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## You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List of Statutory Grounds for Termination of Parental Rights

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# FLORIDA STATE UNIVERSITY LAW REVIEW



YOU CAN NEVER GO HOME AGAIN:  
THE FLORIDA LEGISLATURE ADDS INCARCERATION TO  
THE LIST OF STATUTORY GROUNDS FOR  
TERMINATION OF PARENTAL RIGHTS

*The Honorable Jean M. Johnson & Christa N. Flowers*

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# YOU CAN NEVER GO HOME AGAIN: THE FLORIDA LEGISLATURE ADDS INCARCERATION TO THE LIST OF STATUTORY GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

THE HONORABLE JEAN M. JOHNSON\* AND CHRISTA N. FLOWERS\*\*

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## I. INTRODUCTION

Of all the roles one plays in life, that of being a parent is perhaps the most important. The role requires a huge commitment of time and emotional support. However, when a parent is unable to meet a child’s basic needs due to neglect or abuse, the best interests of the child may necessitate the revocation or termination of the parent’s right to custody of the child. In these crucial cases, a court, upon finding a parent to be unfit, may terminate the parent’s parental rights.<sup>1</sup>

Many statutory grounds for termination of parental rights exist in Florida.<sup>2</sup> However, cases may arise where termination is warranted but unavailable because the particular situation is not covered by a

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1. See FLA. STAT. § 39.464 (1997). Section 39.464 allows petitions for the termination of parental rights to be filed by the Department of Children and Families, a guardian ad litem, a licensed child-placing agency, or “any person who has knowledge of the facts alleged or who is informed of said facts and believes that they are true.” Id. § 39.464(1)(a)-(f).

2. See, e.g., id. § 39.464(1)(a)-(e); *infra* text accompanying note 13.

statute. In 1997, the Florida Legislature considered such a case, and in response, enacted chapter 97-226, Florida Laws, adding incarceration to the list of statutory grounds for termination of parental rights.<sup>3</sup> The new statute requires that the incarceration be for a substantial portion of the child's life.<sup>4</sup> Furthermore, the court must deem the parent to be either a violent career criminal, a habitual felony offender, a sexual predator, or to have been convicted of a sexual battery constituting a capital, life, or first degree felony or a substantially similar offense in another jurisdiction.<sup>5</sup> Additionally, the court must determine by clear and convincing evidence that it would be harmful to the child for the parent-child relationship to continue.<sup>6</sup>

This Article examines Florida's new termination of parental rights statute from a constitutional and judicial economy perspective. Part II discusses the grounds for termination available prior to the new statute, and the events leading to the new statute's enactment. Part III provides a summary of the requirements of the new statute. Part IV provides a constitutional analysis of the new statute, considering both substantive and procedural due process issues. Part V examines the effect the new statute will have on the judiciary. Part VI highlights potential problems with the new statute. Finally, Part VII concludes that despite its potential problems and uncertainty, the new statute is a welcome addition to the ongoing effort to protect Florida's children from harm.

## II. THE ROAD TO FLORIDA'S INCARCERATION-AS-GROUNDS-FOR-TERMINATION STATUTE

### A. Termination of Parental Rights Prior to the New Statute

Because termination of parental rights is a serious, permanent step, it occurs only under narrowly defined circumstances in Florida.<sup>7</sup> Section 39.464, Florida Statutes, details the grounds and processes surrounding voluntary and involuntary termination of parental rights.<sup>8</sup>

Voluntary termination of parental rights occurs when a parent executes a written surrender and consents to an order transferring custody of the child to the Department of Children and Families (Department), or to a licensed child-placing agency for subsequent

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3. See Act effective Oct. 1, 1997, ch. 97-226, 1997 Fla. Laws 3926 (amending FLA. STAT. §§ 39.464 (grounds for termination of parental rights), 39.469 (powers of disposition; order of disposition), 39.471 (oaths, records, and confidential information), 61.13 (custody following divorce) (1995)).

4. See FLA. STAT. § 39.464(1)(d)(1) (1997).

5. See *id.* § 39.464(1)(d)(2).

6. See *id.* § 39.464(1)(d)(3).

7. See *id.* § 39.464(1)(a)-(f).

8. See *id.*

adoption.<sup>9</sup> The Department or agency must be willing to accept custody of the child.<sup>10</sup> This is a relatively simple process compared to involuntary termination.

Petitioners permitted to seek involuntary termination of parental rights include the Department, a guardian ad litem, a licensed child-placing agency, or any person who has knowledge of or is informed of the stated facts and believes that such facts contain merit.<sup>11</sup> The petitioner seeking termination must meet certain requirements. First, the petitioner must file a petition in circuit court alleging one or more of the statutory grounds for termination.<sup>12</sup> Prior to enactment of the new statute, grounds for involuntary termination included when the identity or location of the parents was unknown and could not be ascertained; when the life or well-being of the child was threatened by the parents, irrespective of the provision of services; when the parents engaged in egregious conduct that threatened the life, health, or safety of the child or the child's siblings, or when the parent knowingly failed to prevent such conduct; and when the parents continued to abuse, neglect, or abandon the child after the child had been adjudicated dependent and a case plan had been filed with the court.<sup>13</sup>

In addition, the petitioner must demonstrate that the parents of the child were informed of their right to counsel and that a court previously adjudicated the child dependent.<sup>14</sup> Moreover, the petitioner must demonstrate that the best interests of the child would be served by granting the petition.<sup>15</sup> If the court finds that the grounds stated in the petition have been proven by clear and convincing evi-

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9. See *id.* § 39.464(1)(a).

10. See *id.*

11. See *id.*

12. See *id.* § 39.464(1)(a)-(e).

13. See *id.*

14. See *id.* § 39.4611(1)(b) (noting that the parents must have been offered a case plan, or a plan of rehabilitation, as described in FLA. STAT. § 39.464).

15. See *id.* § 39.4611(1)(c). Courts consider the following factors when determining the best interests of the child: (1) whether a permanent relative placement is available for the child; (2) whether the parents are willing and able to provide the child with the requisite food, clothing, shelter, and medical care; (3) whether the child's well-being will be endangered if reunified with the parents; (4) whether the child's mental and physical health needs can be met in the future; (5) whether the child would suffer harm by terminating the love, affection, and other emotional ties with the parents; (6) whether an older child is likely to remain in long-term foster care; (7) whether the child can form significant relationships with a parental substitute and enter into a more stable environment; (8) whether the child has lived in a stable environment for an extended period of time and whether it is desirable to maintain this continuity; (9) whether the child and the person with present custody have a strong relationship; (10) whether the court deems the child to be sufficiently intelligent to understand the situation to express a preference; (11) whether the child provides a recommendation to the guardian ad litem or legal representative. See *id.* § 39.4612.

dence, it must place the child in the custody of either the Department or a licensed child-placing agency for subsequent adoption.<sup>16</sup>

Typically, when a court terminates the parental rights of one parent, it terminates the rights of the other parent.<sup>17</sup> However, under certain circumstances a court may terminate the parental rights of one parent while leaving the other parent's rights intact.<sup>18</sup> These circumstances include when the child has one surviving parent, when the prospective parent's location is unknown, when the parent in question obtains such rights through a single-parent adoption, and when it is necessary for the child's protection.<sup>19</sup>

While Florida's statutes address a variety of circumstances under which it is appropriate to terminate parental rights, they do not address all situations that demand parental rights be terminated. Section 39.469, Florida Statutes, addresses one such situation that until 1997 was not included within the statutory grounds for termination of parental rights: termination of parental rights based solely on incarceration.<sup>20</sup>

Prior to the passage of the new statute, the non-incarcerated parent could attempt to petition the court for termination of the incarcerated parent's rights on the grounds of abandonment.<sup>21</sup> Florida courts, however, have consistently held that incarceration, in and of itself, does not constitute abandonment.<sup>22</sup> Therefore, an incarcerated

16. See *id.* § 39.469(2)(b)(2).

17. See *id.* § 39.469(4).

18. See *id.* § 39.469(4)(a)-(d).

19. See *id.*

20. See *id.* § 39.464(1)(d)(1)-(3). The new statute applies when the parent of a child is incarcerated in a state or federal correctional institution and:

1. The period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years;

2. The incarcerated parent has been determined by the court to be a violent career criminal as defined in s. 775.084, a habitual violent felony offender as defined in s. 775.084, or a sexual predator as defined in s. 775.21; has been convicted of first degree or second degree murder in violation of s. 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation in another jurisdiction which is substantially similar to one of the offenses listed in this paragraph . . . .

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

*Id.*

21. See *id.* § 39.464(1) (noting that any person who has knowledge of the facts alleged may petition for the termination of parental rights).

22. See, e.g., *B.W. v. Department of HRS*, 498 So. 2d 946, 948 (Fla. 1986) (declining to find abandonment where the incarcerated father, though unable to provide financial support for his children, still attempted to maintain contact with them); *Harden v. Thomas*, 329 So. 2d 389, 391 (Fla. 1st DCA 1976) (declining to find abandonment despite the father's life sentence).

parent could retain his or her parental rights even if the non-incarcerated parent argued that such rights might not be in the best interests of the child.<sup>23</sup> After learning of one family's story, Florida lawmakers moved to include incarceration for certain offenses as a statutory ground for the termination of parental rights.<sup>24</sup>

### B. The Spradley Case

In August 1990, Kim Spradley married John Edward Taylor following the birth of their son, Justin.<sup>25</sup> The marriage collapsed soon thereafter, and Kim moved with Justin into the apartment of her close friend, Lisa Kessler.<sup>26</sup> Taylor began stalking Spradley, begging her to return to him.<sup>27</sup> Enraged at his inability to convince his estranged wife to return home, Taylor broke into Lisa Kessler's apartment early on Thanksgiving morning, 1990, and thrust a knife into Kessler's neck eight times.<sup>28</sup> As a result of the wounds inflicted by Taylor, Kessler died, yet Taylor remained free for almost a year following the murder while police investigated the situation.<sup>29</sup> At his and Spradley's divorce hearing, he was charged with first degree murder and burglary.<sup>30</sup> He was convicted and sentenced to life in prison.<sup>31</sup>

When Kim Spradley remarried, she and her new husband were adamant that Justin not know about his natural father.<sup>32</sup> The Spradleys sought to have Justin's last name changed to Spradley when he reached school age, but Taylor, imprisoned at Marion Correctional Institution, fought the request and won.<sup>33</sup> He also filed for visitation and shared parental responsibility.<sup>34</sup> The Spradleys did not want Justin to visit Taylor in prison because they did not believe the contact to be in Justin's best interest.<sup>35</sup> They based this belief on the report of a child psychologist who had interviewed Justin and determined that because Justin believed Spradley was his natural fa-

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23. See *infra* Part II.B.

24. See Twila Decker, *Mom Tries to Keep Son From a Killer: His Dad*, ORLANDO SENT., Feb. 2, 1997, at A1 (detailing the story of Justin Taylor, who's father was incarcerated for committing murder).

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.* (noting that Taylor will not be eligible for parole until 2015).

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

ther, he would suffer emotional trauma if told about Taylor.<sup>36</sup> However, under Florida law, Kim Spradley had no legal recourse available to keep Justin from his father.

News of the Spradleys' situation reached Representative Evelyn Lynn.<sup>37</sup> Moved by the Spradleys' plight, Representative Lynn sponsored House Bill 1111,<sup>38</sup> which would permit courts to terminate the parental rights of parents incarcerated for certain offenses.<sup>39</sup> On May 30, 1997, the bill passed as chapter 97-226, Florida Laws.<sup>40</sup> Florida has now joined the growing ranks of states that allow incarceration as a ground for termination of parental rights.<sup>41</sup>

### III. A SUMMARY OF FLORIDA'S INCARCERATION-AS-GROUNDS-FOR TERMINATION STATUTE

For the new statute to apply, the parent must be incarcerated in a state or federal institution for a "substantial portion"<sup>42</sup> of time before

36. See Lori Horvitz, *Defiant Mom Refuses to Tell Son About Father*, DAYTONA NEWS-J., Dec. 16, 1996, at A1.

37. *Repub.*, Ormond Beach

38. Fla. HB 1111 (1997).

39. See Decker, *supra* note 24, at A1.

40. Act effective Oct. 1, 1997, ch. 97-226, 1997 Fla. Laws 3926 (amending FLA. STAT. §§ 39.464, 39.469, 39.471, 61.13 (1995)). The statute was enacted without the Governor's signature. See *id.* at 3932.

41. See e.g., ALA. CODE § 26-18-7(a)(4) (1996); ARIZ. REV. STAT. § 8-533(B)(4) (1997) (providing for termination of parental rights when the parent is "deprived of civil liberties due to conviction of a felony . . . if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years"); CAL. FAM. CODE § 7825 (West 1997) (noting that the proceeding "may be brought where . . . [t]he child is one whose parent or parents are convicted of a felony" and "the crime of which the parent or parents were convicted . . . prove[s] the unfitness of the parent or parents to have the future custody and control of the child"); COLO. REV. STAT. § 19-3-604(1)(b)(III) (1997) (stating that when determining the unfitness of the parent, the court shall consider the "[l]ong-term confinement of the parent of such duration that the parent is not eligible for parole for at least six years after the date the child was adjudicated dependent or neglected"); GA. CODE § 15-11-81(b)(4)(B)(iii) (1997) (courts may consider "a demonstrable negative effect on the quality of the parent-child relationship"); IOWA CODE § 232.116(1)(i)(2) (1997) (permitting termination of parental rights against parents who have been imprisoned for a period of five or more years); LA. CHILD CODE art. 1015(6) (West 1996) (allowing termination of parental rights after two years of incarceration); MICH. COMP. LAWS § 712A-19b(3)(h) (1997) (considering termination where "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding [two] years, and the parent has not provided for the child's proper care and custody and there is no reasonable expectation that the parent will"); WYO. STAT. § 14-2-309(a)(iv) (Michie 1997) (providing for termination of parental rights where the parent is incarcerated for a felony and is deemed unfit to have custody of the child).

42. FLA. STAT. § 39.464(1)(d)(1) (1997). The new statute does not define what constitutes a substantial portion of time. By not providing a definition, the Legislature has given the judiciary the discretion to adapt the rule to the particular facts of each case. Other state statutes have defined the length of incarceration considered detrimental to the child in a similar manner. However, some states have specifically defined the length of incarceration considered detrimental to the child. For example, Colorado allows for termination of parental rights when a parent will not be "eligible for parole for at least six years

the child attains eighteen years of age.<sup>43</sup> To terminate the incarcerated parent's rights, a court must deem the parent to be a violent career criminal, a habitual felony offender, or a sexual predator.<sup>44</sup> Parents convicted of first- or second-degree murder, sexual battery constituting a capital, life, or first-degree felony, or parents who have been convicted of a substantially similar offense in another jurisdiction may also have their rights terminated under the new statute.<sup>45</sup> The state must prove "by clear and convincing evidence that continuing the parental relationship with that incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interest of the child."<sup>46</sup>

The new statute also amended section 39.469, Florida Statutes, allowing the parental rights of only one of the parents to be terminated when that parent is incarcerated.<sup>47</sup> The court will enter an order terminating the rights of the incarcerated parent and place the child in the custody of the remaining parent.<sup>48</sup>

Chapter 97-226, Florida Laws, also amended section 61.13, Florida Statutes, which addresses child custody and support following dissolution of marriage. Florida law has a preference for shared parental responsibility following dissolution of marriage.<sup>49</sup> However, under the new statute, incarceration of a parent meeting the requirements of section 39.464(1)(d), Florida Statutes, creates a rebuttable presumption against granting shared parental responsibility in dissolution of marriage proceedings.<sup>50</sup> However, the convicted parent is not relieved of the duty to financially provide for the child.<sup>51</sup> Moreover, a parent may seek to completely terminate the incarcerated parent's parental rights in accordance with section 39.464(1), Florida Statutes.

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after the date the child was adjudicated dependent or neglected." COLO. REV. STAT. § 19-3-604(1)(b)(III) (1997).

43. See FLA. STAT. § 39.464(1)(d)(1) (1997).

44. See *id.* § 39.464(1)(d)(2).

45. See *id.*

46. *Id.* § 39.464(1)(d)(3).

47. See Act effective Oct. 1, 1997, ch. 97-226, Fla. Laws 3926 (amending FLA. STAT. § 39.469(4) (1995), codified at FLA. STAT. § 39.469(6)(1997)).

48. See *id.*

49. See FLA. STAT. § 61.13 (2)(b)(2) (1997).

50. See *id.*

51. See *id.* (stating "the convicted parent is not relieved of any obligation to provide financial support").

#### IV. THE CONSTITUTIONALITY OF ALLOWING INCARCERATION TO SERVE AS GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

In *Santosky v. Kramer*,<sup>52</sup> the United States Supreme Court held that “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”<sup>53</sup> In *Padgett v. Department of Health and Rehabilitative Services*,<sup>54</sup> the Florida Supreme Court adopted the holding of *Santosky* and further held that “this interest is especially implicated in proceedings involving termination of parental rights.”<sup>55</sup> Therefore, courts apply a very strict standard of review when determining whether termination of parental rights will violate a parent’s right to either substantive or procedural due process.<sup>56</sup>

##### A. Substantive Due Process

The United States Supreme Court has determined that fundamental rights are incorporated within the liberty provision of the Fourteenth Amendment’s Due Process Clause.<sup>57</sup> The Court has stated that this right to liberty “denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children.”<sup>58</sup> Therefore, courts must apply a high standard of review when deciding whether a state’s intrusion into a citizen’s private life, for example, by terminating parental rights, violates the parent’s substantive due process rights.<sup>59</sup> The standard of review in such a case is whether the challenged law serves a compelling state interest, and whether it accomplishes its goal through the least intrusive means possible.<sup>60</sup>

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52. 455 U.S. 745 (1982).

53. *Id.* at 753.

54. 577 So. 2d 565 (Fla. 1991).

55. *Id.* at 570.

56. *See id.* at 571.

57. Substantive due process jurisprudence originated from cases such as *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The concept of privacy with regard to family matters extends from the landmark decision of *Roe v. Wade*, 410 U.S. 113, 152-54 (1973), in which the Court found a “penumbra” of rights in the Constitution guaranteeing privacy regarding matters within the realm of the family. In Florida, the protection extended to this liberty interest in the context of the family stems from the privacy provision of article I, section 23 of the Florida Constitution. *See Fla. H.R. Comm. on Family Law and Children*, HB 1111 (1997) Staff Analysis 4 (June 13, 1997) (on file with comm.); *see also Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) (holding that a state may only intrude upon the parents’ fundamental right to raise their children when the children are threatened by harm).

58. *Meyer*, 262 U.S. at 398.

59. *See id.*

60. *See, e.g., Hroncich v. Department of HRS*, 667 So. 2d 804, 808 (Fla. 5th DCA 1995) (holding that in light of the fact that the mother’s mental illness could be controlled through medication, termination of parental rights was not the least intrusive means to prevent harm to the child).

The Florida Supreme Court applied this standard of review in *Beagle v. Beagle*.<sup>61</sup> *Beagle* concerned a statute that allowed grandparent visitation where either one or both parents prohibited a relationship between the minor child and the grandparents.<sup>62</sup> The parents objected to the grandparents' court-awarded visitation rights under the statute and challenged the statute's constitutionality.<sup>63</sup> The Florida Supreme Court agreed with the parents and held that the state may not intrude upon the fundamental rights of parents to raise their children except in cases where the children are threatened with harm.<sup>64</sup>

Further, in *Padgett*, the Florida Supreme Court stated that "before parental rights in a child can be permanently and involuntarily severed, the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child."<sup>65</sup> Therefore, the Florida courts can sever a parent's rights to his or her child if it can be shown by clear and convincing evidence that substantial risk of harm is posed to the child if the parent's rights are not terminated,<sup>66</sup> and that termination of parental rights is the least restrictive means of preventing harm to the child. If those standards are met, the termination can proceed without violating the parent's substantive due process rights.<sup>67</sup>

#### 1. Does Incarceration of a Parent Pose a Substantial Risk of Harm to the Child?

Incarceration of a parent cannot be used to show abandonment,<sup>68</sup> but can it by inference be used to show a substantial risk of future harm to the child?

If a parent is incarcerated for a substantial portion of time, and is thus unable to assume meaningful parental responsibilities, detriment to the child could occur.<sup>69</sup> In *Palmer v. Department of Health*

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61. 678 So. 2d 1271 (1996).

62. See *id.* at 1273; FLA. STAT. § 752.01(1)(e) (1997).

63. See *Beagle*, 678 So. 2d at 1273.

64. See *id.* at 1277 (holding that the interest of parents in determining the care and upbringing of their children free from governmental interference is a longstanding and fundamental liberty interest).

65. *Padgett v. Department of HRS*, 577 So. 2d 565, 571 (Fla. 1991).

66. See *id.* (holding that the state must prove by clear and convincing evidence that "reunification with the parent poses a substantial risk of significant harm to the child"); FLA. STAT. § 39.464(1)(d)(3) (1997).

67. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (stating that a state may violate privacy interests, but it must use the least restrictive means possible when so doing).

68. See *supra* note 22.

69. See H.R. Comm. on Family Law and Children, HB 1111 (1997) Staff Analysis 4 (June 13, 1997) (on file with comm.).

and Rehabilitative Services,<sup>70</sup> a court found a father's diagnosed pedophilia, which had not been treated and had no prospects of successful treatment, to be sufficient grounds to terminate his parental rights.<sup>71</sup> The Court stated that in this situation, the propensity for future behavior that would adversely affect the child could be reasonably predicted.<sup>72</sup>

The legislative intent behind the new statute seems clear. A parent incarcerated for a substantial period of time prior to the child turning eighteen cannot meaningfully participate in the upbringing of the child. The 1997 Legislature sought to prevent a child from languishing in foster care, unable to be adopted into a stable, nurturing environment because a long-term incarcerated parent will not relinquish his or her parental rights. In these instances, substantial harm would occur to the child. The child's best interests would be better served by terminating the incarcerated parent's rights, and allowing the child to live in a more stable family environment.<sup>73</sup>

Moreover, the Legislature considered the harm some children, such as Justin Taylor, would undoubtedly suffer by having to visit a parent who has been incarcerated for committing a violent crime.<sup>74</sup> For example, in Justin's situation, the revelation that his step-father was not his natural father and that his natural father was in jail for murder could damage his emotional well-being. Additionally, visiting incarcerated parents would subject children to an emotionally unhealthy environment and perhaps desensitize them to incarceration.

## 2. Is Termination of Parental Rights the Least Intrusive Means of Preventing Harm?

Termination of parental rights appears to be the most drastic step that the state can take. Because the least intrusive means standard is very fact specific, one must apply it on a case-by-case basis. Therefore, in the context of termination of parental rights, courts must determine if anything short of termination would effectively achieve

70. 547 So. 2d 981 (Fla. 5th DCA 1989).

71. See *id.* at 984.

72. See *id.*

73. See FLA. STAT. §§ 39.464, 39.4611 (1997); *Padgett v. Department of HRS*, 577 So. 2d 565, 570 (Fla. 1991).

74. In considering the psychological effect that children might experience when visiting an incarcerated parent, the rationale promulgated in *Palmer v. Department of HRS* regarding prospective abuse seems applicable. In *Palmer*, the court opined that the father had no reasonable hope of successfully completing the treatment, much less completing the treatment within a reasonable time. Because of this, the court reasoned that the child's emotional and physical well-being were placed at risk. See *Palmer*, 547 So. 2d at 984; see also *supra* text accompanying note 36 (stating that Justin Taylor would suffer emotional trauma if his mother told him that his natural father was in jail for murder and the only father he ever knew, his step-father, was not his real father).

the compelling state interest of preventing substantial harm to a child.

In many cases, termination of parental rights is the only means available to protect the child from harm. For example, in *In re DJS and JSG*,<sup>75</sup> the children were left without a permanent home due to the father's refusal to relinquish his parental rights.<sup>76</sup> The court considered the father's prior incarceration and his past history of abuse and neglect in deeming termination of parental rights the only viable solution.<sup>77</sup> It stands to reason that if a less intrusive means were available to protect the children from harm, the court would have used it.

At times, courts have reversed lower courts' termination of parental rights, finding that less intrusive means existed. In *Hroncich v. Department of HRS*,<sup>78</sup> the Fifth District Court of Appeal reversed a trial court's termination of parental rights because authorities failed to prove neglect by clear and convincing evidence.<sup>79</sup> The court noted that the mother's schizophrenia accounted for her initial lack of compliance with the performance agreement.<sup>80</sup> Additionally, the court noted that medication would stabilize her mental condition.<sup>81</sup> Therefore, the trial court's order terminating the mother's parental rights was not the least intrusive means that could be taken to protect the child.<sup>82</sup>

There is no bright-line rule for courts to use when determining whether or not termination of parental rights is the least intrusive means of preventing harm to a child. Therefore, courts must base such decisions on the facts of each particular case, including whether the parent is now, or may at some future time be, a danger to the child, or has abused, abandoned, or neglected the child to the extent that termination is the only viable option left to the state.<sup>83</sup>

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75. 563 So. 2d 655 (Fla. 1st DCA 1990).

76. See *id.* at 660.

77. See *id.* at 662-70 (considering factors such as the father's prior arrest for child abuse and his frequent failure to properly supervise his children, which resulted in a three-year-old child who often whimpered, stared into space, and was unable to feed himself or use the bathroom by himself).

78. 667 So. 2d 804 (Fla. 5th DCA 1995).

79. See *id.* at 808 (noting that prospective neglect is proven through evidence when "a parent's past conduct [] or current mental condition makes the risk of future harm to the child likely").

80. See *id.* at 806.

81. See *id.* at 806-07.

82. See *id.* at 807.

83. Compare *id.* with *Palmer v. Department of HRS*, 547 So. 2d 981, 984 (Fla. 5th DCA 1989) (finding a father's untreated pedophilia to be grounds to terminate parental rights).

## B. Procedural Due Process

In *Mathews v. Eldridge*,<sup>84</sup> the United States Supreme Court stated that government may not deprive an individual of a liberty or property interest within the meaning of the Fifth or Fourteenth Amendments without the benefit of procedures designed to prevent the risk of erroneous deprivation of the right in question.<sup>85</sup> The Court promulgated a test designed to ensure that proper procedures were followed prior to the deprivation of substantive property rights.<sup>86</sup> While children are certainly not property, the test is equally applicable to the protection of liberty interests, which include parental rights.<sup>87</sup> The test provides that a court should consider three factors when examining the constitutional sufficiency of administrative procedures prior to the initial termination of fundamentally protected rights.<sup>88</sup> Courts will consider:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.<sup>89</sup>

Extensive procedural safeguards are currently in place in Florida to prevent the erroneous deprivation of parental rights.<sup>90</sup> First, "[w]hen a petition for termination of parental rights has been filed, the clerk of the court shall set the case before the court for an advisory hearing."<sup>91</sup> The parents must be served with the petition.<sup>92</sup> The court must advise the parents before the adjudicatory hearing that they have a right to counsel,<sup>93</sup> and the court must continue to advise the parents of their right to counsel at each stage of the proceeding.<sup>94</sup> The court, if necessary, will determine if the parents knowingly and intelligently waived their right to counsel.<sup>95</sup> The court will then set an adjudicatory hearing within forty-five days of the advisory hear-

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84. 424 U.S. 319 (1976).

85. See *id.* at 321.

86. See *id.*

87. See *id.*

88. See *id.*

89. *Id.*

90. See FLA. STAT. § 39.467(1) (1997).

91. *Id.* § 39.461(3).

92. See *id.* § 39.462(1)(a)(1)(1)-(2).

93. See *id.* § 39.463.

94. See *id.* § 39.465(1)(a). This section further states that no waiver will be accepted by the court where it appears that the parent, guardian, or custodian of the child is unable to make an intelligent choice on the matter because of mental condition, age, education, experience, the nature and complexity of the case, or other factors the court might deem relevant. See *id.*

95. See *id.* § 39.466(1).

ing.<sup>96</sup> Only when the petitioner has proven his or her case by clear and convincing evidence, will parental rights be terminated.<sup>97</sup>

While the parents' privacy interest in continuing the parent-child relationship is substantial,<sup>98</sup> the law's detailed procedural requirements minimize the risk of erroneous deprivation.<sup>99</sup> Additionally, the new statute's failure to specifically define the required period of incarceration<sup>100</sup> further protects the parent's procedural due process rights because courts will not be constrained by an arbitrary time limit.<sup>101</sup>

#### V. JUDICIAL CONSIDERATIONS REGARDING FLORIDA'S INCARCERATION-AS-GROUNDS-FOR-TERMINATION STATUTE

In Florida, judges are given a great deal of discretion in dependency and child custody cases. The new statute continues that tradition. However, in practice, incarceration and felony convictions were already considered by judges in dependency and custody cases.<sup>102</sup> The main effect of the new statute is the weight those factors will be given, as they now must receive official consideration by judges considering termination of parental rights.<sup>103</sup>

The first difficulty judges will face is determining the meaning of the term "substantial portion" with regard to the amount of time the parent is incarcerated before the child reaches majority.<sup>104</sup> The new statute does not state what qualifies as a substantial portion of time.<sup>105</sup> Other state statutes have codified six years as a substantial portion of time.<sup>106</sup> For example, Arizona's statute, like Florida's, does

96. See *id.* § 39.466(3).

97. See *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

98. See *supra* Part IV.A.

99. See FLA. STAT. § 39.462 (1997).

100. See *id.* § 39.464(1)(d)(1).

101. See *id.* § 39.4612(2) (requiring courts to consider the parent's ability to provide the child with "food, clothing, medical care or other remedial care . . . and other material needs of the child"); *id.* § 39.4612(3) (noting that courts will inquire into the parent's capacity to "care for the child to the extent that the child's health and well-being will not be endangered upon the child's return home"); see also *B.W. v. Department of HRS*, 498 So. 2d 946, 948 (Fla. 1986) (holding that the father, despite his incarceration, had not abandoned his children because he attempted to maintain contact with them); *In re DJS and JSG*, 563 So. 2d 655, 666 (Fla. 1st DCA 1990) (considering the father's past incarcerations as evidence of prospective abuse of his children) (quoting *In re Baby Boy A*, 544 So. 2d 1136, 1137 (Fla. 4th DCA 1989)).

102. See FLA. STAT. § 39.464 (1997).

103. See *supra* Part III.

104. See *supra* Part III; FLA. STAT. § 39.464(1)(d)(1) (1997).

105. See, e.g., COLO. REV. STAT. § 19-3-604(1)(b)(III) (1997) (providing that at least six years of incarceration is required to terminate parental rights); see also LA. CHILD. CODE art. 1015(6)(a), (d) (West 1996) (stating that the child must have been in the custody of the Department of Health and Human Services for at least two years, and that the parent must have at least five more years of forthcoming incarceration).

106. See, e.g., ARIZ. REV. STAT. § 8-533(B)(4) (1997).

not set a specific time period.<sup>107</sup> Arizona's statute states in part that parental rights may be terminated when the parent has been incarcerated for a felony offense that carries a sentence of such length that the child would be deprived of a normal home "for a period of years."<sup>108</sup>

Despite this precedent from a state with a similar statute, there are likely to be differing opinions among Florida judges concerning what constitutes a substantial period of time. It can be anticipated, however, that the older the child and the longer the child has had a relationship with the incarcerated parent, the less likely the court will sever the relationship.

Moreover, in a chapter 61 proceeding regarding shared parental responsibility, it is presumed that incarceration of a parent is detrimental to best interests of the child.<sup>109</sup> In a chapter 39 proceeding, however, the state must prove by clear and convincing evidence that continuing the relationship would be detrimental to the best interests of the child. To overcome the state's evidence, the incarcerated parent will need to show financial support; meaningful involvement in the child's life such as participation and interest in school and athletic activities; actual physical care for the child such as bathing and feeding; and professed expressions of affection for the child prior to the period of incarceration.<sup>110</sup> The child's wishes, particularly those of older children, may be considered in some cases.<sup>111</sup>

While it is difficult to say how many termination for incarceration cases will be presented to the courts, it seems doubtful that there will be large numbers.<sup>112</sup> Any amount, however, presents logistical

107. See *id.*

108. In *re* Appeal in Maricopa County Juvenile Action No. JS-5609, 720 P.2d 548, 551 (Ariz. Ct. App. 1986) (noting that five years of incarceration constituted a sufficient period of time to deprive a father of his parental rights).

109. See FLA. STAT. § 61.13(b)(2) (1997).

110. See, e.g., In *re* B.W. v. Department of HRS, 498 So. 2d 946, 948 (Fla. 1986). In this case, the father was incarcerated. The state attempted to terminate his parental rights on abandonment grounds. The Florida Supreme Court denied the request to terminate the father's rights, partially on the grounds that the father repeatedly asked the HRS caseworkers and the foster parents to bring the children to the prison for visits. The father also wrote his children regularly. He also wrote the HRS workers, the foster parents, and school officials, inquiring about and expressing concern for the welfare of the children. As one of the requirements of abandonment in Florida is the failure to communicate with the children, the court refused to terminate parental rights in light of the father's attempted communication. See *id.*

111. If a younger child has a deep attachment to an incarcerated parent, deprivation of that parent could be more detrimental to the child than allowing the incarcerated parent to maintain parental rights. With an older child, the same principle applies, but an older child is presumably more emotionally secure, and therefore more able to make a rational decision about personal needs.

112. Courts will have to consider whether an appropriate home is available for the child. Courts will probably be less likely to sever parental rights if the child will merely languish in the state's foster care system. As with all adoptions, younger children have a

problems for the courts and prisons as they must ensure that prisoners are informed of and able to participate in the termination hearings. In the Colorado case of *In re C.G.*,<sup>113</sup> an incarcerated father filed suit against the state on the grounds that the state's refusal to transport him at state expense to his termination hearing was a violation of his right to procedural due process.<sup>114</sup> The Colorado Court of Appeals held that the denial was not a violation of the father's due process rights as he was represented by counsel prior to and during the hearing, and he was given the opportunity to present testimony by deposition or affidavit.<sup>115</sup>

From the judges' standpoint, the new statute has essentially added another criteria—that of felony incarceration for a substantial period of time—to the list of factors that are considered in the termination of parental rights. The new statute provides judges with the opportunity to further ensure that the best interests of Florida's children are upheld.

## VI. POTENTIAL DIFFICULTIES WITH THE NEW STATUTE

Most likely, courts will not apply the new statute in a uniform manner because of its lack of specificity regarding the requisite incarceration period. On the one hand, this lack of specificity will permit authorities to manipulate the statute to fit the particular circumstances of each case. On the other hand, authorities will not have concrete guidelines by which they can judge their actions. This problem can be easily remedied by adding a specific time period to the statute, thus making its application and effect uniform throughout the state. However, such an addition subverts the Legislature's intent of granting judges discretion when dealing with the facts of individual cases.<sup>116</sup>

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greater chance of being adopted than older children. In 1996-1997, there were 532 children below age five awaiting adoption after termination of parental rights. There were 858 children between the ages of six and 12 and 281 children between the ages of 13 and 15 awaiting adoption. Finally, only 51 children between the ages of 16 and 18 were awaiting adoption after termination of parental rights. The breakdowns in ages of children actually adopted were not available from the Department of Children and Families. However, one can assume that the Department is not seeking termination of parental rights in the cases of older children because it will be harder to place them in permanent homes. Moreover, because there are such large numbers of younger children available for adoption, one must wonder how likely it is that the state will seek to add to the pool of children awaiting good homes. See DEPARTMENT OF CHILD. AND FAM., ADOPTION AND RELATED SERVICES ANNUAL SUMMARY REPORT (1996-1997); see also FLA. STAT. § 39.4611(1)(c)(6) (1997) (requiring the court to consider the likelihood that an older child will remain in long-term foster care).

113. 885 P.2d 355 (Colo. Ct. App. 1994).

114. See *id.* at 357.

115. See *id.*

116. Telephone Interview with Peggy Sanford, Staff Attorney for the Florida House of Representatives Committee on Children and Family Law (September 15, 1997). Ms. San-

Certain “functional” problems also exist regarding the inclusion of incarcerated parents in termination of parental rights proceedings. Transporting prisoners and scheduling hearings will have to be strictly monitored to ensure that, for procedural due process, an incarcerated parent can be present at proceedings if desired.<sup>117</sup> A statutory provision defining procedures for those situations would enable the judiciary to more effectively apply the new statute in a constitutionally valid manner.

## VII. CONCLUSION

The addition of incarceration as grounds for termination of parental rights presents many meaningful questions. As the constitutionality of the new statute seems secure, the most profound impact of the statute will be its effect on the judiciary. The new statute allows the courts an additional means by which parental rights can be terminated. However, it presents uncertainty, as courts must determine what length of sentence justifies termination, and whether the termination is truly in the child’s best interest.

Perhaps Chief Justice Shaw stated it best when he said “While we are loath to sanction government interference in the sacrosanct parent-child relationship, we are more reluctant still to forsake the welfare of our youth. Florida’s children are simply too important.”<sup>118</sup> In spite of the difficulties that will come, if the new statute protects even one child from harm it can be considered a success.

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ford stated that the Legislature purposely did not promulgate a specific time limit because it was impossible to cover every possible situation. Ms. Sanford explained that the Legislature left the time limit to the court’s discretion to apply it to the facts of each case.

117. See *supra* Part IV.B. Incarcerated parents do not have statutory right to attend hearings as long as they can participate by phone. Courts do not transport prisoners incarcerated for serious felony offenses such as murder.

118. *Padgett v. Department of HRS*, 577 So. 2d 565, 571 (Fla. 1991).