The Third and Fourth DCAs follow a different interpretation based on this reasoning. These courts assert that extending dependency resources to children who are being well-taken care of would contravene of the larger goals of the dependency system and its laws—and as such, the language cannot be applied straightforwardly. The Third DCA reasoned that "[a] godmother is neither a parent nor legal custodian under the statute. However, it is apodictic among the canons of judicial interpretation that judicial interpreters should consider the entire text of a statute, including its structure and the physical and logical relation of its many parts, when applying the language of the statute to a set of facts [referring to the whole-act or whole-text rule]."[38] "We conclude, just as we did recently in *In re K.B.L.V.*: 'The purpose of the dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.' "[39]

The reasoning behind the absurdity doctrine is that a "statutory application which offends widely and deeply held social values must represent a failure of expression or foresight, which the legislators would surely have corrected had it come to their attention."[40] Some cases address statutory applications *so* absurd as to be accepted by both textualists and purposivists alike (e.g. *United States* v. *Kirby*, 74 U.S. 482 (1868)), whereas in others an absurdity to one person is merely a quirk to another. The doctrine is best used in cases of "true ambiguity. That is, where two different interpretations are plausible, the court will reject the interpretation that leads to absurd results."[41] In this regard, the Florida

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[36]Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892) ("[T]he legislature used general terms with the purpose of reaching all phases of that evil. . .. It is the duty of the counts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."); *see, e.g.*, Michael C. Dorf, *The Supreme Court, 1997 Term–Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 15 (1998).

[37]Morell E. Mullins, *Tools, Not Rules—The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 21 (2003).

[38]*In re* B.R.C.M., 182 So. 3d 749, 754 (Fla. 3d DCA 2015), *decision quashed sub nom.* B.R.C.M. v. Fla. Dep't of Children & Families, 42 Fla. L. Weekly S472 (Fla. Apr. 20, 2017).

[39] *Id*.

[40]JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 80 (2d ed. 2010).

[41]Levin, *supra* note 25, at 219.

courts have not undergone a traditional absurdity doctrine analysis. It appears that the courts are making an assessment of what the legislature would have wanted to give the purposes and goals of Chapter 39, with an implicit absurdity doctrine rationale.

The underlying rationale is that finding a child who has a caregiver to be dependent would be in conflict with Chapter 39's purpose, and to openly contravene the purpose of Chapter 39 would offend a "deeply and widely held social value." Going back to the text, the legislature's express purpose of Chapter 39 is "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; to promote the health and well-being of all children under the state's care; and to prevent the occurrence of child abuse, neglect, and abandonment."[42] This bland statement, however, hardly sheds light on the matter: whether Chapter 39's purpose refers only to the care, safety, and protection of children who are "truly needy."[43] The Third and Fourth DCAs have better grounding in this argument than in the plain text, because the practice in any case of the last century involving statutory construction is to give effect to the intent of the legislature.[44] The plain meaning "can be overcome by compelling evidence of a contrary legislative intent."[45] As such, the question is whether the plain text should control or if there is compelling evidence of contrary legislative intent—leading into the next section's discussion.

B. STATUTORY DEVELOPMENT AND LEGISLATIVE HISTORY

Courts often compare a statute to its predecessor statute. If the legislature reenacts the predecessor statute without changes, it is viewed as an affirmation of the previous language and its interpretations; if the legislature has made substantive changes, those changes can be a significant indicator of legislative intent.[46] While looking at statutory development is a textual tool of interpretation, it is useful to discuss it hand in hand with legislative history. Legislative history is often a useful source of information on the historical context and reasoning behind the legislature's decision to change the language.

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[42]FLA. STAT. § 39.001(1)(a) (2017).
[43]*B.R.C.M.*, 182 So. 3d at 752.
[44]WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 232 (2d ed. 2006).
[45] *Id*.
[46]Levin, *supra* note 25, at 215.

In this case, statutory development is significant in that the term "caregiver" *was* previously used in (15)(e), but removed. Prior to the major reorganization of chapter 39 in 1998, the forerunning provision stated that a dependent child was one found "[t]o have no parent, legal custodian, or *responsible adult relative* to provide supervision and care."[47] In 1998, during the rewrite of the chapter, the legislature struck the term "responsible adult relative" and replaced it with "caregiver."[48] The following year, the legislature erased the term "caregiver" entirely from the provision.[49] The term "caregiver" was methodically removed and replaced with "legal custodian" in several other parts of the statute. The current language of (15)(e) was put in place and has not been changed since 1999.

The committee reports from 1999 shed some light on why the term "caregiver" was removed. Conventionally, committee reports have been regarded as the most reliable form of legislative history[50]—or at least, the most accessible. In fact, very little history surrounding the legislature's 1999 enactment of (15)(e) is available other than two committee reports. The more detailed committee report, written by the Judiciary Committee, Committee on Children and Families, and Senator Mitchell, states that the 1999 bill "makes technical and necessary changes to chapter 39, F.S., to correct errors and inconsistences resulting from last year's major reorganization of the chapter during the 1998 session (ch. 98-403, L.O.F.). It clarifies the definitions, roles, obligations and rights of parents, legal custodians and caregivers depending on their involvement in proceedings under chapter 39, F.S."[51] Later on the committee states "[s]ubsequent to the rewrite of chapter 39, F.S., some errors and inconsistencies were uncovered [and] are being addressed to some extent in the proposed bill including clarifying the rights, responsibilities and legal obligations of parents, legal custodians and caregivers which vary according to their role and involvement in different proceedings under the chapter." "Specifically, it attempts to clarify the usage of the terms 'parent,' [] 'legal custodian,' and 'caregiver' . . . [i]t also clarifies that when the term 'parent or legal custodian' is used in any provision that it refers to rights or

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[47]FLA. STAT. § 39.01(11)(e) (1997) (emphasis added).
[48]FLA. STAT. § 39.01(14)(e) (1998); Ch. 98-403, Laws of Fla.
[49]FLA. STAT. § 39.01(14)(e) (1999); Ch. 99-193, Laws of Fla.
[50]MANNING & STEPHENSON, *supra* note 40, at 136.
[51]Fla. S. Comm. on Judiciary, Child. & Fams., Sen. Mitchell, SB 1666 (1999) Staff Analysis 1-2 (Apr. 15, 1999), *available at* https://archive.flsenate.gov/data/session/1999/Senate/bills/analysis/pdf/SB1666.ju.pdf.

responsibilities of the parent and only if there is no living parent, then the legal custodian stands in the stead of the parent."[52]

The committee report from the Committee on Children and Families specifically states "Section 1. Amends s. 39.001, F.S., 1998 Supp., to remove the terms 'guardian' and 'caregiver' and insert the term 'legal custodian.' The changes are technical and conforming."[53] Aside from the committee reports, there is no further discussion or explanation. No floor discussion was had addressing the choice of terminology, even when the amendment that methodically removed and replaced the term "caregiver" with "legal custodian" in several parts of the bill was presented on the floor.[54]

That the term "caregiver" *was* in the provision at one point, but removed, strongly supports a plain text interpretation of the statute. Both committee reports reflect an understanding that the "rights, responsibilities and legal obligations" of "parents, legal custodians and caregivers . . . vary."[55] The April committee analysis is "smoking gun" evidence of legislative intent, explicitly stating that one goal of the 1999 legislation was to clarify the terms "parent," "legal custodian," and "caregiver" in the aftermath of the previous year's statutory reorganization. The legislative history and the genuine variations in legal rights and responsibilities strongly support an intentional restriction of (15)(e) to parents and legal custodians.

C. THE MEANING OF PARENT, CUSTODIAN, GUARDIAN, OR CAREGIVER

Aside from canons of statutory interpretation and legislative history, an overview of the differences between a "parent," "legal custodian," and general "caregiver" weigh in favor of saying that the legislature's exclusion of the term "caregiver" in section 39.01(15)(e) was contemplative and purposeful. Repurposing "caregiver" to expand section (15)(e) is problematic because it would radically change the meaning of the provision. The "caregiver" umbrella encompasses many different categories that are unequal in legal weight. The legal distinctions would become muddied in a provision that is premised on these same distinctions.

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[52] *Id*.
[53]Fla. S. Comm. on Child. & Fams. & Sen. Mitchell, SB 1666 (1999) Staff Analysis 2 (Mar. 23, 1999), *available at* https://archive.flsenate.gov/data/session/1999/Senate/bills/analysis/pdf/SB1666.cf.pdf.
[54]*See* Fla. S. Jour. 1199 (Reg. Sess. 1999).
[55]*Supra* note 54.

Two practical classes of caregivers exist. One category consists of those who have legal custody of the child, such as parents and legal custodians. The second category is everyone else: those adults that have no legally conferred status or legally recognized relationship to a certain child. As a practical concern, a caregiver that falls under a category lower than that of a parent or legal custodian does not have the power to do things like sign, authorize, or request legal or medical documents for the child.[56] Only a parent or legal custodian can give consent to any medical treatment.[57] Perhaps surprisingly, even once parental rights are terminated, the Department of Children and Families (DCF) is still supposed to keep a parent informed of medical decisions.

For children that are without a parent or legal custodian (or if there *is* a parent or legal custodian, but they cannot be reached or refuse treatment), the statutorily designated next step is to obtain a court order giving consent to medical treatment.[58] However, medical treatment might be needed outside of normal working hours such that a court-order cannot be quickly obtained. Alternatively, DCF has the authority to consent; however, the authority of DCF to consent to medical treatment is limited to the time reasonably necessary to obtain court authorization.[59] These last two options are obviously fraught with timing concerns in a medical emergency but are the only apparent legal recourse for a child who is only being taken care of by someone who is not their legal guardian.

Furthermore, a parent's legal claim to their child is the strongest claim. The right to parent is recognized as a fundamental right.[60] So, a parent who has had their child sheltered from them has the opportunity to get custody back through the course of a dependency proceeding by completing their court-determined services.[61] Legal custodians or

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[56]§ 39.407 (concerning medical, psychiatric, and psychological examination and treatment of child, and physical, mental, or substance abuse examination of person with or requesting child custody in regard to children who are not committed to the Department of Children and Families).

[57]FLA. STAT. § 39.201(1)(a) (2017).

[58] *Id*.

[59]DCF can only consent to "ordinary" medical treatment; any kind of surgery is not considered an "ordinary" procedure so a court order must always be obtained for surgery. *See* § 743.0645; Dep't of Children & Family Servs. v. G.M., 816 So.2d 830, 831-32 (Fla. 5th DCA 2002).

[60]Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 648 (2014) ("The legal rights of parenting, often summarized as 'care, custody, and control' over one's children, were described by Justice O'Connor in *Troxel v. Granville* as 'perhaps the oldest of the fundamental liberty interests recognized by this Court.' ") (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)).

[61]§ 39.621(8). Reunification with parent is the first preferred permanency goal. § 39.621(2)(a).

permanent guardians are a step down: they have certain custody rights enumerated under statute, but if a child were removed from a legal custodian or permanent guardian, that custodian or guardian would not have the same rights as a parent in a dependency proceeding.[62]

Parents and legal custodians are held to more concrete legal responsibilities. For example, the parent or legal custodian of a child remains financially responsible for the cost of medical treatment provided to the child, even if the parent or legal custodian did not consent to the medical treatment.[63] By contrast, it is unclear what rights or affirmative duties other caregivers have–the only language used in the statute is "responsible for a child's welfare."[64] A school employee or day-care employee, one such statutorily enumerated caregiver, is responsible for the child's welfare–but common sense dictates that it would only be for the duration the child is at school or day care. In addition, the legislature chose to explicitly list the affirmative duties of a legal custodian: the "duty to protect, nurture, guide, and discipline the child and to provide him or her with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care."[65] There is no equivalent list of explicit duties or responsibilities for general caregivers.

The significance of a legally recognized relationship supports the idea that a general caregiver cannot be equated with a parent or legal custodian. A child without any legally recognized ties is subject to the charity and kindness of those who have no enforceable obligation to care for the child. The legislature did not treat general caregivers with the same weight as a parent or legal custodian/guardian, and a review of the pertinent responsibilities and duties supports this reasoning. While the presence of an already capable parent or legal custodian/guardian would surely prevent adjudication under section (15)(e), this logic should not extend to caregivers that have not been given any legally recognized relationship with the child.

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[62]*See* § 39.01(34). The term "custodian" encompasses "guardian," because legal custody is a legal status created by a court which vests in a *custodian* of the person or *guardian* . . .." (emphasis added). *Id.*
[63]§ 39.407 (13).
[64]§ 39.01(10).
[65]§ 39.01(34).

IV. Interaction between SIJ status and Dependency Provision Interpretation

A. WHAT IS SPECIAL IMMIGRANT JUVENILE STATUS?

The next section will discuss how Special Immigrant Juvenile (SIJ) status interacts with the interpretation of (15)(e). The issues surrounded (15)(e) have largely arisen in cases dealing with immigrant juveniles filing private dependency petitions—as such, a discussion of SIJ status is appropriate and necessary. As the Third DCA expressed, "[t]hat [this immigrant juvenile's] petition floats on an undercurrent of polarized views regarding national immigration policy is . . . without question."[66]

SIJ status was created in 1990 by the United States Congress through an amendment to the Immigration and Nationality Act (INA), to provide special consideration for undocumented juvenile immigrants who have suffered parental abuse, abandonment, or neglect.[67] The United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security, the agency charged with the ultimate power to grant SIJ status, has set out more exact requirements for its application.

The Code of Federal Regulations sets out the rules promulgated by USCIS to apply for SIJ status. An alien juvenile is eligible for classification as a special immigrant if he or she:

> (1) Is under twenty-one years of age;
> (2) Is unmarried;
> (3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;
> (4) Has been deemed eligible by the juvenile court for long-term foster care;
> (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and
> (6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in

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[66]*In re* B.R.C.M., 182 So. 3d 749, 766 (Fla. 3d DCA 2015), *decision quashed sub nom.* B.R.C.M. v. Fla. Dep't of Children & Families, 42 Fla. L. Weekly S472 (Fla. Apr. 20, 2017).

[67]WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 4 (2007), http://media.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf.

> which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents.[68]

Subsection 6 refers to what is commonly referred to as a "special findings order" or "best interest order" from a state dependency court. This order (1) certifies that reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law, and (2) states that it would not be in the juvenile's best interest to be returned to the parent's previous country of nationality or residence.[69] The juvenile then petitions for SIJ status by filing the requisite forms with USCIS.[70] USCIS then engages in its investigation and makes the ultimate determination as to whether SIJ status will be granted.[71]

While the federal regulation states that it requires "adjudication of dependency,"[72] it does not reflect Congress's changes to the SIJ status requirements.[73] The federal regulation does refer back to the original section 101(a)(27)(J) of the Immigration and Nationality Act[74]—Congress has since amended this act's codified language.[75] It is no longer strictly required that a juvenile be adjudicated dependent to apply for SIJ status—a quasi-declaration of dependency will do.[76] The juvenile can be:

> [D]eclared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with [one] or both of the immigrant's parents is not

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[68]8 C.F.R. § 204.11(c) (2018). The seventh provision only applies to aliens before June 1, 1994. *Id.*

[69]*Id.*; *see* Shannon Aimee Daugherty, Note, *Special Immigrant Juvenile Status: The Need To Expand Relief*, 80 BROOK. L. REV. 1087, 1087 (2015); Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2014).

[70]*SIJ Petition Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/green-card/special-immigrant-juveniles/sij-petition-process (last updated Sept. 21, 2016).

[71]Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2018); *H.S.P. v. J.K.*, 223 N.J. 196 (N.J. Sup. Ct. 2015).

[72]8 C.F.R. § 204.11(c)(3).

[73]William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (repassed and codified at 8 U.S.C. §1101).

[74]8 C.F.R. § 204.11(c) ("An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act . . . .").

[75]U.S. CITIZENSHIP AND IMMIGRATION SERVICES, MEMORANDUM ON TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (TVPRA) OF 2008: SPECIAL IMMIGRANT JUVENILE STATUS PROVISIONS (March 24, 2009) at 2 [hereinafter USCIS MEMO].

[76] *Id*.

viable due to abuse, neglect, abandonment, or a similar basis found under State law [emphasis added].[77]

The second provision allows a juvenile more flexibility in applying for SIJ status, in that it allows a change of placement, paternity action, or a similar court order deciding the child's placement or custody to satisfy the eligibility requirement. While the most common practice in Florida is to file a petition for dependency, under the language above it is perfectly acceptable to use another type of petition or action.[78] The USCIS application forms reflect this updated language.[79] As Judge Salter accurately pointed out in *In re T.J.*, a dependency adjudication is not required for SIJ status and this misperception can lead to unwanted outcomes: "T.J. should be eligible for placement with her aunt as a 'fit and willing relative,' section 39.6231 . . . The adjudication will permit T.J. to seek federal immigration status as a special immigrant juvenile . . . A summary denial, on the other hand, might incent T.J.'s aunt to truly 'abandon' T.J. at a police station or Department office in a misguided effort to obtain a dependency ruling."[80]

In sum, in order to be considered eligible for SIJ status, the juvenile must either be declared dependent by a state juvenile court or have any state court render a decision as to the legal or physical custody of the juvenile. However, there is still confusion in the legal landscape—a common belief in the dependency system is that *only* a dependency adjudication can render a juvenile eligible to apply for SIJ status.[81] This underutilization of other types of court orders, such as an order appointing guardianship, raises the bar for immigrant juveniles attempting to get SIJ

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[77]8 U.S.C. § 1101(a)(27)(J) (2018).

[78]Florida can look to other state and federal cases affirming the feasibility of using other types of orders. In *In re Menjivar*, a federal immigration administrative appeals unit found that a child was eligible for SIJ status because a Texas state court had designated a family member to serve as the child's guardian or conservator. *See* WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 9 (2007), http://media.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf; *see also B.F. v. Superior Court*, 143 Cal. Rptr. 3d 730, 732 (Cal. Ct. App. 2012) (finding that the action of a state probate court taking jurisdiction and rendering a decision as to the care and custody of the minors was sufficient to qualify the minors for SIJ status).

[79]USCIS Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant ("Have you been declared dependent upon a juvenile court in the United States, or have you been legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court?").

[80]*In re* T.J., 59 So. 3d 1187, 1191 (Fla. 3d DCA 2011).

[81]In Person Interview with Prof. Paolo Annino, Supervising Attorney, Children's Advocacy Clinic, Florida State University College of Law (Oct. 26, 2016).

status and has likely contributed to the perception of SIJ hopefuls misappropriating Florida dependency channels.[82] Greater utilization of other types of petitions can be one creative solution to the dissimilitude among the Florida District Courts of Appeal.

B. FEDERALISM AND APPLICATION ISSUES

Like many conflicts in the law, this circuit split becomes clearer when looked at through a federalism lens. State law has been subsumed for a larger federal goal; in response, state courts are on alert for misappropriation of their state judicial system. Congress has made several amendments over the years, expanding the availability of SIJ status. The amendments removed the "eligible for long-term foster care" requirement, and the threshold for application was expanded in three directions: by adding that a court could find the juvenile's "reunification 'with one *or both'* of the immigrant's parents is not viable due to abuse, neglect, abandonment, or *a similar basis under state law*."[83] The definition of "Special Immigrant Juvenile" was also expanded to include a child "who has been placed under the custody of an individual or entity appointed by a State or juvenile court."[84] Several other changes are explained in a memorandum issued by USCIS.[85]

Although the SIJ status determination belongs to the federal government, only state courts can make the needed dependency and best interest findings. Each dependency provision is a valid basis for dependency and therefore a valid basis for SIJ status.[86] Using existing state dependency provisions presents complications, because state dependency statutes were not designed for this purpose. It is likely that state-dependency provisions were envisioned with the "garden-variety" dependency case in mind.

Cases dealing with immigrant children are intertwined with larger issues. For one, attempts to locate and communicate with parents or other witnesses outside the United States are fraught with logistical difficulties. Additionally, the facts surrounding an alien juvenile's petition are naturally different than the typical case accounted for by the Florida

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[82]*O.I.C.L v. Dep't of Children & Families*, 169 So. 3d 1244, 1247 (Fla. 4th DCA 2015).
[83]USCIS MEMO, *supra* note 79. In stark contrast with the recent Florida Supreme Court's recent decision which dismissed a dependency petition for mootness, the 2008 amendments attempted to protect immigrant juveniles from being denied SIJ status on the basis of mootness by pegging the case to the age of the child at the time of filing. *Id.* (citing section 235(d)(6) of the TVPRA).
[84] *Id*.
[85] *Id*.
[86]8 U.S.C. § 1101(a)(27)(J)(i).

Legislature in Chapter 39. State judges must contemplate how to approach child abuse cases that originate outside the United States. This problem applies to *all* of Florida's seven dependency grounds. For example, imagine a fifteen-year old girl who lives safely and comfortably in the U.S., but whose parents firmly intend on forcing her into a marriage with a much older adult man when she is returned to her home country. If this case occurred in Florida alone, it would fit nicely under a section 39.01(15)(f) argument ("substantial risk of imminent abuse, abandonment, or neglect by the parents or legal custodians").[87] When relying on Florida law, courts have no clear guidance on whether to consider this an "immediate" threat of harm. She faces no harm in the United States. The danger is arguably speculative because it would not occur unless and when she is deported to her home country. The child faces what is essentially the "threat [of] deportation,"[88] which does not fit well under any dependency provision. The harm that will most assuredly occur at the hands of her parents depends on the federal government's decision to deport—but a state judge cannot read the minds of immigration authorities, and so the risk of deportation is difficult to ascertain. If that harm is inflicted, it is then arguably inflicted at the will of the federal government. Some aspects of immigration are inadvertently being brought into the courtroom for state judges to grapple with.[89]

Problems in applying state law to complex immigrant juvenile cases are undoubtedly what led to the sudden circuit split. In *In re K.B.L.V.*, the court expresses its sentiments towards the marriage of state and federal in this area as such: "It is as if we are customs agents, although the federal government will make the final decision. I admit to an erosion of roles between state and federal responsibilities in our federal system in recent times. However, we are not yet colonies or territories of the United States government. We correctly decline to subordinate ourselves to the whim of the United States Congress in this case."[90]

V. Conclusions

A multitude of factors indicate that the judicial expansion of section 39.01(15)(e), Florida Statutes, cannot be supported by the text or legislative purpose. I conclude that taking a straightforward approach and

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[87]FLA. STAT. § 39.01(15)(f) (2017).
[88]*In re* K.B.L.V., 176 So. 3d 297, 300 (Fla. 3d DCA 2015).
[89]As stated above, the federal government *requires* that a *state court* make a decision as to whether it is not in the child's best interests to return to his or her country of origin. 8 U.S.C. § 1101(a)(27)(J).
[90]In re K.B.L.V., 176 So. 3d 297, 301 (Fla. 3d DCA 2015).

sticking with the literal language of section (15)(e) is the more reasonable interpretation. A textual overview, the available legislative history, and the legal differences between a general "caregiver," a "legal custodian," and a "parent" all militate strongly in favor of saying that the legislature intentionally left out "caregiver" in section (15)(e). Only the lack of a capable parent or legal custodian, i.e. someone that the child has a legally significant relationship, would be so meaningful that it would render a child dependent on the state. The most concerning aspect of the judicial expansion of (15)(e) is that it would compel petitioners to show more than what Florida's statutory language requires.

This judicial expansion has appeared prominently in opinions concerning privately filed juvenile petitions, with language expressing strong skepticism towards petitions filed on behalf of juveniles seeking SIJ status.[91] It should be acknowledged that immigrant juveniles' petitions *are* different. Fact-finding is naturally more difficult: there are greater barriers to confirm allegations that took place in another country. Additionally, Florida's dependency system and its relevant statutes are not truly built to accommodate the involvement of private attorneys.[92] The Department of Children and Families is normally responsible for bringing dependency petitions and thus has the ability and incentive to regulate the flow of dependency cases. The introduction of private petitions upsets that balance. Perhaps one solution would be for the legislature to better amend dependency law and resources to accommodate for private petitioners. The ultimate answer, however, is to recognize that there will be difficulties in fact-finding and not to punish juvenile petitioners with complex cases.

Individual attorneys in the field play an important role. Private attorneys seeking dependency petitions for their clients should utilize other types of petitions to meet SIJ status eligibility. The federal statute does not strictly require that a juvenile be declared dependent, as discussed earlier.[93] Private attorneys should make full use of temporary custody, paternity, appointment of guardianship, custody, and support, and DJJ (commitment to a Department of Juvenile Justice detention center) orders. Admittedly, this solution does more to circumvent the problem than address it head on; however, greater usage of other types of court orders would reduce both the perception and *actual number* of SIJ hopefuls

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[91]*See supra* Section IV; *O.I.C.L.* 169 So. 3d at 1250 ("While this court is sympathetic to the plight of alien minors seeking the opportunity of a better life in the United States, the role of the trial judge is not to set immigration policy or to decide whether, as a humanitarian gesture, any particular alien minor should be permitted to stay in the United States.").

[92]*See, e.g.*, FLA. STAT. § 39.501(1), § 39.5075(4)-(5) (2017) (stating it is DCF's responsibility to file for SIJ status for a dependent child).

[93]8 U.S.C. § 1101(a)(27)(J)(i).

seeking dependency orders—thereby alleviating stress on state dependency system resources and avoiding the thorny legal issues that arise when state dependency law and immigration issues become intertwined.

USCIS should make it clearer that attorneys truly can use these other types of court orders. Although other types of orders are mentioned on the application forms for SIJ, the agency has not amended its published regulations to reflect Congress's amendments.[94] The current published Code of Federal Regulations is still in conflict with the U.S. Code and can be confusing for petitioners. It has likely misled many into believing a dependency adjudication is the only option for meeting SIJ eligibility.

If the courts must consider the caregiver in their dependency determination, they can. The caregiver can be an indicator of the parent's capability (or custodian's capability), for better or worse. Courts can focus on the key issue of section (15)(e)—does the child have a "capable parent or legal custodian"—and still consider the child's informal caregiver. For example, evidence can be presented as to whether the parent or legal custodian is the one who made appropriate arrangements with a caregiver, signed over power of attorney to the caregiver, is sending money to care for the child in their stead, or other factors that indicate the capability or lack of capability to parent.[95]

Florida's courts rightfully should be concerned with any potential abuse of judicial resources; however, the plain language of the statute is the interpretation best supported both by the text and known legislative intent, and keeps the legal distinctions between "parents," "legal custodians," and "caregivers" intact. The legal community must be tenacious in pursuing those solutions which achieve greater uniformity and reliability in the application of our laws, for all children in our state.

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[94]*See supra* Section III.

[95]Take, for example, a Tennessee case where the father worked as an over-the-road truck driver and had arranged for various caregivers for his child, most of whom he found at truck stops and restaurants; the father picked up the latest caregiver, who had outstanding warrants, in Atlanta, and after meeting her for one hour, moved her into his home and left the child with her for a period of three weeks. *In re Ronald L.D.*, No. E2011-01619-COA-R3-PT, 2012 Tenn. App. LEXIS 49, *1, *4 (Tenn. Ct. App. 2012).