

# THE PROVERBIAL RIGHT-WITHOUT-A-REMEDY DILEMMA TO EFFECTIVE COUNSEL IN FLORIDA TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

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## I. INTRODUCTION

A parent who is subjected to Florida termination of parental rights proceedings has a right to counsel and an indigent parent has a right to appointed counsel for an important reason:<sup>1</sup> due to its complexity, a nonattorney parent can hardly be expected to navigate through such proceedings without counsel.<sup>2</sup> Specifically, while recognizing a right to counsel for indigent parents, the Florida Supreme Court held that “counsel must be appointed for (1) the natural married or divorced indigent parents of the child, (2) the natural indigent mother of an illegitimate child, and (3) the natural indigent father of an illegitimate child when he legally has recognized or is in fact

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<sup>1</sup> A.G. v. S.A., 40 So. 3d 908, 909 (Fla. Dist. Ct. App. 2010).

<sup>2</sup> L.W. v. Dep’t of Health & Rehabilitative Servs., 695 So. 2d 724, 726 (Fla. Dist. Ct. App. 1996) (citing Cleaver v. Wilcox, 499 F.2d 940, 945 (9th Cir. 1974)).

maintaining the child.”<sup>3</sup> However, “[m]andatory appointment of counsel for the father of an illegitimate child who has not legally acknowledged or in fact supported the child” is not required by statute or case law.<sup>4</sup>

If the parent’s right to counsel is violated before the lower court, such violations are considered fundamental errors, which the appellate court can address for the first time on appeal.<sup>5</sup> That said, a distinction exists between the absence of counsel and ineffective assistance of counsel: once the latter occurs (e.g., counsel fails to raise an issue that could have changed the outcome of the case thereby not preserving it for appellate review), appellate courts will not reverse the trial court’s order terminating parental rights even if such an issue is raised for the first time on appeal.<sup>6</sup> The parent wishing to challenge the trial court’s order will not prevail and no other mechanism of enforcing his or her right to effective counsel is available.<sup>7</sup> This Article addresses the issue of the right to counsel in Florida termination of parental rights proceedings without a corresponding mechanism of enforcement.<sup>8</sup>

## II. THE EXTENT OF THE RIGHT TO COUNSEL IN TERMINATION PROCEEDINGS

The Florida “legislature codified the statutory right to counsel in 1995.”<sup>9</sup> “As originally enacted, the right [to appointed counsel] was limited to indigent parents who had been ‘threatened with criminal charges based on the facts underlying the dependency petition or a permanent loss of custody of their children . . . .’”<sup>10</sup> Today, section

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<sup>3</sup> *In re D.B.*, 385 So. 2d 83, 91 (Fla. 1980).

<sup>4</sup> *Id.*

<sup>5</sup> *A.G. v. Fla. Dep’t of Children & Families*, 65 So. 3d 1180, 1183 n.1 (Fla. Dist. Ct. App. 2011) (citing *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)) (“Denial of counsel is always harmful, regardless of the strength of the admissible evidence, and can be properly categorized as per se reversible [error].”).

<sup>6</sup> *See Aills v. Boemi*, 29 So. 3d 1105, 1108-10 (Fla. 2010) (stating the requirements for proper preservation of an error for appellate review).

<sup>7</sup> *See In re E.K.*, 33 So. 3d 125, 127-30 (Fla. Dist. Ct. App. 2010).

<sup>8</sup> *See infra* Part II-III.

<sup>9</sup> *C.L.R. v. Dep’t of Children & Families*, 913 So. 2d 764, 767 (Fla. Dist. Ct. App. 2005).

<sup>10</sup> *Id.*

39.013(1) of the Florida Statutes establishes the statutory right to appointed counsel in dependency proceedings against indigent parents.<sup>11</sup> Specifically, section 39.013(1) states that “[p]arents who are unable to afford counsel must be appointed counsel.”<sup>12</sup> To ensure this right is not impaired, the trial court presiding over the dependency proceeding must advise a parent of his or her right to counsel at each stage of the proceedings.<sup>13</sup>

As written and construed, this right to counsel extends only to parents of the child.<sup>14</sup> Thus, for instance, the Second District concluded that an indigent grandfather who had been the child’s *de facto* parent for essentially the child’s entire life did not have a statutory right to appointed counsel in the dependency proceeding because the statute provided for appointment of counsel only for indigent parents.<sup>15</sup> Moreover, “a nonparent legal custodian acting in *loco parentis*” to the child, such as a stepparent, guardian, custodian, or other individual, does not have parental rights equivalent to the natural or adoptive parent.<sup>16</sup> Indigent individuals who are not the adoptive or natural parents of the child in a dependency action are not entitled to counsel paid for by the State “because they cannot potentially lose parental

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<sup>11</sup> *Id.*; see FLA. STAT. § 39.013(1) (2014).

<sup>12</sup> § 39.013(1); *C.L.R.*, 913 So. 2d at 767 (“The 1995 provision morphed into its current form in 1998 as part of Chapter 98-403, § 23, Laws of Florida, and now states that ‘Parents who are unable to afford counsel must be appointed counsel.’”) (citing § 39.013(1)).

<sup>13</sup> See, e.g., § 39.013(1); *S.B. v. Dep’t of Children & Families*, 851 So. 2d 689, 691 (Fla. 2003); *G.W. v. Dep’t of Children & Families*, 92 So. 3d 307, 308-10 (Fla. Dist. Ct. App. 2012) (holding that the father’s due process right to counsel required the trial court to advise the father of his right to counsel at the shelter hearing and to appoint counsel, if necessary, before conducting the hearing).

<sup>14</sup> § 39.013(1).

<sup>15</sup> *Justice Admin. Comm’n v. Peterson*, 989 So. 2d 663, 666 (Fla. Dist. Ct. App. 2008) (“We recognize that the grandfather has been the court-approved custodian of this child for almost her entire life and that it seems counter to public policy to deny fees to the legal representative of this indigent parental substitute. However, our branch of government possesses neither the power to appropriate funds nor the ability to identify, by enactment of law, to whom those revenues should be paid.”).

<sup>16</sup> *Id.* at 665 (“[A] stepparent, custodian, guardian, or other person standing in *loco parentis* to a child does not acquire all of the rights or assume all of the obligations of a natural parent.”) (quoting *K.A.S. v. R.E.T.*, 914 So. 2d 1056, 1063 (Fla. Dist. Ct. App. 2005)).

rights they do not possess.”<sup>17</sup> More importantly, the statute entitling parents to counsel and indigent parents to the appointment of counsel in dependency proceedings makes no distinction between offending parents and nonoffending parents.<sup>18</sup> Thus, the nonoffending parent “may need, and indeed may be entitled, to take action based on any possible relief afforded by [the Department of Children and Families] to the offending parent.”<sup>19</sup>

As to such a parent, the trial court presiding over the dependency proceeding has specific duties to fulfill. First, it is statutorily required to appoint counsel for indigent parents, and second, the trial court must ascertain whether the parent understands the right to counsel.<sup>20</sup> Once a parent wishes to waive his or her right to counsel and proceed pro se, the trial court must determine whether the waiver is knowing and intelligent.<sup>21</sup> To do so, the trial court must consider the parent’s age, mental condition, experience, education, the complexity or nature of the case, and other factors to determine whether a parent is able to make an intelligent and understanding waiver.<sup>22</sup> Otherwise, the trial court may not accept a waiver of counsel.<sup>23</sup> If a parent waives counsel in court then it must be of record.<sup>24</sup> That is, the court must “enter its findings in writing with respect to . . . waiver of counsel for indigent parents or the waiver of counsel by nonindigent parents.”<sup>25</sup> The Fourth District explained that “the right to counsel in [termination of parental rights] cases [is] part of a process designed to insure that the final result is reliably the correct one.”<sup>26</sup> If the trial court accepts a

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<sup>17</sup> *Id.*

<sup>18</sup> *A.G. v. Fla. Dep’t of Children & Families*, 65 So. 3d 1180, 1183 (Fla. Dist. Ct. App. 2011). *But cf.* *C.L.R. v. Dep’t of Children & Families*, 913 So. 2d 764, 767 (Fla. Dist. Ct. App. 2005) (“A parent may be a ‘party’ by operation of the rule, but if not named as an actor causing the need for dependency, he or she is not entitled to appointed counsel pursuant to section 39.013(1).”).

<sup>19</sup> *A.G.*, 40 So. 3d at 910.

<sup>20</sup> FLA. STAT. § 39.013(9)(a) (2014).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 39.013(9)(c)(1).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 39.013(9)(c)(2).

<sup>25</sup> *Id.* § 39.013(9)(a).

<sup>26</sup> *Dep’t of Children & Family Servs. v. Natural Parents of J.B.*, 736 So. 2d 111, 117 (Fla. Dist. Ct. App. 1999). Interestingly, termination of parental rights proceedings

waiver of counsel at any hearing or proceeding, the trial court must renew the offer of assistance of counsel at each subsequent stage of the proceedings at which the parent appears without counsel.<sup>27</sup> Once counsel has made an appearance or the trial court has appointed counsel to represent the parent, the attorney must continue his or her representation of the parent throughout the proceedings.<sup>28</sup> If, however, counsel is allowed to withdraw from representation or the attorney-client relationship is otherwise discontinued, the trial court must “advise the parent of the right to have new counsel retained or appointed for the remainder of the proceedings.”<sup>29</sup> A court-appointed attorney who represents an indigent parent at a shelter hearing is paid from state funds appropriated by the Legislature.<sup>30</sup> However, section 39.013(9), Florida Statutes, is inapplicable where the parent executes a written surrender of his or her child and thereafter voluntarily consents to a court order that terminates parental rights.<sup>31</sup> And finally, the statutory scheme indicates that it is the responsibility of the trial court, not of the indigent parent, “to ensure the parent’s right to counsel is respected.”<sup>32</sup>

### III. THE PROVERBIAL RIGHT-WITHOUT-A-REMEDY DILEMMA

Where the constitutional right to counsel is clear,<sup>33</sup> a

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are still civil proceedings as Florida courts refuse “to equate termination of parental rights proceedings (“TPR”) with those of a criminal nature.” *See, e.g., S.B. v. Dep’t of Children & Families*, 825 So. 2d 1057, 1060 (Fla. Dist. Ct. App. 2002). However, as in criminal cases, parents may waive their right to counsel, but before they do so the court must determine whether the waiver is knowing and intelligent. § 39.013(9)(a).

<sup>27</sup> *Id.* § 39.013(9)(c)(3).

<sup>28</sup> *Id.* § 39.013(9)(b).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 39.013(10). For this reason, “[t]he public defender’s office should not be appointed in any dependency matters.” *Yacucci v. Hershey*, 549 So. 2d 782, 784 (Fla. Dist. Ct. App. 1989).

<sup>31</sup> § 39.013(9)(d).

<sup>32</sup> *G.W. v. Dep’t of Children & Families*, 92 So. 3d 307, 310 (Fla. Dist. Ct. App. 2012) (“The trial court’s failure to provide the father the opportunity to have counsel present at the shelter hearing constituted a clear departure from the essential requirements of law, amounting to a miscarriage of justice.”); *A.G. v. Fla. Dep’t of Children & Families*, 65 So. 3d 1180, 1183 n.1 (Fla. Dist. Ct. App. 2011).

<sup>33</sup> *E.T. v. State*, 930 So. 2d 721, 725 (Fla. Dist. Ct. App. 2006) (“[T]he Florida Supreme Court has held Florida’s constitutional due process clause creates a right to

corresponding remedy where counsel ineffectively provides this right should seemingly exist, for “a constitutional right to counsel means effective counsel; otherwise, the right is meaningless.”<sup>34</sup> Even so, Florida courts have been confounded by how to provide a remedy and to what extent one exists.<sup>35</sup> Courts have discussed three possibilities for procedural mechanisms to provide the remedy: Florida Rule of Juvenile Procedure 8.270, direct appeal, and a writ of habeas corpus.<sup>36</sup> None have been found to offer an aggrieved parent a remedy for the violation of his or her right to effective counsel for similar reasons.<sup>37</sup>

### A. Florida Rule of Juvenile Procedure 8.270

All procedures relating to children, including petitions, pleadings, subpoenas, summonses, and hearings, are governed by the Florida Rules of Juvenile Procedure.<sup>38</sup> These rules contain general provisions relating to the following: commencement of proceedings;<sup>39</sup> the application of the Uniform Child Custody Jurisdiction and Enforcement Act;<sup>40</sup> the transfer of cases;<sup>41</sup> pleadings;<sup>42</sup> process, diligent searches, and service of pleadings and papers;<sup>43</sup> motions;<sup>44</sup> computation and enlargement of time;<sup>45</sup> discovery;<sup>46</sup> examinations, evaluations, and

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appointed counsel in proceedings which can result in the permanent loss of parental custody.”).

<sup>34</sup> *Id.* at 726.

<sup>35</sup> See *T.H. v. Dep’t of Children & Families*, 97 So. 3d 256, 257 (Fla. Dist. Ct. App. 2012); *In re E.K.*, 33 So. 3d 125, 127-30 (Fla. Dist. Ct. App. 2010); *L.H. v. Dep’t of Children & Families*, 995 So. 2d 583, 584-85 n.1 (Fla. Dist. Ct. App. 2008); *E.T.*, 930 So. 2d at 727-28. See generally Anthony C. Musto, *Potato Potahto: Whether Ineffective Assistance or Due Process, an Effective Rule is Overdue in Termination of Parental Rights Cases in Florida*, 21 ST. THOMAS L. REV. 231 (2009) (arguing, almost five years ago, for a criminal 3.850-style remedy).

<sup>36</sup> See *In re E.K.*, 33 So. 3d at 127.

<sup>37</sup> See *id.* at 130.

<sup>38</sup> FLA. STAT. § 39.013(1) (2014).

<sup>39</sup> FLA. R. JUV. P. 8.201(a).

<sup>40</sup> *Id.* at 8.203.

<sup>41</sup> *Id.* at 8.205.

<sup>42</sup> *Id.* at 8.220.

<sup>43</sup> *Id.* at 8.225(a)-(b), (f).

<sup>44</sup> *Id.* at 8.235.

<sup>45</sup> *Id.* at 8.240.

treatment;<sup>47</sup> hearings;<sup>48</sup> orders;<sup>49</sup> motions for rehearing;<sup>50</sup> relief from judgments or orders;<sup>51</sup> contempt;<sup>52</sup> and, dependency mediation.<sup>53</sup>

Florida Rule of Juvenile Procedure 8.270 provides for relief from a judgment of termination of parental rights in four general categories of circumstances: (1) “[m]istake, inadvertence, surprise, or excusable neglect”; (2) “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for rehearing”; (3) “[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of any other party”; and (4) “the order or judgment or any part thereof is void.”<sup>54</sup> It also provides relief from clerical mistakes made in judgments.<sup>55</sup> Since ineffective assistance of counsel is not part of this delineated list, claims of ineffective assistance of counsel “do not present a cognizable basis for relief under rule 8.270.”<sup>56</sup> Instead, Florida courts have repeatedly stressed that rule 8.270 does not provide a mechanism to raise an ineffective assistance claim.<sup>57</sup>

Simply, “claims of ineffective assistance of counsel cannot be shoehorned into any of the rule’s provisions” and “no other more appropriate rule of juvenile or appellate procedure currently exists.”<sup>58</sup> In response, the Juvenile Court Rules Committee has commented that it believes the issue to be beyond the scope of its purview.<sup>59</sup>

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<sup>46</sup> *Id.* at 8.245.

<sup>47</sup> *Id.* at 8.250.

<sup>48</sup> *Id.* at 8.255.

<sup>49</sup> *Id.* at 8.260.

<sup>50</sup> *Id.* at 8.265.

<sup>51</sup> *Id.* at 8.270.

<sup>52</sup> *Id.* at 8.285.

<sup>53</sup> *Id.* at 8.290.

<sup>54</sup> *Id.* at 8.270(b).

<sup>55</sup> *Id.* at 8.270(a).

<sup>56</sup> See *In re E.K.*, 33 So. 3d 125, 126-27 (Fla. Dist. Ct. App. 2010).

<sup>57</sup> *Id.* (citing *L.H. v. Dep’t of Children & Families*, 995 So. 2d 583, 583-84 (Fla. Dist. Ct. App. 2008)).

<sup>58</sup> *Id.* at 127.

<sup>59</sup> *In re Amendments to the Fla. R. of Juv. Proc.*, 26 So. 3d 552, 553 n.1 (Fla. 2009) (per curiam).

### B. *Direct Appeal*

In the context of the right to counsel in termination proceedings, courts have conceded that “the right to counsel in termination proceedings is not the same as one enjoyed by defendants in criminal cases,”<sup>60</sup> but courts have also acknowledged that “depriving a parent of a child as well as a parent’s interest in the accuracy and justice of the termination proceedings are extremely important interests warranting [the kind of] deference and protection” expected in criminal cases.<sup>61</sup> Even if direct appeal was actually a viable tool based on this logic, in the criminal context, the Florida Supreme Court has “repeatedly stated [that ineffective assistance claims] are not cognizable on direct appeal.”<sup>62</sup> This is the norm—“[w]ith rare exception.”<sup>63</sup> Typically, a criminal ineffective assistance claim must be raised through a procedural mechanism provided via Florida Rule of Criminal Procedure 3.850.<sup>64</sup> While an exception to this rule allows ineffective assistance claims to be cognizable on direct appeal, it is only so where the entire ineffectiveness claim is apparent on the face of the record.<sup>65</sup> Such a showing is both difficult to make and “rarely” found.<sup>66</sup>

Due to these features, Florida courts have found that direct appeal of an ineffective assistance of counsel claim in a termination proceeding does not provide a “viable” avenue for relief.<sup>67</sup> The reason is tied to the nature of appellate review and an ineffective assistance claim.<sup>68</sup> As in criminal cases, ineffective assistance of counsel claims in termination of parental rights cases often present a question of fact

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<sup>60</sup> *L.H.*, 995 So. 2d at 584.

<sup>61</sup> *Id.*

<sup>62</sup> *Smith v. State*, 998 So. 2d 516, 522-23 (Fla. 2008) (citing *State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974)).

<sup>63</sup> *Id.* at 522 (quoting *Martinez v. State*, 761 So. 2d 1074, 1078 n.2 (Fla. 2000)); see also *Gore v. State*, 784 So. 2d 418, 437-38 (Fla. 2001); *Blanco v. State*, 507 So. 2d 1377, 1384 (Fla. 1987).

<sup>64</sup> *Smith*, 998 So. 2d at 522 (citing *McKinney v. State*, 579 So. 2d 80, 82 (Fla. 1991)).

<sup>65</sup> *Id.* at 522-23 (citing *Gore*, 784 So. 2d at 437-38; *Blanco*, 507 So. 2d at 1384); *In re E.K.*, 33 So. 3d 125, 127 (Fla. Dist. Ct. App. 2010).

<sup>66</sup> *In re E.K.*, 33 So. 3d at 127; see *Smith*, 998 So. 2d at 523.

<sup>67</sup> *In re E.K.*, 33 So. 3d at 127.

<sup>68</sup> *Smith*, 998 So. 2d at 522; see also *infra* note 71 and accompanying text.

that cannot be assessed without conducting an evidentiary hearing.<sup>69</sup> Counsel accused of rendering ineffective assistance of counsel will most likely have to provide testimony regarding circumstances surrounding his or her action or inaction giving rise to the claim, and the parent will likely explain the situation differently.<sup>70</sup> This makes credibility and factual determinations necessary, and this job is the sole province of the trial court.<sup>71</sup> These findings then limit, define, and constrain appellate review.<sup>72</sup> It thus stands that the circumstances and procedure of direct review do not particularly fit with the premise of an ineffective assistance claim.<sup>73</sup>

### C. *Petition for Habeas Corpus*

Without another apparent alternative, parents have elected to file habeas corpus petitions to assert their ineffective assistance claims.<sup>74</sup> Habeas corpus is a common law remedy designed to afford a prompt judicial determination of the legality of a detention or restraint under which a person has been held.<sup>75</sup> It is an independent civil proceeding that is available in both civil and criminal cases even though it is usually associated with criminal law.<sup>76</sup> Habeas corpus is most often used in civil cases to challenge the validity of civil commitment orders and in connection with child custody matters.<sup>77</sup>

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<sup>69</sup> See *Smith*, 998 So. 2d at 522.

<sup>70</sup> 82 AM. JUR. TRIALS 1 *Defending Against Claim of Ineffective Assistance of Counsel* § 71-73 (2002).

<sup>71</sup> See, e.g., *Tanzi v. State*, 964 So. 2d 106, 114 (Fla. 2007) (quoting *Brooks v. State*, 918 So. 2d 181, 188 (Fla. 2005)); see *State v. Vino*, 100 So. 3d 716, 719 (Fla. Dist. Ct. App. 2012) (“In conducting its review, an appellate court must restrain itself from the natural human impulse to consider that its own view of the facts is superior to that of a trial judge.”).

<sup>72</sup> See *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997).

<sup>73</sup> See *id.*

<sup>74</sup> See, e.g., *E.T. v. State*, 930 So. 2d 721, 722 (Fla. Dist. Ct. App. 2006).

<sup>75</sup> See *Jones v. Fla. Parole Comm’n*, 48 So. 3d 704, 706 (Fla. 2010).

<sup>76</sup> See *Suarez Ortega v. Pujals de Suarez*, 465 So. 2d 607, 610 (Fla. Dist. Ct. App. 1985) (citing *Crane v. Hayes*, 253 So. 2d 435, 439 (Fla. 1971)).

<sup>77</sup> See *Bishop v. Sheldon*, 68 So. 3d 259, 260 (Fla. Dist. Ct. App. 2010) (citing *Murray v. Regier*, 872 So. 2d 217, 223 (Fla. 2002)) (noting that habeas corpus is the proper remedy to challenge the legality of pretrial detention in a commitment proceeding under the Jimmy Ryce Act); see *Suarez Ortega*, 465 So. 2d at 610 (citing *Crane*, 253

This route seemed promising at first as the Florida Supreme Court had granted a parent, via a habeas petition and apparently on ineffective assistance grounds, a belated appeal of her termination proceeding where her counsel had not timely filed a notice of appeal.<sup>78</sup> The court explained that habeas “was designed as a speedy method of affording a judicial inquiry into the cause of the alleged unlawful custody of an individual.”<sup>79</sup> It added that “habeas corpus has been authorized as a remedy for ascertaining a parent’s right to custody of his or her children.”<sup>80</sup> The court concluded “that the parent’s petition for writ of habeas corpus should be filed with the trial court. This will permit a resolution of any factual issues as well as any defenses including those predicated upon laches.”<sup>81</sup> Ultimately, however, the court based its opinion “strictly on the extenuating circumstances of this particular case . . . .”<sup>82</sup> It decided, seemingly, nothing more than the right to a belated appeal: “in those limited situations when a parent is entitled to belated appeal, the petition for writ of habeas corpus is the proper procedural vehicle for seeking *the appeal*.”<sup>83</sup> Consequently, the court *In re E.H.* did not squarely hold habeas relief was the mechanism to assert an ineffective assistance of counsel claim.<sup>84</sup>

With the opportunity to then squarely address the issue, the Florida Supreme Court unanimously dismissed an appeal of a habeas denial as moot because the child at issue had already been adopted.<sup>85</sup> In its dismissal, though, the court referred the issue to both the Juvenile Court Rules Committee and the Appellate Court Rules Committee.<sup>86</sup> Thereafter, however, the Juvenile Court Rules Committee submitted recommendations to the Florida Supreme Court that specifically

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So. 2d at 439).

<sup>78</sup> See *In re E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992); see also *In re E.K.*, 33 So. 3d 125, 127-28 (Fla. Dist. Ct. App. 2010) (discussing the Florida Supreme Court’s decision).

<sup>79</sup> *In re E.H.*, 609 So. 2d at 1290.

<sup>80</sup> *Id.* at 1291.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1290.

<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> See *id.*

<sup>85</sup> *E.T. v. State*, 957 So. 2d 559, 559-60 (Fla. 2007) (per curiam).

<sup>86</sup> *Id.*

declined to address the issue of a proper procedure for ineffective assistance claims.<sup>87</sup> The Juvenile Court Rules Committee explained, “the issue is outside the scope of its purview.”<sup>88</sup> Thus, despite certifying questions and the referral, Florida courts were left without guidance on whether habeas was an appropriate mechanism to provide relief.<sup>89</sup>

In response, a panel of the Second District rejected habeas as an option.<sup>90</sup> The panel noted that the Fourth District, after an extensive survey of the law in other states, had done the same.<sup>91</sup> The Fourth District could find only one other state that used habeas as a mechanism for review.<sup>92</sup> The habeas route appeared inappropriate because of “unlimited time to file the petition, the lack of any identified rules, the proper burden of proof, and the proper parties to such a petition,”<sup>93</sup> and because the criminal right to counsel, derived from the Sixth Amendment of the U.S. Constitution, differs substantially from the termination right to counsel, derived from the due process clause in the Florida Constitution.<sup>94</sup> Beyond solely the different phrases and sources of the right, the liberty interest at stake is “simply not equivalent.”<sup>95</sup>

This rejection of the habeas route, however, was not without disagreement.<sup>96</sup> Chief Judge Stevenson dissented and would have found habeas appropriate to assert the claim.<sup>97</sup> Judge Stevenson compared the situation to that under the Jimmy Ryce Act, allowing for

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<sup>87</sup> *In re* Amendments to the Fla. Rules of Juv. Proc., 26 So. 3d 552, 553 n.1 (Fla. 2009) (per curiam).

<sup>88</sup> *Id.*

<sup>89</sup> *E.T.*, 957 So. 2d at 559 (listing certified questions of whether a claim exists for ineffective assistance of counsel in termination proceedings, and if so, what mechanism is appropriate to bring this claim).

<sup>90</sup> *See In re E.K.*, 33 So. 3d 125, 126 (Fla. Dist. Ct. App. 2010).

<sup>91</sup> *Id.* at 128 (citing *E.T. v. State*, 930 So. 2d 721, 726-28 (Fla. Dist. Ct. App. 2006)).

<sup>92</sup> *E.T.*, 930 So. 2d at 727 n.2 (explaining that California is the only state with a habeas mechanism to advance an ineffective assistance in a termination proceedings claim).

<sup>93</sup> *In re E.K.*, 33 So. 3d at 128 (quoting *E.T.*, 930 So. 2d at 728).

<sup>94</sup> *E.T.*, 930 So. 2d at 726.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 729 (Stevenson, C.J., dissenting).

<sup>97</sup> *Id.*

involuntary civil commitment for sexually violent predators.<sup>98</sup> Without a procedural mechanism available under the Jimmy Ryce Act for ineffective assistance of counsel claims, the First District held that those committed under the Jimmy Ryce Act could file habeas petitions to assert their claims.<sup>99</sup> This is because “an individual who faces involuntary commitment to a mental health facility has a liberty interest at stake, and therefore has the right to the effective assistance of counsel at all significant stages of the commitment process.”<sup>100</sup> “Although raising the issue of ineffective assistance of counsel by petition for writ of habeas corpus may be inconvenient,” the First District held, “it is the only avenue available until either the Florida Legislature or the Florida Supreme Court acts to provide procedures for collateral relief.”<sup>101</sup> For Judge Stevenson, the same principle applied to dependency proceedings, and he found a lack of another mechanism and the likely futile use of direct appeal to be telling.<sup>102</sup>

#### IV. FRAMEWORK OF A POTENTIAL SOLUTION

With courts ultimately rejecting each approach parents have attempted, it appears a new mechanism must be created before parents will be able to enforce their right to effective assistance of counsel.<sup>103</sup> One possible suggestion, advanced nearly five years ago, was to create a rule similar to rules permitting post-conviction relief in criminal cases where there is a “sentencing error.”<sup>104</sup> This approach appears to pose problems in the termination arena though.<sup>105</sup> For example, in some

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<sup>98</sup> *Id.* at 730; see FLA. STAT. §§ 394.910-931 (2000); Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act, 1998 Fla. Laws Ch. 98-64 § 1.

<sup>99</sup> *E.T.*, 930 So. 2d at 730 (Stevenson, C.J., dissenting) (citing *Manning v. State*, 913 So. 2d 37, 38 (Fla. Dist. Ct. App. 2005)).

<sup>100</sup> *Manning*, 913 So. 2d at 37.

<sup>101</sup> *Id.* at 38.

<sup>102</sup> *E.T.*, 930 So. 2d at 729-30 (Stevenson, C.J., dissenting).

<sup>103</sup> See *supra* Part III.A-C; see also Musto, *supra* note 35, at 249.

<sup>104</sup> Musto, *supra* note 35, at 249-50 (suggesting the use of a scheme similar to criminal procedure rules, which permits reversal of sentencing errors; i.e., a parent could file a motion while the termination appeal is pending, and if the trial court does not address the motion within a certain period of time then it is deemed denied and appealable).

<sup>105</sup> See *id.* at 250-51.

instances, an evidentiary hearing will be necessary to fetter out the parent's claims; this means that the appellate court would have to remand for an evidentiary hearing while the termination order is still on appeal.<sup>106</sup> Any mechanism must balance the best interests of the child, always the paramount concern in termination (and other family law) proceedings, with the parent's right to effective assistance, placing more weight on the best interests of the child.<sup>107</sup>

As an option, a rule similar to Florida's Rule of Criminal Procedure 3.850 could be workable.<sup>108</sup> This rule provides for vacation, set aside, or correction of a criminal judgment upon a limited number of explicit situations.<sup>109</sup> It provides a strict time limit of two years from the date of judgment and sentence, with very limited exceptions.<sup>110</sup> It lists very specific technical requirements as to the form of the motion and its contents.<sup>111</sup> And importantly, the rule provides for a mechanism to summarily deny a claim either refuted by the record or otherwise frivolous.<sup>112</sup> Furthermore, a trial counsel's performance is strongly presumed to be effective.<sup>113</sup> These same considerations, tweaked and limited for the termination context, would provide an effective mechanism to preserve a parent's right to effective counsel while keeping the best interests of the child of prime consideration.<sup>114</sup> Such balance of competing interests is necessary because, in proceedings related to children in the custody of the State, courts are charged with the duty of ensuring that the best interests of children are advanced.<sup>115</sup>

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<sup>106</sup> *Id.* at 250.

<sup>107</sup> *See E.T.*, 930 So. 2d at 726-27 (quoting *In re Adoption of T.M.F.*, 573 A.2d 1035, 1043 (Pa. Super. Ct. 1990)) (explaining that a court must compare the parent's right to effective counsel to the welfare of the child because the child is more susceptible to damage if the court ignores the child's welfare for an extended period, such as in an appeal).

<sup>108</sup> *See Musto*, *supra* note 35, at 245.

<sup>109</sup> FLA. R. CRIM. P. 3.850(a).

<sup>110</sup> *Id.* at 3.850(b).

<sup>111</sup> *Id.* at 3.850(c)-(e).

<sup>112</sup> *Id.* at 3.850(f)-(h), (n).

<sup>113</sup> *Barnhill v. State*, 971 So. 2d 106, 110 (Fla. 2007).

<sup>114</sup> *See Musto*, *supra* note 35 and accompanying text.

<sup>115</sup> *P.K. v. Dep't of Children & Families*, 927 So. 2d 131, 133 (Fla. Dist. Ct. App. 2006) (explaining that the best interests of the child prevail through the adoption proceedings).

For example, the rule would only need to provide relief for one circumstance, ineffective assistance of counsel.<sup>116</sup> Next, the rule should utilize a shorter timeframe: even as short as 180 days and further limited by the adoption of the child.<sup>117</sup> And summary proceedings should be available, as well in situations of successive motions, claims refuted by the record, and those which fail to advance a prima facie case of ineffective assistance.<sup>118</sup> Further, the rule must contain reference to the best interests of the child standard and permit the court discretion to deny claims where the best interests of the child would be materially affected.<sup>119</sup> Finally, again to preserve the best interests of the child, pending adoption proceedings should not be affected by the filing of a motion under this new rule,<sup>120</sup> unless the parent can initially show, potentially to a heightened standard of proof, that the motion has a likelihood of success.<sup>121</sup>

## V. A QUESTION OF GREAT PUBLIC IMPORTANCE

It now appears, however, that the Florida Supreme Court might provide some needed answers to this question in the coming months.<sup>122</sup> Recently, the First District certified two narrowly tailored questions of great public importance regarding the right to counsel in termination of parental rights cases<sup>123</sup> to the Florida Supreme Court; the court accepted

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<sup>116</sup> See *supra* Part III.

<sup>117</sup> See Musto, *supra* note 35, at 246-47, 250 (explaining that resolving issues expeditiously would be an advantage); see also Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 208 (2004).

<sup>118</sup> See Musto, *supra* note 35, at 246-47.

<sup>119</sup> *P.K.*, 927 So. 2d at 133 (explaining that the best interests of the child prevail through the adoption proceedings).

<sup>120</sup> *Id.*

<sup>121</sup> The exact language and construct of a specific rule is beyond the scope of this Article. Instead, we hope only to raise the issue and provide some of the necessary considerations in our preferred mechanism, the adoption of a rule of juvenile or family procedure specifically addressing effective assistance of counsel.

<sup>122</sup> See *J.B. v. Fla. Dep't. of Children & Families*, No. SC14-1990, 2014 WL 5420898, at \*1 (Fla. Oct. 21, 2014).

<sup>123</sup> The First District certified the following two questions:

I. IS THE CRIMINAL STANDARD OF INEFFECTIVE ASSISTANCE OF COUNSEL ANNOUNCED IN *STRICKLAND V. WASHINGTON* APPLICABLE

jurisdiction on October 21, 2014, and scheduled oral argument for early February 2015.<sup>124</sup> Acknowledging that the case affected “the substantial interests of a child,” the court is hearing the case on an expedited timetable.<sup>125</sup>

In its opinion, the First District lamented the “lack of any effective procedure for raising ineffective assistance of counsel claims.”<sup>126</sup> And after briefly discussing how every existing mechanism has either failed or is inadequate, the court “urge[d] our supreme court to address this important matter through the exercise of its rulemaking power.”<sup>127</sup> The court, for the first time since 2007,<sup>128</sup> will have an opportunity to clarify the procedural conundrum that Florida parents are presently in.<sup>129</sup>

## VI. CONCLUSION

The problem confronting Florida courts can be succinctly stated: parents have a right to effective counsel pursuant to Florida due process but no remedy for ineffective counsel.<sup>130</sup> Pursuing a claim of ineffective assistance of counsel on direct appeal is practically, if not absolutely, a futile endeavor, and habeas petitions present a host of problems.<sup>131</sup> Despite this knowledge at all levels and calls from courts and commentators<sup>132</sup> alike, the issue remains salient yet unresolved.<sup>133</sup>

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TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN  
PROCEEDINGS INVOLVING THE TERMINATION OF PARENTAL RIGHTS?  
II. IS ANY PROCEDURE AVAILABLE FOLLOWING THE TERMINATION OF  
PARENTAL RIGHTS TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF  
COUNSEL THAT ARE NOT APPARENT ON THE FACE OF THE RECORD?

*J.B. v. Dep’t of Children & Families*, No. 1D13-4346, 2014 WL 4976981, at \*6-7 (Fla. Dist. Ct. App. Oct. 21, 2014).

<sup>124</sup> *J.B.*, 2014 WL 5420898, at \*1.

<sup>125</sup> *Id.*

<sup>126</sup> *J.B.*, 2014 WL 4976981 at \*6-7.

<sup>127</sup> *Id.* at \*6.

<sup>128</sup> *E.T. v. State*, 957 So. 2d 559, 559-60 (Fla. 2007).

<sup>129</sup> *J.B.*, 2014 WL 5420898, at \*1.

<sup>130</sup> *See supra* Part III.

<sup>131</sup> *See supra* Part III.B-C.

<sup>132</sup> *See, e.g., J.B.*, 2014 WL 4976981, at \*6-7; *Musto, supra* note 35, at 251-52.

<sup>133</sup> *See, e.g., L.H. v. Dep’t of Children & Families*, 995 So. 2d 583, 583-84 (Fla. Dist.

In light of this ambiguity—and the dangers it poses to a right that is the foundation of the adversarial system—an appropriate rule should be promulgated.<sup>134</sup> Ignoring the problem might benefit the children in the long run, as the State will attempt to ensure permanency by seeking adoption right after the termination of parental rights occurs, but it does so at the expense of a parent's right to be effectively represented and to have some voice in his or her child's future.<sup>135</sup> The need for some definite resolution is particularly high in dependency proceedings, for if a child is not adopted by age three, his or her chances of adoption drastically plummet.<sup>136</sup>

The Florida Supreme Court and the committees face an impossible task.<sup>137</sup> Promulgating a rule, which would allow filing a motion for ineffective assistance of counsel after direct appeal, will definitely extend litigation and may lead to frustration of any chances for adoption of a particular child even if such motions would be processed in an expedited manner in the trial courts and on appellate review.<sup>138</sup> On the other hand, without a procedural mechanism in place, the right to effective counsel will be a nullity, in reality leaving parents with the only option of the filing of a malpractice action, which will not restore their parental rights.<sup>139</sup> To strike the balance might be a difficult and contentious process, but it must be begun by those obligated and empowered to establish procedures for this state's courts.<sup>140</sup> Sometimes, if not always, the absence of a procedural mechanism has no mere incidental effect on substantive rights; sometimes, if not always, such a dearth can render these rights no more than dulcet chimeras.

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Ct. App. 2008).

<sup>134</sup> See *supra* Part IV.

<sup>135</sup> See Musto, *supra* note 35, at 235.

<sup>136</sup> See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 655-56 (1999).

<sup>137</sup> See *E.T. v. State*, 930 So. 2d 721, 725 (Fla. Dist. Ct. App. 2006).

<sup>138</sup> See Musto, *supra* note 35, at 251.

<sup>139</sup> See *E.T.*, 930 So. 2d at 726.

<sup>140</sup> See *supra* Part IV.