"PROVIDING FOR COOPERATION BETWEEN PRIVATE ADOPTION ENTITIES AND THE DEPARTMENT OF CHILDREN AND FAMILIES?" WHEN LEGISLATIVE INTENT FALLS SHORT

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I. INTRODUCTION

Parents are bestowed with fundamental rights that protect their ability to make decisions concerning the upbringing of children in their care, but these rights are not absolute. Over 21,000 children are currently in Florida's foster care system after being removed from homes for alleged abuse, neglect, or abandonment.[1] Florida's foster care system aims to provide safe homes for children in need of temporary care, but more children need safe homes than Florida's foster care system can provide. Notwithstanding the shortage of foster beds, many children remain in foster care for years without ever achieving permanency.

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1. *Placement in Out-of-Home Care Data*, FLA. DEP'T CHILD. & FAMS. (Jan. 10, 2023), https://www2.myflfamilies.com/service-programs/child-welfare/placement.shtml (showing as of January 2022, there are 11,440 children placed in licensed foster homes, 5,920 children placed with approved relatives, 2,037 children placed with non-relative caregivers, 1,460 children placed in group homes, 862 children placed in "other" placements, and 201 children placed in residential treatment centers).

Under Florida's adoption intervention statute, parents who have a child removed from their physical custody by the Department of Children and Families ("DCF") and are subjected to a dependency case have the right to choose a private adoption instead of working a case plan for reunification. While adoption is not the first, or best, alternative to reunification for many situations, private adoption through adoption intervention allows parents to regain a sense of control. Parents choosing a private adoption play an active role in the child's permanency by choosing an adoptive placement for their child. Private adoption can also provide the opportunity for an open, ongoing connection between the child and the biological family, which promotes the adoptee's sense of identity and overall well-being.

The Florida Legislature created the adoption intervention statute to encourage cooperation between the parties involved in a dependency case and interveners, and to provide permanency for children:

> It is the intent of the Legislature to provide for cooperation between private adoption entities and the Department of Children and Families in matters relating to permanent placement options for children in the care of the department whose birth parents wish to participate in a private adoption plan with a qualified family.[2]

But, under the statute's current state, the parties involved in adoption interventions do not always work together towards this goal. By honoring the fundamental rights of parents to make decisions regarding the custody of their children, adoption intervention is a solution that not only provides permanency quickly, but also reduces the strain on Florida's overburdened foster care system. While well intended, the statute does not function to meet the goal of its legislative intent as the parties involved have taken contentious—as opposed to cooperative—stances. Trial courts are split, and legislative action is desperately needed.

This Article aims to identify issues within the current structure of the adoption intervention statute and its application, provide an overview of the competing interests, and propose solutions to promote cooperation between all parties involved to

2. FLA. STAT. § 63.022(5) (2022).

come closer to a mutual understanding of navigating adoption interventions. Part II discusses the current climate of Florida's foster care system. Part III provides an overview of the adoption intervention process from a parent signing a consent to the court ordering a transfer of custody. Part IV outlines problems with the adoption intervention statute including the conflicting stances on a parent's right to choose an adoptive placement for a dependent child. Part V offers remedies to the identified problems addressing the legislative branch, the court, and the parties involved in adoption interventions. Adoption intervention aims to provide a forever home for foster children by empowering parents to use their fundamental right to take an active role in deciding an adoptive placement for their dependent child. But, at the end of the day, it is about serving the best interests of the child.[3]

II. FLORIDA'S OVERBURDENED FOSTER CARE SYSTEM

Florida's foster care system aims to provide safe homes for children in need of temporary care. Licensed foster families accept children into foster homes not for the purpose of providing permanency, but to function as a temporary family for a child in need. Florida's foster care system is overburdened by a lack of adequate housing opportunities in foster homes, resulting in children being placed in alternative placements. The following parts provide a brief overview of the process of a child coming into the custody of DCF and the current climate of Florida's foster care system.

A. Infringing Upon the Fundamental Right to Parent

The United States Supreme Court has routinely held that parents[4] have a fundamental right, under the Fourteenth Amendment's Due Process Clause,[5] "to make decisions concerning

3. *Id.* § 63.022(2) ("It is the intent of the Legislature that in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination.").

4. The terms parent and caregiver are used interchangeably throughout this Article, but both reference any person who has custody of a child, not necessarily a biological parent.

5. This Article is written with optimism that the Due Process Clause will continue to protect parenting decisions, notwithstanding the belief most recently expressed by Justice Thomas in his concurring opinion in *Dobbs v. Jackson Women's Health Organization* that "the Due Process clause does not secure *any* substantive rights" and "in future cases, [the Court] should reconsider all . . . substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

the care, custody, and control of their children."[6] *Troxel v. Granville* noted that this right "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[7] Florida also recognizes the right to privacy, as a fundamental right, encompassing the right to make parenting decisions.[8] But this right is not absolute.[9] Parenting also bestows responsibilities and obligations "to care for the child, specifically to ensure the child's life, safety, well-being, and physical, mental, and emotional health."[10] When a parent does not fulfill these responsibilities and obligations, the State has an interest to protect the child and may do so by infringing upon a parent's fundamental rights.

The State of Florida may not infringe upon a parent's fundamental rights unless the action is narrowly tailored to a compelling state interest.[11] The State has a compelling interest in protecting children from abuse, neglect, and abandonment by "holding parents accountable for meeting the needs of children."[12] DCF can remove a child from the physical custody of a caregiver to shelter the child and initiate a dependency proceeding.[13] The purposes of removing a child, and initiating dependency proceedings, are not to punish an offending parent but to protect the child.[14] When a child is removed and taken into DCF's custody,

6. Troxel v. Granville, 530 U.S. 57, 66 (2000); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y Sisters Holy Names Jesus & Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Santosky v. Kramer, 455 U.S. 745 (1982).

7. 530 U.S. at 65.

8. FLA. CONST. art. I, § 23 (2022); *see also* Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996).

9. *In re* Camm, 294 So. 2d 318, 320 (Fla. 1974) (explaining that the right to parent "is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail").

10. S.M. v. Fla. Dep't Child. & Fams., 202 So. 3d 769, 782 (Fla. 2016).

11. FLA. STAT. § 1014.03 (2022) (stating that the State cannot interfere with the right of a parent "to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means").

12. FLA. STAT. § 63.022(1)(a) (2022).

13. FLA. STAT. § 39.402(1)(a) (2022) (stating that a child can be taken into DCF's custody and placed in a shelter after probable cause that "[t]he child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment"); FLA. STAT. § 984.03(48) (2022) (defining "Shelter" to mean "a place for the temporary care of a child who is alleged to be or who has been found to be dependent").

14. FLA. STAT. § 39.501(2) (2022); A.J. v. Dep't Child. & Fams., 111 So. 3d 980, 982 (Fla. 5th Dist. Ct. App. 2013).

parents temporarily lose physical custody of their child, but their fundamental right to parent does not automatically dissolve.[15]

B. Foster Care in Florida

When a child is removed from a caregiver, the child is placed under the State's custody with the State acting *in loco parentis* for the child.[16] As the administrative agency for child welfare in the State of Florida, DCF determines who will assume temporary physical care of the child while the child is under DCF's supervision.[17] Priority for a temporary caregiver is given to

15. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

16. Buckner v. Fam. Servs. Cent. Fla., Inc., 876 So. 2d 1285, 1288 (Fla. 5th Dist. Ct. App. 2004); *In loco parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *in loco parentis* as "relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent").

17. *In re* Pendarvis, 133 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 1961) (stating that "once a child has been lawfully declared to be a dependent child . . . he becomes a ward of the state, and a broad discretion is vested in the Juvenile Court to do those things which appear to the court to be in the best interest of the child"). Florida Statute section 39.01375 describes the best interest factors that DCF, or the court, should consider when determining a suitable placement after removal to include:

> (1) The child's age.
>
> (2) The physical, mental, and emotional health benefits to the child by remaining in his or her current placement or moving to the proposed placement.
>
> (3) The stability and longevity of the child's current placement.
>
> (4) The established bonded relationship between the child and the current or proposed caregiver.
>
> (5) The reasonable preference of the child, if the child is of a sufficient age and capacity to express a preference.
>
> (6) The recommendation of the child's current caregiver, if applicable.
>
> (7) The recommendation of the child's guardian ad litem, if one has been appointed.
>
> (8) The child's previous and current relationship with a sibling and if the change of legal or physical custody or placement will separate or reunite siblings, evaluated in accordance with s. 39.4024.
>
> (9) The likelihood of the child attaining permanency in the current or proposed placement.
>
> (10) The likelihood the child will be required to change schools or child care placement, the impact of such change on the child, and the parties' recommendations as to the timing of the change, including an education transition plan required under s. 39.4023.
>
> (11) The child's receipt of medical, behavioral health, dental, or other treatment services in the current placement; the availability of such services and the degree to which they meet the child's needs; and whether the child will be able to continue to receive services from the same providers and the relative importance of such continuity of care.

nonoffending parents and relatives.[18] Sometimes, a relative can be located to take temporary placement of the child, but in Florida, children removed from the home are almost three times as likely to be placed with strangers in a licensed foster home, group home, or other residential facility.[19]

Foster homes are intended to temporarily provide a safe and loving home for children who have been removed and cannot be placed with a relative.[20] Licensed foster homes are not licensed to adopt the children they receive, only to provide temporary care, and reunification with the child's family is the primary goal.[21] Families exclusively wanting to adopt from foster care are encouraged by DCF to adopt children who are legally free for adoption, which often consists of older children, children with special needs, and sibling groups.[22]

Foster care is intended to be temporary, but many children remain in foster care for years without ever achieving permanency.

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(12) The allegations of any abuse, abandonment, or neglect, including sexual abuse and human trafficking history, which caused the child to be placed in out-of-home care and any history of additional allegations of abuse, abandonment, or neglect.

(13) The likely impact on activities that are important to the child and the ability of the child to continue such activities in the proposed placement.

(14) The likely impact on the child's access to education, Medicaid, and independent living benefits if moved to the proposed placement.

(15) Any other relevant factor.

FLA. STAT. § 39.01375 (2022).

18. FLA. STAT. § 39.4021(2)(a) (2022) (The priority order of out-of-home placements after removal includes: "1. Nonoffending parent. 2. Relative caregiver. 3. Adoptive parent of the child's sibling, when the department or community-based care lead agency is aware of such sibling. 4. Fictive kin with a close existing relationship to the child. 5. Nonrelative caregiver that does not have an existing relationship with the child. 6. Licensed foster care. 7. Group or congregate care.").

19. *Placement in Out-of-Home Care Data*, *supra* note 1 (showing, as of January 2022, 16,000 children removed were placed in a licensed foster home, group home, or other non-relative placement compared to 5,920 children placed with a relative).

20. *Foster Care Overview*, FLA. DEP'T CHILD. & FAMS., https://www.myflfamilies.com/services/child-family-services/foster-care/overview (last visited Feb. 24, 2023).

21. *Fostering Definitions*, FLA. DEP'T CHILD. & FAMS., https://www.myflfamilies.com/services/abuse-services/domestic-violence/programs/foster-care/definitions (last visited Feb. 24, 2023) (explaining that "[f]oster parents are able to adopt foster children in some circumstances" after a parent's rights are terminated and defining foster care as being "made up of individuals or families who have requested to be able to take dependent children into their home"); *Rewards of Being a Foster Parent*, FLA. DEP'T CHILD. & FAMS., https://www.myflfamilies.com/services/child-family-services/foster-care/rewards (last visited Feb. 24, 2023) (listing the benefits of becoming a foster home, among which do not include adoption); *NFPA Guiding Principles*, NAT'L FOSTER PARENT ASS'N, https://nfpaonline.org/guiding-principles (last visited Feb. 20, 2023) (listing reunification as the primary focus of foster care).

22. *Explore Adoption*, FLA. DEP'T CHILD. & FAMS., http://www.adoptflorida.org (last visited Feb. 20, 2023).

Out of the children currently in Florida's foster care system,[23] over 4,900 are already legally free for adoption.[24] Some of these children will eventually achieve permanency by being reunified with their family or by being adopted, once legally available for adoption, but many of them never achieve permanency. Approximately 800 children leave the system each year by "aging out."[25]

For children adopted through the foster care system, achieving permanency can take years. In June 2019, Governor Ron DeSantis signed "A Year is a Long Time in the Life of a Child Act," which was designed to reduce the amount of time Florida children spend in foster care by prioritizing a permanency plan for children within one year of removal.[26] At the time the bill was signed into law, 24,000 children in the State of Florida were languishing in foster care.[27] State records reflect that children taken into DCF's custody spend approximately eighteen months in foster care with only thirty-eight percent leaving the system within one year of removal.[28] Approximately half of the number of children removed from foster care are reunified with their caregivers while roughly twenty-seven percent are adopted, after spending an average of two and a half years in foster care.[29] This bill places additional

23. *Placement in Out-of-Home Care Data*, *supra* note 1.

24. *Office of Child and Family Well-Being Dashboard*, FLA. DEP'T CHILD. & FAMS. (Jan. 10, 2023), https://www2.myflfamilies.com/service-programs/child-welfare/dashboard/ (selecting "Permanency" from the left side menu, then selecting "Annual Rate of Adoptions Achieved" to show that as of January 1, 2022, 4,963 children were legally free for adoption).

25. *Id.* (selecting "Well-Being" then selecting "Young Adults Aging Out and Educational Achievements," showing a trend of 797–1,018 children aging out over the last four fiscal years). The Florida foster care system permits children to leave, or "age out," of foster care when they turn eighteen. *Youth Foster Care: Rights and Expectations*, FLA. DEP'T CHILD. & FAMS., https://www2.myflfamilies.com/service-programs/independent-living/foster-rights-and-expectations.shtml (last visited Feb. 12, 2023) (scrolling down to the "you have the right" heading and clicking on planning). Alternatively, they can elect to stay in care, and receive financial and educational benefits until they turn twenty-one but only if they are enrolled in eligible post-secondary education. *Independent Living for Youth & Young Adults*, FLA. DEP'T CHILD. & FAMS., https://www2.myflfamilies.com/service-programs/independent-living/youth-young-adults.shtml (last visited Feb. 25, 2023).

26. *Governor Signs 'A Year is a Long Time in the Life of a Child Act' into Law*, FLA. BAR NEWS (July 1, 2019), https://www.floridabar.org/the-florida-bar-news/governor-signs-a-year-is-a-long-time-in-the-life-of-a-child-act-into-law/ (reflecting the State's push to provide permanency for children within one year of removal through reunification, guardianship, or adoption).

27. *Id.*

28. Christopher O'Donnell, *Get Kids Out of Foster Care Quicker, State Orders. But It May Split up Families*, TAMPA BAY TIMES (Dec. 16, 2019), https://www.tampabay.com/news/florida/2019/12/16/get-kids-out-of-foster-care-quicker-state-orders-but-it-may-split-up-families/.

29. *Id.*

pressure on parents to timely preserve their parental rights by completing a case plan for reunification, or making another plan, before risking children being made legally free for adoption against their parent's will or potentially spending the rest of their childhood in foster care.

Children from low-income families have the greatest risk of being permanently separated from their biological family when parents fail to complete a case plan within the new allotted time.[30] Case plans for reunification vary but can include successful completion of substance dependence treatment, parenting or anger management classes, obtaining gainful employment and a stable income, or securing safe housing.[31] On top of completing the requirements of a case plan, parents must also maintain scheduled visitation with their child and attend court hearings—both of which often conflict with their ability to maintain stable employment.[32] While deviations from the one year permanency requirement are permitted on a case-by-case basis, practicing attorneys fear that the bill will result in "more children permanently separated from their parents and more stress on an already clogged dependency-court system."[33]

Florida is short over 3,487 foster beds.[34] The Safe Children Coalition ("SCC") reports only 170 foster homes in Florida's Twelfth Circuit, an insufficient amount to meet the demand, which results in children being moved out of the area.[35] Moving children from their geographic area disrupts their school environment, childcare placements, availability to be placed with siblings, social activities, visitation with caregivers, and continuity of medical care.[36] Almost half of the foster children removed from the Twelfth Circuit are placed "outside of their county of residence" from which they were removed.[37]

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Placement in Out-of-Home Care Data*, *supra* note 1 (showing as of January 2023, Florida has 17,490 foster beds for 20,977 children).
35. ABC7 Staff, *Safe Children Coalition in Need of More Foster Homes for Children*, ABC7 (Oct. 7, 2021), https://www.mysuncoast.com/2021/10/07/safe-children-coalition-need-more-foster-homes-children/.
36. *Id.*
37. *Id.* (showing the SCC is pushing for an additional forty to fifty foster homes in the Twelfth Circuit to provide for the demand).

Florida is failing its foster children. Pressure from the lack of available foster homes results in children being placed into foster homes with unaddressed allegations of abuse, drug abuse, and molestation.[38] Alternatively, when traditional foster homes are not available, the State relies on group homes to act as long-term placement options for older foster youth and disproportionately house Black foster youth in restrictive, institutionalized, group settings.[39] Studies show that more foster children are sent to prison than college and receive post-traumatic stress disorder diagnoses at higher rates than war veterans.[40] Additionally, thousands of vulnerable foster children find themselves homeless after aging out of the system, subjecting them to human trafficking, domestic violence, and substance abuse.[41]

While achieving permanency for an individual child, adoption through foster care strains the foster care system from within, removing an available foster bed from a system desperate for safe, temporary housing. The Florida Legislature favors adoption of legally free children, over guardianship or other methods of providing custody, when it is an available option and in the best interests of the child because stability and permanency are important for a child's physical and mental well-being.[42] The State of Florida has a "compelling interest in providing stable and permanent homes for adoptive children . . . and to enforce the child's statutory right to permanence and stability in adoptive placements."[43] The Florida foster care system limits the number of children that can reside in a single foster home to five, including the family's own children, absent an exception.[44] Well-meaning

38. Pat Beall et al., *Florida Took Thousands of Kids from Families, Then Failed to Keep Them Safe*, USA TODAY NEWS (Dec. 20, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/10/15/flooded-foster-kids-florida-failed-find-safe-homes/3624505001/.

39. Sixto Cancel, *I Will Never Forget That I Could Have Lived with People Who Loved Me*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/opinion/foster-care-children-us.html (showing that over 43,800 foster children in the United States live in an institutional placement or group home used as long-term placements for, disproportionately Black, foster youths).

40. Laura Bauer & Judy L. Thomas, *Throwaway Kids*, KAN. CITY STAR (Feb. 25, 2020), https://www.kansascity.com/news/special-reports/article238206754.html (describing one study showing that one in four inmates surveyed "were the product of foster care").

41. *Id.*

42. FLA. STAT. § 63.022(1)–(3) (2022); G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008), *certified question answered and rev'd*, 985 So. 2d 978 (Fla. 2008); C.M. v. Dep't Child. & Fam. Servs., 854 So. 2d 777, 779 (Fla. 4th Dist. Ct. App. 2003).

43. *G.S.*, 985 So. 2d at 982.

44. FLA. STAT. § 409.175(3) (2022); *see also* Beall et al., *supra* note 38.

adults become foster parents to help children in need but can lose sight of the temporary purpose of fostering. Understandably, foster parents grow attached to the children in their care and often desire to adopt their foster children, if they become available for adoption, but adoption through foster care removes an available foster bed in a system short on space. Private adoption, through the adoption intervention statute, provides permanency for foster children faster and opens a foster bed to receive more temporary placements.

III. FLORIDA ADOPTION INTERVENTION

Biological parents make the difficult choice to voluntarily place their child for adoption for a variety of reasons, and the adoption intervention statute aims to honor a parent's choice while promoting the child's best interest by providing permanency.[45] Under Florida's adoption intervention statute, parents whose children are removed from their physical custody by DCF have the right to choose a private adoption instead of working a case plan for reunification.[46] While adoption is not the first, or best, choice for every situation, there are many benefits to private adoption instead of allowing the child to be adopted through, or potentially languish in, Florida's foster care system. Private adoption through adoption intervention allows a parent to regain a sense of control and play an active role in the child's permanency by choosing an adoptive placement for the child.

In the State of Florida, Chapter 63 governs private adoption,[47] and Florida Statute Section 63.082(6) is known as the Adoption Intervention Statute.[48] The statute is lengthy and contains extensive detail because it outlines a process by which biological parents voluntarily relinquish a fundamental right to the care, custody, and control of their child. Private adoptions under Chapter 63 differ from dependency adoptions, which are governed

45. FLA. STAT. § 63.022(3) (2022).

46. FLA. STAT. § 63.082(6)(a) (2022).

47. FLA. STAT. § 63.032(2) (2022) (defining adoption as "the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock").

48. FLA. STAT. § 63.012 (2022) (with adoption interventions falling under Chapter 63 "known as the 'Florida Adoption Act'").

by Chapter 39, because parents choosing a private adoption do so by voluntarily relinquishing their parental rights to a qualified adoption entity. Adoptions initiated through the Chapter 39 dependency system are typically involuntarily relinquishments, through a formal termination of parental rights ("TPR") proceeding, after a child has been removed.

Adoption intervention is a two-step judicial process. The court must first determine whether the adoption entity has filed the required documents to be entitled to intervene in the dependency case.[49] If so, the court must grant the motion to intervene, and the adoption entity becomes a party to the case. Next, the court must determine whether a transfer of custody and change of placement is appropriate through a statutorily prescribed, modified best interest standard.[50]

For a motion to intervene to be granted, an adoption entity[51] must file a valid consent for adoption, signed by a parent of a child who is subject to the dependency proceeding.[52] Only the consent of one parent is required for an adoption entity to be entitled to intervene.[53] By statute, parents of children who are subject to a dependency proceeding are required to be informed of the option of a private adoption on three separate occasions throughout the dependency proceeding.[54] When a parent elects a private adoption, the parent contacts an adoption entity, most often an attorney or licensed child placing agency, to sign a consent to adoption. In order to exercise this option, parents must have their parental rights intact, meaning that their parental rights to the child cannot already have been terminated during the Chapter 39 dependency proceeding.[55] Once a parent's rights to a child are terminated, the right to make decisions regarding the care,

49. FLA. STAT. § 63.082(6)(c) (2022).

50. *Id.*

51. FLA. STAT. § 63.032(3) (2022) (defining an adoption entity as "the department, a child-caring agency . . . an intermediary, a Florida child-placing agency . . . or a child-placing agency licensed in another state which is licensed by the department to place children in the State of Florida").

52. FLA. STAT. § 63.082(6)(b) (2022).

53. FLA. STAT. § 63.082(6)(a) (2022); *see also In re* M.R., 327 So. 3d 848, 851 (Fla. 4th Dist. Ct. App. 2021) (holding that one parent's consent is sufficient for an adoption entity to intervene in a dependency case by recognizing that the term "parent," under the definition portion of the statute, does not include both parents).

54. *See* discussion *infra* pt. IV.A.2 detailing the notice requirement.

55. FLA. STAT. § 63.082(6)(a) (2022).

custody, and control of the child are lost, and the parent no longer has the right to elect a private adoption.[56]

Voluntary consents to adoption under Chapter 63 have the same requirements, regardless of dependency status, and a consent for adoption executed for a child who is under the supervision of DCF[57] is "valid, binding, and enforceable by the court."[58] A consent for adoption must be signed after a child's birth.[59] After birth, a mother can sign a consent for adoption either forty-eight hours after the child's birth or upon receiving notification that she is "fit to be released from the licensed hospital or birth center, whichever is earlier."[60] A consent to adoption can be signed by a man any time after a child's birth.[61] In Florida, a consent for adoption is "valid upon execution" for children under six months of age, unless a court finds that the consent "was obtained by fraud or duress."[62] For a child over six months of age, a consent is valid upon execution but subject to a three day revocation period.[63]

An adoption entity must provide a preliminary home study[64] and "any other evidence of the suitability of the placement."[65] For

56. *Id.*

57. *Id.* (stating "or otherwise subject to the jurisdiction of the dependency court as a result of the entry of a shelter order, a dependency petition, or a petition for termination of parents rights").

58. *Id.*; *see also In re* S.N.W., 912 So. 2d 368, 370 (Fla. 2d Dist. Ct. App. 2005) (holding that a trial court's decision to invalidate a mother's consent for adoption is reversed and remanded for further proceedings, after DCF's concession, that the trial court was required to allow the adoption entity to intervene and that the mother's consent was valid and "could not be set aside without notice to [the adoption entity] and an appropriate evidentiary basis to establish the consent was obtained by fraud or duress").

59. FLA. STAT. § 63.082(4)(a) (2022).

60. FLA. STAT. § 63.082(4)(b) (2022).

61. *Id.*

62. *Id.*

63. *Id.*

64. It should be noted that DCF references a "preliminary home study," while adoption entities referencing the same document simply call it a home study. FLA. ADMIN. CODE ANN. r. 65C-16.019 (2022). A "final home study," according to DCF, is a combination of the preliminary home study and the post-placement supervision reports conducted after placement. *Id.* Adoption entities typically do not distinguish between a preliminary and final home study, only one home study and the subsequent post-placement reports.

65. FLA. STAT. § 63.082(6)(b) (2022).

almost all Florida adoptions,[66] a favorable[67] preliminary home study[68] must be obtained before a child can be placed into a prospective adoptive home.[69] Typically, DCF conducts home studies on prospective adoptive placements of its choosing, but for adoption intervention, an additional DCF home study is not required. A preliminary home study, conducted by a child placing agency or home study provider, is presumed sufficient "[u]nless the court has concerns regarding the home study provider, or concerns that the home study may not be adequate to determine the best interests of the child."[70]

When a consent to adoption is obtained, the adoption entity is entitled to intervene in the Chapter 39 dependency case[71] and cooperation between the adoption entity and DCF is prescribed by statute.[72] After a court finds that an adoption entity has filed a valid consent, the court should grant the motion to intervene which

66. Florida statute does not require a preliminary home study for adult adoptions and stepparent or relative petitioners without a showing of good cause, but a favorable home study is required for all intervention adoptions, regardless of relative status. FLA. STAT. § 63.092(3) (2022).

67. *Id.* (noting that a favorable home study allows a family to take placement of a child, but a suitable home study is not a presumption of suitability for a final hearing on a petition for adoption because a court must separately consider suitability under the "totality of the circumstances").

68. *Id.* A preliminary home study contains confidential information about a prospective adoptive family and determines the suitability of the home for pre-adoptive change of placement. At minimum, a preliminary home study must include:

> (a) An interview with the intended adoptive parents.
>
> (b) Records checks of the department's central abuse registry, which the department shall provide to the entity conducting the preliminary home study, and criminal records correspondence checks under s. 39.0138 through the Department of Law Enforcement on the intended adoptive parents.
>
> (c) An assessment of the physical environment of the home.
>
> (d) A determination of the financial security of the intended adoptive parents.
>
> (e) Documentation of counseling and education of the intended adoptive parents on adoptive parenting, as determined by the entity conducting the preliminary home study. The training specified in s. 409.175(14) shall only be required for persons who adopt children from the department.
>
> (f) Documentation that information on adoption and the adoption process has been provided to the intended adoptive parents.
>
> (g) Documentation that information on support services available in the community has been provided to the intended adoptive parents.
>
> (h) A copy of each signed acknowledgment of receipt of disclosure required by s. 63.085

Id.

69. *Id.*

70. FLA. STAT. § 63.082(6)(b) (2022).

71. *Id.*

72. FLA. STAT. § 63.022(5) (2022).

allows the adoption entity to become a party to the case, and a preliminary home study must be filed identifying the prospective adoptive family.[73] Once party status is obtained, the adoption entity can begin the discovery process, by accessing the child's records contained within the case file,[74] before filing a motion to transfer custody.

After the motion to intervene is granted, a court is faced with the decision of whether to transfer custody of the child from DCF to the adoption entity for pre-adoptive change of placement with the identified adoptive family.[75] The statute identifies eight factors the court must weigh when determining whether to transfer custody of the child:

> 1. The permanency offered;
>
> 2. The established bonded relationship between the child and the current caregiver in any potential adoptive home in which the child has been residing;
>
> 3. The stability of the potential adoptive home in which the child has been residing as well as the desirability of maintaining continuity of placement;
>
> 4. The importance of maintaining sibling relationships, if possible;
>
> 5. The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient maturity, understanding, and experience to express a preference;
>
> 6. Whether a petition for termination of parental rights has been filed pursuant to s. 39.806(1)(f), (g), or (h);
>
> 7. What is best for the child; and
>
> 8. The right of the parent to determine an appropriate placement for the child.[76]

73. FLA. STAT. § 63.082(6)(b) (2022).

74. Along with the DCF case file, the GALP file on the child can also be requested in discovery, as well as information in files of applicable community-based providers, independent medical providers, etc.

75. FLA. STAT. § 63.082(6)(b) (2022).

76. FLA. STAT. § 63.082(6)(e) (2022).

The court must use the relevant enumerated factors to determine whether transferring custody serves the best interests of the child but is not limited to only considering the listed factors.[77] Once the court determines that it is in the best interests of the child to transfer custody, "the court shall promptly order the transfer of custody of the minor child to the prospective adoptive parents, under the supervision of the adoption entity" and may impose reasonable requirements on a transition plan for the child.[78]

IV. PROBLEMS WITH THE ADOPTION INTERVENTION STATUTE

Although seemingly a straightforward process, adoption intervention has caused frustration for the court and parties involved. The statute, in its current state, provides insufficient guidance to the court on how to apply the eight factors. Additionally, the working relationships between the four or five main parties involved in an intervention proceeding (DCF, Guardian ad Litem, the adoption entity, and one or both parents) are sometimes complicated, on one or more sides, by over-zealous representation and mutual skepticism about each other's position as to the purposes of the intervention statute, how it should be interpreted and applied by the court, and the child's best interest.[79] As a result, circuit and district courts across Florida interpret and apply the statute differently. Consistency is not easily found, even within the same circuit.[80] The following parts will highlight several

77. *Id.*

78. *Id.* § 63.082(6)(d).

79. Telephone Interview with Cheryl R. Eisen-Yeary, Solo Practitioner, The Law Office of Cheryl R. Eisen (Sept. 25, 2021). Cheryl R. Eisen-Yeary has extensive experience in adoption law, was a founding member of the Florida Adoption Council ("FAC") in 2001 and has been a member of the American Academy of Adoption and Assisted Reproduction Attorneys ("AAAA"), formerly the American Academy of Adoption Attorneys, since 1999. In addition to the everyday legal work associated with making adoptive placements, Ms. Eisen-Yeary has handled contested adoption cases, including both contested and non-contested adoption intervention cases, in several Florida circuits, and appellate work in the Florida District Court of Appeal for the First, Second, and Fifth districts. She has served as General Counsel to three Florida licensed child-placing agencies, representing one for over twenty years. She has served as outside counsel for Children's Home Society of Florida and has provided pro bono services to Jewish Adoption and Foster Care Options ("JAFCO"). Ms. Eisen-Yeary has graciously offered to share her professional experiences while working with the adoption intervention statute for purposes of this Article.

80. *Id.*

issues with the procedural and practical applications of the adoption intervention statute.

A. Procedural Issues

The adoption intervention statute has several procedural problems contributing to the overall unpredictable outcomes. Before the court even determines whether transferring placement of the child is in the child's best interest, the court and the parties involved must first navigate several hurdles, including the location of the adoption intervention statute, insufficient notice to parents, time constraints on a final hearing, and issues surrounding both the lack of sufficient preliminary information related to the child and the lack of time to gather adequate information. As a result, the procedural process of adoption intervention has caused frustration.[81] The following parts aim to identify the main areas of contention as they relate to the procedural process of working with the adoption intervention statute.

1. Adoption Intervention: Hidden in Plain Sight

As a result of unfortunate placement, the statute governing adoption intervention is nearly impossible to locate, difficult to interpret, and not best served by its current location. Buried deep within Chapter 63, under a portion of the statute that describes the procedures for obtaining a valid consent and the requirements for social and medical information, rests the adoption intervention statute.[82] The title of this section does not mention adoption intervention, or offset it from other provisions under section 63.082, even though section 63.082(6) is the main portion of the statute governing intervention adoptions.[83] As a result, courts cannot interpret the intervention statute in isolation and must separate the portions of the statute that deal solely with Chapter 63 adoptions and apply the intervention portion of the statute to a Chapter 39 dependency proceeding. Searching for "adoption intervention" on the Florida Legislature's official Internet source for Florida statutes produces twenty-four results, none of which

81. *Id.*
82. FLA. STAT. § 63.082 (2022).
83. *Id.* (titling this section "Execution of consent to adoption or affidavit of nonpaternity; family social and medical history; revocation of consent").

include reference to Chapter 63, let alone the adoption intervention portion of the statute—a major problem for the age of digital legal research.[84]

2. Inadequate Notice

Biological parents who are parties to a dependency proceeding are not being provided adequate notice of their right to choose a private adoption. Chapter 63 requires that parents be informed of their right to choose a private adoptive placement for their children through an adoption entity at three separate benchmarks during Chapter 39 dependency proceedings.[85] However, Chapter 39 does not require such notice until the filing of a petition for termination of parental rights, the step immediately before the termination of parental rights and a parent's last opportunity to exercise the right to a private placement.[86]

While weakening the power of parents to make custody decisions about their children,[87] a 2016 amendment to the statute provided additional notice requirements for parents by changing one conjunction in the statute.[88] The notice requirement was amended to take place earlier in the dependency process by changing the conjunction "or" to "and."[89] This change expanded the Chapter 63 notice requirement for biological parents of the right to choose a private adoption from one instance to three.[90] The reason for the additional notice requirement was ostensibly to expedite

84. Search Results for "Adoption Intervention," ONLINE SUNSHINE, http://www.leg.state.fl.us/statutes/index.cfm?StatuteYear=2021&AppMode=Display_Results&Mode=Search%2520Statutes&Submenu=2&Tab=statutes&Search_String=adoption+intervention (last visited Feb. 17, 2023).

85. FLA. STAT. § 63.082(6)(g) (2022) (directing the court to provide written notice to a biological parent in a dependency case of the right to choose a private adoption "[a]t the arraignment hearing . . . in the order that approves the case plan . . . and in the order that changes the permanency goal to adoption").

86. FLA. STAT. § 39.802(4)(d) (2022) (stating that a petition for termination of parental rights must include a statement "[t]hat the parents of the child will be informed of the availability of private placement of the child with an adoption entity"); FLA. STAT. § 63.082(6)(a) (2022).

87. *See* discussion *infra* pt. IV.B.1. (elaborating on the 2016 amendment).

88. PROFESSIONAL STAFF OF THE COMMITTEE ON JUDICIARY, BILL ANALYSIS AND FISCAL IMPACT STATEMENT, CS/SB 590, at 7 (Jan. 11, 2016), https://www.flsenate.gov/Session/Bill/2016/590/Analyses/2016s0590.pre.ju.PDF.

89. *Id.*

90. *Compare* FLA. STAT. § 63.082(6)(e) (2013), *with* FLA. STAT. § 63.082(6)(e) (2016).

permanency.[91] Making parents aware of this option by shouting it "loud and proud, early and often" was intended to promote intervention earlier in a dependency proceeding.[92]

Even with increased instances of notice after the 2016 amendment, the statute still fails to provide parents with adequate notice. Oftentimes, written notice to parents about their right to choose a private placement is buried in dependency paperwork that they may never see, realize, or have the opportunity to discuss with counsel. Biological parents in the dependency system frequently report never being made aware, or properly educated, on their right to a private placement.[93] Without proper notification, parents do not have the chance to choose this option in a timely manner before their rights are involuntarily terminated, before the child has been in foster care long enough to raise a bonding problem, or before they feel pressured into relinquishing their parental rights to the State. Some parents are not fully aware of this option until several months, or even years, after a dependency proceeding has been initiated. This causes further frustration to the parties involved, including the foster parents who have been caring for the child for a significant amount of time and who may have hopes to adopt the child. In these cases, timing can mean the difference between parents choosing a home and maintaining a relationship with their children or never having contact with their children again after their parental rights are involuntarily terminated.[94]

3. Thirty-Day Final Hearing Requirement

Another challenge that arises during an intervention proceeding is that a "final hearing on the motion to intervene and the change of placement of the child must be held within thirty days after filing of the motion [to intervene]."[95] The purpose of this requirement is for the dependency court to avoid unnecessary

91. PROFESSIONAL STAFF OF THE COMMITTEE ON JUDICIARY, *supra* note 88, at 7 (reasoning that "[m]oving up the time of notice might expedite the permanent placement of a child's [sic]").

92. Taylor Smith, *Florida Adoption Intervention Statute: Balancing the Constitutional Rights of the Parents with the Best Interests of the Dependent Child*, 5 CHILD & FAM. L.J. 57, 71 (2017).

93. *Id.* at 70–71.

94. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79.

95. FLA. STAT. § 63.082(6)(c) (2022).

delay and reduce potential harm to the child by promptly determining whether a transfer of custody is in the best interests of the child.[96] The thirty day requirement can be waived for "good cause or mutual agreement of the parties," [97] but the mutual agreement of contentious parties can be difficult to obtain, notwithstanding obtaining a timely hearing alongside backlogged dockets.[98]

4. Preliminary Home Study Issues

Before being identified as a prospective adoptive placement, a hopeful adoptive family should be fully aware of a prospective adoptive child's medical and developmental needs. However, adoption entities are initially not entitled to any information about the child contained within the DCF dependency case because they are not a party to the case until the motion to intervene is granted.[99] Thus, adoption entities only have information about the child obtained directly from the parent when attempting to evaluate the suitability of, or advocate for, the prospective adoptive placement.

The issue regarding the preliminary home study involves conflicting stances on whether the preliminary home study must be filed at the same time as a valid consent to grant the motion to intervene. Subsection 63.082(6)(b) states, in relevant part:

> Upon execution of the consent of the parent, the adoption entity shall be permitted to intervene in the dependency case as a party in interest and must provide the court that acquired jurisdiction over the minor . . . a copy of the preliminary home study of the prospective adoptive parents . . . .[100]

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96. *Id.*; *see also* C.S. v. S.H., 671 So. 2d 260, 264 n.4 (Fla. 4th Dist. Ct. App. 1996) (where litigation in a contested intervention case between an out-of-state biological relative, selected for adoptive placement by DCF, and the child's foster parents lasted over two years before custody of the three-year-old child was transferred to the biological relatives with the court noting that the lack of continuity was both attributed to judicial complication and the appearance that none "of the attorneys representing the interested parties alerted the judges to the urgency of making an expedited ruling . . . [and] every month that went by increased the potential for psychological harm to [the child] attendant to a separation from her foster parents").

97. FLA. STAT. § 63.082(6)(c) (2022).

98. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79.

99. *Id.*

100. FLA. STAT. § 63.082(6)(b) (2022).

Though the plain reading of the statute does not require the preliminary home study to be filed prior to being entitled to an order granting a motion to intervene—only a valid consent—DCF generally interprets this section as requiring both a valid consent and a preliminary home study to be filed before being permitted to intervene, and courts typically agree.[101]

Adoption entities support the interpretation that a preliminary home study is not required to be permitted to intervene on the premise that DCF's own administrative rules define a preliminary home study for adoption intervention as requiring "document[ation] that the family and medical history of the child's family and the current and projected needs of the specific child were discussed [with the prospective adoptive family]."[102] Additionally, the preliminary home study must include "a determination that the family has the strengths to meet the identified current and projected needs of the specific child including the adoptive parents' willingness to access needed services."[103]

Because adoption entities are not entitled to information about the child contained within the dependency file until after a motion to intervene has been granted, adoption entities cannot provide a preliminary home study that meets DCF's qualifications by discussing the child's needs with the prospective adoptive family or making a determination that the family is able to meet the child's current and future needs. Under any other interpretation, adoption entities must solely rely on information about the child obtained directly from the biological parent.

For a variety of reasons, a biological parent may be an unreliable source of information related to the child's current medical and developmental needs.[104] Sometimes the prospective adoptive child has been under DCF's care for a significant amount of time. While under the care of DCF, a child often experiences medical, developmental, and psychological changes due to early intervention evaluations and services.[105] Therefore, such information obtained from the biological parent is regularly outdated or inaccurate, making it difficult for an adoption entity to

101. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79.
102. FLA. ADMIN. CODE ANN. r. 65C-16.019(3)(a) (2022).
103. *Id.* r. 65C-16.019(3)(b).
104. Telephone interview with Cheryl R. Eisen-Yeary, *supra* note 79.
105. *Id.*

properly evaluate whether a prospective adoptive family is a suitable placement to serve a prospective child's needs before being required to file the family's preliminary home study.[106] The lack of complete and accurate information about the child prevents an adoption entity from providing an adequate preliminary home study when filing a motion to intervene.

5. Lack of Sufficient Time for Discovery

Once the motion to intervene is granted, the adoption entity can access the child's records contained within the dependency file and begin the discovery process. However, another issue arises because the thirty-day final hearing requirement[107] does not allow sufficient time to complete formal discovery, set a final hearing on the motion to intervene, or transfer placement of the child.[108] The discovery process in other civil cases can take several months to years. Adoption entities need time to receive and review the child's records contained in the dependency file, request additional records, investigate the child's current placement, and sometimes conduct depositions. While the timing of adoption intervention cases is of utmost importance to secure permanency as quickly as possible, the thirty-day final hearing requirement does not allow sufficient time to complete a formal discovery process, which is especially troublesome in highly contested cases.[109]

For example, in a case from the First District Court of Appeal, counsel for the interveners asked for a continuance of a TPR trial so the motion to intervene could be heard before the parent's rights were terminated.[110] In a dissenting opinion, one judge expressed frustration with the fact that counsel was present at the hearing but reported not being in a position to argue the motion to intervene due to the fact "that he needed unspecified discovery before he could show that adopting the child would be in the child's best interests."[111] In these types of situations, discovery would be unspecified because counsel for the interveners would not have

106. *Id.*; FLA. STAT. § 63.092(3) (2022) (defining that a preliminary home study is used "to determine the suitability of the intended adoptive parents and may be completed before identification of a prospective adoptive minor").

107. FLA. STAT. § 63.082(6)(c) (2022).

108. Telephone interview with Cheryl R. Eisen-Yeary, *supra* note 79.

109. *Id.*

110. Y.G. v. Dep't Child. & Fams., 246 So. 3d 509, 511 (Fla. 1st Dist. Ct. App. 2018).

111. *Id.* at 514 (Windsor, J., dissenting).

had access to the child's records in the court file to know what he would need in order to provide "any other evidence of the suitability of the [adoptive] placement."[112] This case is an example of not only the necessity of discovery but also the necessity for interveners to be provided with enough time for a proper discovery process.

B. Application of the Eight Factors: Too Much Discretion, Not Enough Direction

The language of the adoption intervention statute has caused frustration for courts and practitioners across the state with its unpredictable and inconsistent application. The wide judicial discretion offered under the statute allows courts to interpret the statute differently, even within the same circuit. To further complicate the situation, appellate courts have been hesitant to overturn decisions for abuse of discretion regarding a determination of the child's best interest.[113] On appeal, these cases have routinely been affirmed without a written opinion.[114]

When interpreting the language of the statute, the court must determine the best interest of the child through a modified best interest test by weighing all relevant factors, including the parent's right to choose a placement for the child. In 2016, the eight factors a court should consider when determining whether a transfer of custody is in the child's best interest underwent changes that have dramatically affected its application. The Guardian ad Litem Program ("GALP") believes that the 2016 amendment changed the burden of proof from a court considering the appropriateness of a parent's choice of placement to strictly a best interest standard,[115] but the 2016 amendment only made the statute murkier.

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112. FLA. STAT. § 63.082(6)(b) (2022).

113. *See* G.S. v. T.B., 969 So. 2d 1049, 1051 (Fla. 1st Dist. Ct. App. 2007), *certified question answered and rev'd*, 985 So. 2d 978 (Fla. 2008) (concluding that "the legislature vested broad discretion in the trial courts" and that the appellate court could not find an abuse of discretion after "the trial court heard extensive testimony relating to the children's best interest and concluded their best interest compelled that the adoption should be denied").

114. Florida Guardian ad Litem, *Representing the Child's Interests in Adoption Intervention Proceedings*, YOUTUBE, at 17:07–17:48 (Nov. 4, 2019), https://www.youtube.com/watch?v=gxcvSi4IE0c (stating "neither of us are getting the better of this business, we are all getting PCA'd . . . per curiam affirmed").

115. *Id.* at 28:54–29:04.

The applicable standard is a modified best interest of the child standard, which takes into consideration a parent's fundamental right, but the language of the eight factors a court must consider makes this determination less clear than simply a best interest determination. The statute reads: "[i]n determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent or adoption entity, the court shall consider and weigh all relevant factors, including, but not limited to [the eight factors]."[116] The seventh factor lists "[w]hat is best for the child" and, understandably, leaves courts questioning the meaning of this factor and how it differs from the overall best interest determination.[117] The legislative history is silent on an exact definition for this factor.[118]

When interpreting the eight factors, courts have historically relied on DCF's interpretation of the statute, by virtue of the agency deference doctrine, which creates an inherent bias against third-party interveners. In 2018, the Florida Constitution was amended to eliminate the type of deference previously awarded to an administrative agency's interpretation of a statute.[119] Instead, the amendment requires the court to interpret a statute de novo.[120]

Before the amendment, criticism of the agency deference doctrine highlighted the inherent prejudice that existed against private litigants. In *Public Health Trust of Miami-Dade County v. Department of Health*, the court noted that:

> the [judge] should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party. Otherwise, whenever a private litigant is up against a state agency and the outcome depends upon the meaning of an ambiguous statute or rule administered

116. FLA. STAT. § 63.082(6)(e) (2022).

117. *Id.*

118. *See* PROFESSIONAL STAFF OF THE COMMITTEE ON FISCAL POLICY, BILL ANALYSIS AND FISCAL IMPACT STATEMENT, CS/CS/CS/SB 590 (Jan. 21, 2016), https://www.flsenate.gov/Session/Bill/2016/590/Analyses/2016s0590.fp.PDF; PROFESSIONAL STAFF OF THE COMMITTEE ON JUDICIARY, *supra* note 88.

119. FLA. CONST. art. V, § 21 (2022) ("In interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.").

120. *Id.*

> by that agency, the agency's thumb would *always* be on the scale, . . . and the non-agency party's interpretive arguments would *never* be heard by a judge who could be completely neutral in deciding such questions of construction.[121]

The agency deference doctrine had become almost incontestable with "[a]n important separation-of-powers issue" lurking below the surface.[122]

Even with the constitutional amendment, courts still rely and place great weight on DCF's interpretation of the adoption intervention statute because it is difficult to evaluate a statute requiring a best interest determination as a detached party who has likely never even laid eyes on the child.[123] A court deferring to only one litigant's statutory interpretation is incompatible with guarantees of due process, particularly when the executive branch is the institution being awarded enhanced power against private citizens, and particularly when the Florida Constitution expressly provides a separation of power provision.[124] There is no reason for a court to defer to the agency's construction, "which may well have its own agenda," when the court is as "capable of reading the statute or rule as the agency."[125] Although courts are now required to interpret the adoption intervention statue de novo, more direction to the court regarding the application of the adoption intervention statute would allow courts to place less reliance on DCF's interpretation of the statute.[126]

1. The "Right" of a Parent to Choose an Adoptive Placement

Two conflicting views exist regarding whether parents have a fundamental right, or only a statutory right, to choose the adoptive placement of their children under the adoption intervention

121. No. 15-3171, 2016 WL 1255758, at *28 (Fla. Div. Admin. Hrgs. Feb. 29, 2016).

122. Hous. Opportunities Project v. SPV Realty, LC, 212 So. 3d 419, 425 n.9 (Fla. 3d Dist. Ct. App. 2016).

123. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79 (explaining that in 2020, a trial judge made it abundantly clear that DCF's interpretation of everything related to intervention governed in his court).

124. FLA. CONST. art. II, § 3 (2022) ("The powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches . . . ."); Frank Shepherd et al., *The Demise of Agency Deference: Florida Takes the Lead*, 94 FLA. BAR J. 18, 22 (Jan./Feb. 2020).

125. *Hous. Opportunities Project*, 212 So. 3d at 425 n.9.

126. *See* discussion *infra* pt. V.B.

statute. Adoption entities have argued that parents have a fundamental and a statutory right while GALP asserts only a statutory right. The 2016 amendment was designed to increase DCF's control over selecting prospective adoptive placements for dependent children and decrease the right of parents to make custody decisions for their child when their parental rights are still legally intact.[127] The amendment aimed to weaken a parent's choice, in favor of the child's current placement, by adding more factors to balance against the parent's right to determine an appropriate placement.[128] Before the 2016 amendment, the court was instructed to first consider "the rights of the parent to determine an appropriate placement for the child" but this language was moved to the last factor to be weighed.[129] The change reportedly "directs a court to consider the value of continuity of the child's placement in his or her current residence," which oftentimes refers to the child's temporary foster home.[130] Also added was direction for the court to consider whether a petition for termination of parental rights had been filed due to allegations of serious misconduct on behalf of the parent.[131]

The conflicting views of whether parents possess a fundamental right to choose an adoptive placement for their children are both supported by conflicting opinions among district courts of appeal. The Second District Court of Appeal supports the position of adoption entities while the Third District Court of Appeal supports the view of the GALP. The First, Fourth, and Fifth District Courts of Appeal have not taken a direct stance on the issue. The Fifth DCA initially adopted the Second DCA's stance on two instances in 2014 but declined to directly specify a parent's constitutional right later in a 2019 case. In 2022, the Fifth DCA reaffirmed its support of the Second DCA's best interest analysis and mentioned the fundamental right to raise a child, but did not address the fundamental right of parents to make custody

127. PROFESSIONAL STAFF OF THE COMMITTEE ON JUDICIARY, *supra* note 88.

128. *Id. Compare* FLA. STAT. § 63.082(6)(e) (2013), *with* FLA. STAT. § 63.082(6)(e) (2016).

129. *Compare* FLA. STAT. § 63.082(6)(e) (2013), *with* FLA. STAT. § 63.082(6)(e) (2016).

130. PROFESSIONAL STAFF OF THE COMMITTEE ON JUDICIARY, *supra* note 88.

131. FLA. STAT. § 63.082(6)(e) (2022). This section of the statute instructs the court to take into consideration whether a TPR petition has been filed for a reason in section 39.806(1)(f), (g), or (h), which include egregious conduct, aggravated child abuse or sexual abuse, and "murder, manslaughter, aiding or abetting the murder, or conspiracy or solicitation to murder the other parent or another child, or a felony battery that resulted in serious bodily injury to the child or to another child." FLA. STAT. § 39.806(1)(f)–(h) (2022).

decisions. The Fourth DCA initially issued an opinion referencing a parent's constitutional rights but later substituted the opinion and removed the reference.

The Second DCA, in *In re S.N.W.*, recognized a parent's constitutional right to determine a child's placement when reviewing an order denying a motion to intervene in a dependency hearing and setting aside a mother's consent to a private adoption.[132] In reversing and remanding the lower court's decision, the Second DCA instructed the dependency court to permit the adoption entity to intervene if it found the mother's consent valid.[133] The court further instructed the dependency court to transfer custody of the child if the court found the prospective adoptive family to be qualified for placement of the child and the adoption to be in the child's best interest.[134] When instructing the dependency court on how to apply the best interest analysis under section 63.082(6), the court stated:

> If the birth parent has executed a valid and binding consent to an adoption, the court is not making a comparative assessment of the birth parents versus the prospective adoptive parents. Further, section 63.082(6)(d) specifically provides that the court "shall give consideration to the rights of the birth parent to determine an appropriate placement for the child"—an explicit recognition of the parents' constitutional right to the care, custody, and control of their children. Thus, the court is also prevented from comparing the birth parents' choice of prospective adoptive parents with other potential placements that the court or the Department might choose for the child. Viewed in this light, the "best interest" analysis requires a determination that the birth parent's choice of prospective adoptive parents is appropriate and protects the wellbeing of the child; not that it is the best choice as evaluated by the court or the Department in light of other alternatives.[135]

Thus, the Second DCA recognized a constitutional right for parents to choose a qualified adoptive family for a child subject to a dependency proceeding.

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132. *In re* S.N.W., 912 So. 2d 368, 369, 372 (Fla. 2d Dist. Ct. App. 2005).

133. *Id.* at 373–74.

134. *Id.* at 373.

135. *Id.* at n.4 (citing *In re* C.W.W., 788 So. 2d 1020, 1023 (Fla. 2d Dist. Ct. App. 2001)); Santosky v. Kramer, 455 U.S. 745, 754 (1982); FLA. STAT. § 39.801 (2004) (citations omitted).

Agreeing with the Second DCA in two 2014 cases, the Fifth DCA recognized a constitutional right for parents to determine a qualified adoptive placement for their child.[136] The Fifth DCA further explained that "the mother's choice of placement with a prospective parent when her parental rights were still intact was an exclusively parental decision . . . subject only to the trial court determining that the prospective parent was properly qualified and that the adoption was in [the child's] best interests."[137] But, in 2019, the Fifth DCA emphasized that a parent's choice is one factor to consider, but the child's best interest is the overriding standard.[138] This case explained that a father's right to participate in choosing an adoptive placement of his child was "purely statutory in nature and . . . secondary to the court's duty to determine the best interests of the child."[139]

In 2022, the Fifth DCA distinguished a case from a Fourth DCA case where the trial judge found a transfer of custody to be in the child's best interest. The Fifth District trial court ultimately failed to apply its own best interest conclusion (that transfer would not be in the child's best interest) by erroneously interpreting the Fourth DCA case as not permitting a best interest analysis to prevail over a parent's right.[140] In doing so, the court acknowledged the fundamental right to parent and a statutory right to select a placement, but did not address whether parents have a fundamental right to make a custody determination.[141] The court reaffirmed its support of *S.N.W.*'s best interest analysis, from its 2014 opinion in *K.A.G.*, and stated that the statute "is clear that when considering a motion to transfer custody . . . the trial court must consider the wishes of the natural parent . . . and weigh those wishes with the other seven factors."[142] The statute may appear to be clear on appellate review, but if it were clear, trial courts charged with applying the statute would not have such difficulties.

136. *In re* Adoption of K.A.G., 152 So. 3d 1271, 1275 n.4 (Fla. 5th Dist. Ct. App. 2014); R.L. v. W.G., 147 So. 3d 1054, 1055 (Fla. 5th Dist. Ct. App. 2014).

137. *R.L.*, 147 So. 3d at 1055.

138. J.G. v. Dep't Child. & Fams., 270 So. 3d 523, 525 (Fla. 5th Dist. Ct. App. 2019).

139. *Id.*

140. W.K. v. Dep't Child. & Fams., 230 So. 3d 905, 908 (Fla. 4th Dist. Ct. App. 2017); Guardian ad Litem Program v. Campbell, 5D22-0217, 2022 WL 1273422, at *4 (Fla. 5th Dist. Ct. App. Apr. 29, 2022).

141. *Campbell*, 2022 WL 1273422, at *3.

142. *Id.* at *4 n.4.

In a distinguishable 2017 case, due to bonding[143] since the children had resided with the foster family for almost three years before a motion to intervene was filed, the Third DCA determined that a parent's choice of placement is one factor to consider.[144] The court noted that:

> [a]lthough parents have a fundamental right to raise their children, and section 63.082(6)(e) provides the parents with the statutory right to select a prospective adoptive parent or parents for the child, that right is not absolute . . . and is "subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail."[145]

The court ultimately affirmed the lower court's finding that the best interests of the child would not be served by an intervention after analyzing the other relevant factors, including an almost three-year bond with the foster family who was willing to adopt.[146]

The Fourth DCA has not yet issued a clear opinion on this issue. In 2017, the Fourth DCA initially issued an opinion on an intervention case recognizing a parent's fundamental and constitutional right to determine an adoptive placement for their child.[147] After denying a Guardian ad Litem ("GAL") motion for clarification,[148] the district court substituted the opinion and removed the language that referenced parents having a fundamental and constitutional right to choose the placement of their child.[149]

Citing *E.Q.*, *R.L.*, *K.A.G.*, and *S.N.W.*, the First DCA recognized that a mother was denied of her right, although not absolute, when the lower court denied a motion to continue and, as a result, did not hear the motion to intervene.[150] GAL filed a motion for rehearing and clarification because it was unclear whether the court was asserting a fundamental right to select an adoptive

143. *See* discussion *infra* pt. V.B.3; E.Q. v. Fla. Dep't Child. & Fams., 208 So. 3d 1258, 1260 (Fla. 3d Dist. Ct. App. 2017).

144. *E.Q.*, 208 So. 3d at 1260.

145. *Id.* (citing *In re* Camm, 294 So. 2d 318, 320 (Fla. 1974)).

146. *Id.* at 1260–61.

147. W.K. v. Dep't Child. & Fams., 230 So. 3d 905, 908 (Fla. 4th Dist. Ct. App. 2017).

148. Florida Guardian ad Litem, *supra* note 114, at 18:02–18:29.

149. *Compare* W.K. v. Dep't Child. & Fams., 42 Fla. L. Weekly 1909 (Fla. 4th Dist. Ct. App. 2017), *with* W.K. v. Dep't Child. & Fams., 230 So. 3d 905 (Fla. 4th Dist. Ct. App. 2017).

150. Y.G. v. Dep't Child. & Fams., 246 So. 3d 509, 513 (Fla. 1st Dist. Ct. App. 2018).

placement or just a statutory right.[151] The motion for clarification was denied.[152]

It is well established that parents have a fundamental right to the care, custody, and control of their minor children, and adoption is a decision regarding a child's custody status.[153] Additionally, *Santosky* held that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[154] But a parent's fundamental right is not absolute because the State can infringe upon the right to protect the child from actual or suspected abuse, neglect, or abandonment. Therefore, parents who have lost temporary custody of a child retain their fundamental right to make decisions about their child, subject to the State's protective measures, unless their parental rights are terminated. The adoption intervention statute aims to balance the parent's fundamental right and the State's interest in protecting the child by only permitting adoption interventions before the termination of parental rights. Parental rights can only be terminated involuntarily after a finding of unfitness and when termination is found to be the least restrictive means of protecting the child.

The Guardian ad Litem Program has taken the stance that biological parents do not have a fundamental right to choose an adoptive placement for their child, only a statutory right.[155] GALP's stance first erroneously relies on a case of minor children who were already free for adoption, not a parent electing to place the child for adoption.[156] In *G.S. v. T.B*, the Florida Supreme Court answered a certified question of whether a trial court abused its discretion when it denied a maternal grandparents' adoption petition to adopt two minor children because the grandparents would not permit visitation between the paternal grandparents and the children.[157] The parents of the children were both deceased, making the children legally free for adoption.[158] The trial court denied the adoption petition because it found that it was in

151. Florida Guardian ad Litem, *supra* note 114, at 18:35–20:59.
152. *Id.*
153. *See* discussion *supra* pt. II.A.
154. Santosky v. Kramer, 455 U.S. 745, 753 (1982).
155. Florida Guardian ad Litem, *supra* note 114, at 14:39–15:11.
156. *Id.* at 15:00–15:15.
157. 985 So. 2d 978, 980 (Fla. 2008).
158. *Id.*

the children's best interest to have visitation with both sets of grandparents, and granting the petition for adoption would create parental rights for the maternal grandparents, allowing them to solely decide who has visitation with the children.[159] The appellate court was hesitant to find an abuse of discretion given the wide judicial discretion awarded to trial judges for an adoption proceeding under Chapter 63, and upheld the trial court's decision to deny the petition.[160] In answering the certified question, the court quashed the First DCA's decision and remanded the case with the instruction to grant the petition for adoption.[161] Since the parents were deceased, they were not exercising their fundamental right by voluntarily electing to place their children for adoption. *G.S.* does not address whether there is a fundamental right to make the decision to place a child for adoption, like the GALP suggests, but rather addresses the legislative preference to provide permanency for legally free minor children through adoption as opposed to guardianship or other custody arrangements requiring continued judicial oversight.[162] GALP's reliance on this case for its position that parents no longer have a fundamental right to make custody decisions about their child once the child is placed under shelter is unfounded. While it is correct that "[a]doption was unknown in common law and exists solely by virtue of statute,"[163] the act of placing a child for adoption concerns a parent's fundamental right to the care, custody, and control of a child. Parents making the decision to place their child for adoption, under the adoption intervention statute, are not asserting a fundamental right to adopt their own child and have not lost the fundamental right to make decisions regarding the custody of their child. The question of whether adoption is in the best interest of a child as a permanency option is a separate issue from a parent, with intact parental rights, exercising a fundamental right to determine a custody placement for their child under Chapter 63's adoption intervention statute.

159. *Id.* at 984.

160. G.S. v. T.B., 969 So. 2d 1049, 1051 (Fla. 1st Dist. Ct. App. 2007), *certified question answered and rev'd*, 985 So. 2d 978 (Fla. 2008).

161. *G.S.*, 985 So. 2d at 985.

162. FLA. STAT. § 63.022(1)–(3) (2022); *G.S.*, 985 So. 2d at 983; C.M. v. Dep't Child. & Fam. Servs., 854 So. 2d 777, 779 (Fla. 4th Dist. Ct. App. 2003).

163. *G.S.*, 985 So. 2d at 982 (citing *In re* Palmer's Adoption, 176 So. 537, 538 (1937)).

2. Evaluating the Prospective Adoptive Placement

The statute instructs the court to consider whether the child's best interests would be served through adoption intervention by evaluating the prospective adoptive home, and only one of the eight enumerated factors is applicable to the prospective adoptive family: "[t]he permanency offered."[164] This provides little guidance to the court on how to determine whether the prospective adoptive home serves the child's best interest while the next two factors, relating to the child's current placement, give the appearance of requiring a comparison of placements. While the main benefit of intervention adoption to the child is permanency, private adoption provides more benefits to the child, including the opportunity for an ongoing connection with the child's biological family. The statute overlooks the additional benefits of private placement.

Private adoption offers permanency. Many children in the foster care system are not reunified with their biological parents through the traditional case plan method. Some of these children will eventually achieve permanency by being adopted by foster parents or by relatives but many of them will never achieve permanency because they will never be adopted. If they are adopted, the adoption process through DCF can take years. Through the intervention statute, private adoption not only guarantees permanency for the child, but the entire process can take as little as three months.[165]

Private adoption gives biological parents the power to choose who will raise their child. Placement through foster care can create an adversarial foundation to the relationship between biological parents and foster families, which in turn affects the child.[166] Through DCF, children are removed from their biological parents, against their will, and placed with foster families who often feel that their role is to protect the child from the biological parents and the environment the child was removed from. Through private adoption, biological parents regain control over the situation and

164. FLA. STAT. § 63.082(6)(e)(1) (2022).

165. FLA. STAT. § 63.122(1) (2022) (mandating that a hearing on a petition to adopt cannot "be held sooner than 30 days after the date the judgment terminating parental rights was entered or sooner than 90 days after the date the minor was placed in the physical custody of the petitioner, unless good cause is shown for a shortening of these time periods").

166. *See also* Smith, *supra* note 92, at 58.

can create a relationship with an adoptive family of their choosing that begins on a positive foundation.

Adoptive parents, through a private adoption, are personally chosen by the biological parent, creating a positive foundation through feelings of honor and gratitude. A positive foundation creates a better environment for an ongoing relationship between the biological parent, the adoptive family, and the child.[167] The extent of open adoption relationships varies, but "the critical feature of an open adoption is that it envisions a continuing relationship between the birth and adopting family despite a final decree of adoption."[168] Open adoptions are standard for modern private adoptions, and the level of openness is subject to negotiation between the biological parent and the adoptive family with support from adoption social workers and other adoption specialists.[169] Initial negotiations about openness take place before the biological parents choose a family, and openness commitments are sometimes memorialized in writing. These legally unenforceable agreements[170] can adapt over time as the child grows older and are more likely to be honored by the adoptive family when a positive foundation exists.[171]

Open adoption is in the best interests of the child.[172] Ongoing connections between adopted children and their biological families allow children the opportunity to ask questions about their adoption, receive important medical information, feel a sense of completeness, and maintain their cultural and ethnic roots.[173] This connection lessens negative feelings of abandonment or shame that can be associated with adoption by nurturing and strengthening the child's sense of identity, self-worth, and belonging.[174] Adoptees who do not have a relationship with their

167. *See* CHILD WELFARE INFO. GATEWAY, HELPING YOUR ADOPTED CHILDREN MAINTAIN IMPORTANT RELATIONSHIPS WITH FAMILY 3 (Sept. 2019), https://www.childwelfare.gov/pubPDFs/factsheets_families_maintainrelationships.pdf.

168. Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 43 (1999).

169. Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317, 2322 (2020).

170. FLA. STAT. § 63.0427 (2022) (describing that "the continuing validity of the adoption may not be contingent upon such postadoption communication or contact"); Tucker, *supra* note 169, at 2317.

171. *See, e.g.*, Tucker, *supra* note 169, at 2317.

172. CHILD WELFARE INFO. GATEWAY, *supra* note 167, at 2; Tucker, *supra* note 169, at 2324.

173. CHILD WELFARE INFO. GATEWAY, *supra* note 167, at 2.

174. *Id.*; Tucker, *supra* note 169, at 2336.

birth parents, or learn their identity later in life, are more likely to have difficulty resolving their grief and are more likely to experience feelings of loss and anger surrounding their adoption.[175]

Creating and maintaining an open adoption often includes concerns of biological parents intruding upon the privacy of the adoptive family or attempting to revoke the adoption, but studies have shown that these concerns are unsupported.[176] Longitudinal studies show that adoptive parents in an open adoption relationship who are dissatisfied with the level of contact with biological parents are dissatisfied because they desire more contact, not less.[177] Additionally, concerns of an open adoption creating an environment where the biological parent has the opportunity to revoke the adoption are also unsupported because "contact seems to strengthen feelings of permanence rather than diminish them and . . . adoptive parents feel more secure in their parenting roles."[178]

Since open adoption is negotiated on an individual basis and has the potential to change over time, each relationship between an adopted child, an adoptive family, and a biological family requires unique oversight. Open relationships can consist of direct communication, indirect communication through an intermediary such as the adoption entity, sharing of pictures and videos, and even supervised visits. Biological and adoptive parents choosing private adoption take comfort in knowing that an adoption entity is available to act as an intermediary when navigating an ongoing connection for the child's best interest. Maintaining biological connections is so crucial to the well-being of adoptees that legal scholars have argued for biological parent contact rights in an attempt to avoid the injustice of lost contact due to currently unenforceable contact agreements.[179] While this scholarship calls for judicial oversight on contractual contact agreements, adoption entities are best suited to help navigate these complex relationships under the parameters of the current law.

175. Tucker, *supra* note 169, at 2336–37.
176. *Id.* at 2340.
177. *Id.*
178. *Id.*
179. *Id.* at 2317.

3. The Stability and Desirability of Continuity of Placement and Established Bonds with Current Caregivers

Understandably, foster parents grow attached and bonded to foster children who are in their care for significant periods of time. After all, the purpose of utilizing foster homes for temporary care is to mirror, as closely as possible, a typical family home environment, but foster parents are not a party to an adoption intervention case.[180] Given the challenges with permanency through foster care, a court should strongly consider whether placement in a foster home is desirable for continuity of placement. Even if a foster parent is interested in adopting a child in their care, DCF must first obtain TPR, which is speculative for DCF until a final order is granted. For adoption through the adoption entity, the parent has already consented to TPR through the agency and that consent is not transferable to DCF. Illustrating this aspect that courts should consider, the trial court in *W.K.* recognized that the prospective adoptive parents offered the child "permanency and an adoptive home that was not speculative or uncertain," and if the court had denied the transfer of custody, it would have left the child "in licensed foster care, where he may or may not be adopted one day."[181]

Adoption intervention also involves the comingling of competing emotions. During an adoption intervention, foster parents may feel threatened by the chance of a foster child leaving their temporary home to be adopted by another family chosen by the biological parent, especially if the foster family would also be willing to adopt the child. Similarly, GAL volunteers, for the GALP, work closely with foster parents. Sometimes these relationships span over many years, and GAL volunteers, understandably, also become closely attached to foster children and the families they oversee. Foster parents may even feel encouraged by DCF workers or GAL volunteers to think they may enjoy some priority to adopt the child if parental rights are eventually terminated.[182]

The GALP consists of volunteer representatives who are appointed by the judge in a proceeding to act as an intermediary

180. W.K. v. Dep't Child. & Fams., 230 So. 3d 905, 907 (Fla. 4th Dist. Ct. App. 2017).
181. *Id.* at 908.
182. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79.

between the child, the court, and DCF.[183] The purpose of the GALP is to provide volunteers to advocate for the child's best interest. "A guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal."[184] The GAL volunteer is instructed to "review all disposition recommendations and changes in placements, and must be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court."[185] Volunteers must undergo a background investigation before being certified as a GAL volunteer, and the GALP "has sole discretion in determining whether to certify a person based on his or her security background investigation."[186] Although serving an important role, in some instances well-meaning GAL volunteers may become too attached to foster families, creating a natural bias against intervention adoption. GAL volunteers are just volunteers, not professionals. The statute's lack of direction on determining the best interest of the child results in courts relying heavily on the GAL volunteer's opinion, including reliance on the GAL's personal, social, conscious, and unconscious biases.[187]

Bonding between the child and the current caregiver is a frequent basis for objection during a contested adoption intervention and has been a contentious factor between the parties involved when the court is determining the desirability of continuity of care in the child's current placement. The emotional connections that can form between GAL volunteers and foster families only increase the contentious issue of bonding. For example, in *W.K.*, the court determined that the foster parents lacked standing to appeal an order to transfer custody of a child in their care, through adoption intervention, to the family chosen by

183. FLA. STAT. § 39.8296(1)(a) (2022); FLA. STAT. § 39.8296(1)(c) (2022) (describing the legislative findings of a guardian ad litem volunteer as "an 'indispensable intermediary between the child and the court, between the child and DCF'").

184. FLA. STAT. § 39.822(1) (2022).

185. FLA. STAT. § 39.822(4) (2022).

186. FLA. STAT. § 39.821(1) (2022) (illustrating that the "security background investigation must include, but need not be limited to, employment history checks, checks of references, local criminal history records checks through local law enforcement agencies, and statewide criminal history records checks through the Department of Law Enforcement").

187. Katherine Hunt Federle & Danielle Gadomski, *The Curious Case of the Guardian Ad Litem*, 36 U. DAYTON L. REV. 337, 349 (2011).

the biological mother.[188] The court determined that the best interest analysis under the intervention statute "requires a determination that the birth parent's choice of prospective adoptive parents is appropriate and protects the well-being of the child; not that it is the best choice as evaluated by the court or the Department in light of other alternatives."[189] The trial court considered the eight factors and determined that the prospective adoptive family, through the adoption entity, guaranteed permanency and was an appropriate placement.[190] A bonding expert testified that "the first three years of a child's life are the most critical for bonding," noting that the child was only eighteen months old and was capable of bonding with new caregivers.[191] At trial, the GAL objected to transfer of custody but "had no reason to believe the prospective adoptive parents would not be an appropriate placement."[192] Even though the trial court found that change of placement was in the best interest of the child, the GAL continued to contend "that it is in the child's best interest to remain in the custody of the foster parents and to be adopted by them,"[193] highlighting one example of the contentious dynamic.

Another example of how a GAL's bias and relationship can cross the line of professionalism is highlighted in *I.B. v. Department of Children and Families*.[194] In *I.B.*, foster parents challenged a placement change, made by DCF, after a foster child was removed from their home to be adopted by relatives.[195] The GAL representative was discharged from the case after TPR was entered and subsequently moved out of state.[196] Even after discharge and moving out of state, the GAL continued to have ongoing contact with the foster family and subsequently wrote a letter to the court to assert her belief that it was in the child's best interest to remain in the foster home and be adopted by them.[197] Contact between GAL volunteers and foster families should not be about establishing or maintaining friendships to stay connected to

188. W.K. v. Dep't Child. & Fams., 230 So. 3d 905, 909 (Fla. 4th Dist. Ct. App. 2017).
189. *Id.* at 908 (citing *In re* S.N.W., 912 So. 2d 368, 373 n.4 (Fla. 2d Dist. Ct. App. 2005)).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 907–08.
194. 876 So. 2d 581, 581–88 (Fla. 5th Dist. Ct. App. 2004).
195. *Id.* at 583.
196. *Id.*
197. *Id.*

a two-year-old child. These connections should serve the child's best interest, not the interests or desires of the adults involved.

When DCF and the GALP are in agreement that transferring custody is not in the best interest of the child, DCF typically urges the court to adopt the GALP's recommendation,[198] but DCF also has its own interpretation of how the agency will determine whether it believes transferring custody is in the child's best interest. In addition to evaluating the preliminary home study of the prospective adoptive family, the factors DCF evaluates to determine best interest include:

> (a) Each parent's compliance with the case plan at the time of consent;
>
> (b) Any concerns about the parent's reason for executing the consent;
>
> (c) Any reservations about the mental capacity of the parent who executed the consent;
>
> (d) The status of notification of relatives that adoption is the new permanency goal;
>
> (e) The status of notification of the adoptive parents of siblings that adoption is the new permanency goal;
>
> (f) The quality and length of the child's relationship with the child's current caregiver;
>
> (g) The quality and length of the child's relationship with any prospective adoptive parents;
>
> (h) The current placement and status of other siblings;
>
> (i) The wishes of the child, if the child is of the appropriate age and maturity to express a preference;
>
> (j) The length of time the child has been in his or her current placement;

198. Telephone Interview with Cheryl R. Eisen-Yeary, *supra* note 79.

> (k) All special needs of the child, including the child's physical health, mental health, educational needs, and attachment concerns;
>
> (l) The Department or community-based care agency (CBC) shall check the child abuse and neglect registries of all states where the prospective adoptive parents and other adults living in the prospective adoptive home resided in the previous five (5) years.[199]

DCF's factors to determine best interest infringe upon a parent's fundamental right by considering compliance with a case plan. Parental compliance with a case plan has nothing to do with the parent's right to make a private placement. Parents elect a private adoption, through adoption intervention, because they do not intend on completing their case plan. In a situation where the evidence shows that the parent's particular choice of placement is not in the child's best interest, the court is always free to reject a placement as not being suitable, but that burden must be on DCF to prove, not the parent to disprove. In order to protect a parent's fundamental right to determine custody, the only statutory requirement related to the parent's status in the dependency case impacting adoption intervention is, and should be, whether the parent's rights have been terminated. The status of a parent's compliance with a case plan is irrelevant.

V. PROPOSED REMEDIES

Adoption intervention has the potential to provide permanency for children subject to Florida's dependency system through a process that empowers biological parents and supports the child's best interest. The statute's intent is to promote cooperation, but it falls short in providing the opportunity for cooperative working relationships between DCF, GALP, and adoption entities. Adjusted procedural processes and more direction to the court, in relation to the statute's application, would help the statute rise to its original legislative intent and realize its full potential. The following sections suggest both procedural and practical remedies to promote cooperation between the parties

199. FLA. ADMIN. CODE ANN. r. 65C-16.019(4) (2022).

involved and streamline the adoption intervention process to provide permanency.

A. Procedural Remedies

The current procedural barricades cause unnecessary delay and additional tension between the parties involved. Adjustments to the procedural process of adoption interventions would lessen frustrations and promote cooperation. When the parties cooperate and work together more efficiently, children are provided permanency faster, and the burden on Florida's foster care system is lessened.

1. Creating a New Section of Chapter 63

Moving the currently buried adoption intervention portion of the statute to a separate subsection under Chapter 63 would reduce confusion for the court, make it more accessible, and make it easier to apply. Additionally, allowing adoption intervention to have its own section under Chapter 63 allows the court to read the statute in isolation instead of having to parse through inapplicable material. With the latest in online legal research and technology in mind, the Florida Legislature should find value in titling the new section in an easily identifiable fashion. Titling the new section "Adoption Intervention," or similar, would provide additional clarity for the purpose, and application, of the section and make it easier to locate through online and traditional means of legal research.

2. Verbal Notice

Written notice is not sufficient to inform parents of their right to choose a private adoption, and verbal notice should be added to the notice requirements. The earlier in a dependency proceeding that an intervention is initiated, the fewer issues a court faces when determining whether to grant the motion because the child has not been in custody long enough to establish an attachment with temporary caregivers and the fewer resources DCF must expend. Adding a verbal notice requirement, alongside written notice, would assure that parents have been meaningfully informed of their right and confirm that the option was not overlooked due to its location in confusing and lengthy dependency

paperwork. Properly informed parents are more likely to make the decision to privately place a child earlier in the dependency process, causing fewer problems for the court and leading to permanency more quickly.

3. Eliminate the Preliminary Home Study Requirement and Increase Discovery Requirements

The current process for intervention proceedings does not provide sufficient time for discovery and leaves adoption entities in the dark about the actual needs of the dependent child. Eliminating the preliminary home study requirement would provide interveners with the opportunity to fact find before determining whether to proceed with a change of placement. Adoption entities should be entitled to party status solely based on a valid consent and filing a motion to intervene, eliminating the preliminary home study requirement. Once the entity is granted party status, it would then be entitled to the child's medical records and information about the child's current care needs and placement. After becoming more informed on the child's needs, the entity would be able to decide whether the entity believes it is in the best interests of the child to proceed with requesting placement with the prospective adoptive family or whether the child's needs would not be best served by a transfer of custody. If the entity decides not to proceed, for whatever reason, the entity should be required to notify the court so the dependency proceeding may continue. In circumstances where the entity feels it has a case to proceed with a change of placement after the discovery process, the entity should next file a home study for the prospective adoptive family along with a motion to transfer custody. When considering the motion to transfer custody, the court would then decide whether transferring custody to the prospective adoptive family is in the child's best interest.

After conducting discovery, one scenario might unfold where the interveners discover that the child has been in the same foster home for a significant amount of time and the foster parents have attested during a deposition that they would be willing and able to provide permanency for the child, should the child become available for adoption through DCF. In this instance, the adoption entity should be entitled to remain as a party to the case to assure DCF is able to terminate the parent's rights and the child is

provided permanency. If DCF cannot terminate parental rights, for whatever reason, the entity, who is still party to the case, could continue with the intervention process and achieve permanency privately with the valid consent already obtained from the biological parent.

One concern that might arise from DCF by eliminating the preliminary home study requirement is that adoption entities might use the statute to conduct "fishing expeditions." Instead, eliminating the preliminary home study requirement in exchange for the adoption entity receiving accurate information about the child before proceeding would provide for less adversarial proceedings. Adoption entities, DCF, and the GALP all have the same goals—to protect the well-being of children and act in their best interest. Providing time for an adequate discovery process will enable the intervener to make an independent decision about whether they have a good case for intervention. If adoption entities know more about the child before proceeding, they will not pursue cases that they do not believe to be in the best interests of the child. Entities may recognize that the child's current placement is best suited to continue providing care for the child or that the identified prospective adoptive family is not fit for handling the needs of the child. Eliminating this requirement places more accountability on adoption entities to only pursue cases where they believe a change of placement would serve the child's best interests by providing access to accurate information about the child's needs at the beginning of the proceeding. Additionally, adoption entities will be in an appropriate position to advocate for the prospective adoptive family as being in the best interests of the child once the entity knows the child's current and anticipated needs.

Eliminating the preliminary home study requirement naturally places more emphasis on cooperation between DCF, GALP, and adoption entities for an adequate discovery process. Placing emphasis on a proper discovery process assures that no one's time is wasted through an unnecessary, drawn-out, adversarial process because the entity did not have adequate information about the child's needs. Adoption entities would no longer need to rely on obtaining agreement from contentious parties to extend the thirty-day final hearing requirement because DCF and GALP would be held accountable for providing discovery to the adoption entity in a timely manner or be required to agree

to extend the thirty-day final hearing requirement if records cannot be furnished.

B. Language of the Eight Factors: Less Judicial Discretion, More Judicial Direction

The factors that a court is directed to consider, in determining whether transferring custody of the child is in the child's best interest, would be easier for courts to apply with more judicial direction and less judicial discretion. Although courts are now required to interpret the adoption intervention statute de novo,[200] more direction regarding the application of the adoption intervention statute would also enable courts to place less reliance on DCF's interpretation of the statute, which strips parents of the fundamental right to make decisions concerning the custody of their children. Child custody cases are unique because they are matters of protecting vulnerable human lives. A certain level of judicial discretion is necessary because what is best for one individual case is not necessarily best for another case. Finding a middle ground to provide more direction for determining a child's best interest, while also maintaining the required level of judicial discretion, is difficult. Acknowledging a parent's fundamental right, specifying how the court should evaluate the prospective placement, and providing more clarity on the issue of bonding are good places for the Florida Legislature to start.

1. Acknowledgement of The Fundamental Right of Parents

Parents who are not part of a dependency proceeding have both a statutory and fundamental right to make a custody decision for their children by choosing to voluntarily place their children for adoption. Private placements of non-dependent children for adoption are also governed by Chapter 63 and do not require the court to determine whether the decision to voluntarily place the child for adoption is in the child's best interest. For these cases, the court must only determine that finalizing an adoption of a legally free minor is in the child's best interests, not that the parent is acting in the child's best interest by relinquishing their parental rights. *Troxel v. Granville* highlighted the established presumption

200. *See* discussion *supra* pt. IV.B.

"that fit parents act in their children's best interests . . . [and] there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[201] The only difference between a parent deciding to privately place a non-dependent child for adoption and a parent deciding to place a dependent child for adoption, under adoption intervention, is the dependency status of the child. In both instances, parents have a fundamental right to make decisions regarding the custody of their children. Dependent children require increased protections from a parent who has been accused of unfitness because the parent no longer realizes the benefit of the presumption that they are acting in the best interest of the child. However, the parent's fundamental right to make decisions regarding the placement of the child is not completely stripped. Any other interpretation would unconstitutionally strip parents of their fundamental right.

Just because a parent has been accused of being unfit does not mean they cannot make a decision in a child's best interest. Since the parent's fitness has been challenged, the parent can no longer unilaterally make decisions regarding the child's custody. The court must provide judicial oversight to assure parental decisions about the child are in the child's best interests. For an intervention adoption, the court must determine whether the parent's choice of adoptive placement is in the best interests of the child. The determination that a court should make is not a comparison between the prospective adoptive placement chosen by the biological parent and the current caregiver.[202] Instead, "the 'best interest' analysis requires a determination that the birth parent's choice of prospective adoptive parents is appropriate and protects the well-being of the child; not that it is the best choice as evaluated by the court or the Department in light of other alternatives."[203]

A dependent child subject to an adoptive placement through intervention is not at risk of abuse, neglect, or abandonment like they would be in the custody of the alleged unfit parent. In adoption intervention, the child is not being returned to the biological family but is instead being placed with a home-study

201. Troxel v. Granville, 530 U.S. 57, 58 (2000) (first citing Parham v. J.R., 442 U.S. 584, 602 (1979); and then citing Reno v. Flores, 507 U.S. 292, 304 (1993)).

202. W.K. v. Dep't Child. & Fams., 230 So. 3d 905, 908 (Fla. 4th Dist. Ct. App. 2017).

203. *Id.* (citing *In re* S.N.W., 912 So. 2d 368, 373 n.4 (Fla. 2d Dist. Ct. App. 2005)).

approved family. The court's role is to determine if the child's best interest will be served in this placement, not to compare placement options because parents have a fundamental right to make decisions about the custody of the child, and that right does not disappear just because the child has been temporarily removed from the parent's care.

Adding language to the eight factors that gives more clarity to the court's role will aid in lessening frustration and provide a more consistent application of the statute. Acknowledging that this right exists but is not absolute will address the GAL's concerns regarding protection of the child. Ultimately, the court will still be tasked with a best interest determination but must take into consideration the parent's fundamental right to determine the child's custody, and any infringement upon that right must be reasonable, necessary, narrowly tailored, and "not otherwise served by a less restrictive means."[204] Judicial oversight over parents choosing an adoptive placement for their children is less restrictive than violating the parent's fundamental rights, which are still intact.

2. Holistically Evaluating the Potential Placement

The Florida Legislature should recognize that a court evaluating the prospective adoptive family should not only consider the permanency offered, but also the ongoing connection to the child's biological roots that open adoption offers to adoptees and the oversight available through private adoption entities. Due to the nature of adoption entities being privately funded and solely focused on adoptive placements, adoption entities are better suited to act as mediator and oversee these unique relationships. Recognition that an ongoing connection to information about an adoptee's biological family is in a child's best interest, and that entities are in the best position to closely oversee open adoption in a safe way, will allow courts to fully consider the impact of private placement with a prospective adoptive family.

Additionally, the statute should provide clear language that the court's placement determination is not a comparison between potential placements. The Florida Legislature should mirror *S.N.W.* by providing that the best interest analysis "requires a

204. FLA. STAT. § 1014.03 (2022).

determination that the birth parent's choice of prospective adoptive parents is appropriate and protects the well-being of the child; not that it is the best choice as evaluated by the court or the Department in light of other alternatives."[205] This clear language resolves the conflicting opinions among the district courts of appeal and informs the court of the appropriate balance between a parent's fundamental right and the child's best interest.

3. Rebuttable Presumptions of "Bonding"

Rebuttable presumptions are no stranger to Florida law, particularly in child custody. For parenting and time sharing of children at dissolution of marriage, Florida law provides a rebuttable presumption of detriment to a child in matters of child custody when "[a] parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence,"[206] when a parent is incarcerated and expects to be incarcerated for a "significant portion of the child's minority,"[207] or when "[a] parent has been convicted of or had adjudication withheld for [a sexual offender] offense" when the perpetrator was at least eighteen years old at the time of the incident or the victim was under eighteen years old.[208] If this presumption is not rebutted by the affected parent, that parent cannot be granted time-sharing of the child.[209] Rebuttable presumptions exist to aid the court in determining a child's best interest and provide clarity of legislative intent.

The factor of the child's bond with a current caregiver, and bonding studies that frequently occur in contested adoption intervention cases, should not relate to bonding and instead should evaluate the child's attachment. "Bonding" and "attachment" are often erroneously used interchangeably.[210] Bonding is a dynamic

205. *W.K.*, 230 So. 3d at 908 (citing *In re S.N.W.*, 912 So. 2d at 373 n.4).

206. FLA. STAT. § 61.13(2)(c)(2)(a) (2022).

207. FLA. STAT. § 39.806(1)(d) (2022); FLA. STAT. § 61.13(2)(c)(2)(b) (2022) (referencing FLA. STAT. § 39.806(1)(d) (2022)).

208. FLA. STAT. § 61.13(2)(c)(2)(c) (2022).

209. FLA. STAT. § 61.13(2)(c)(2) (2022).

210. Telephone Interview with Dr. Edward J. Whyte, PhD Phycologist and Bonding Expert (Nov. 27, 2022) [hereinafter Whyte, Telephone Interview]; Dr. Edward Whyte, Webinar Recording: Bonding and Attachment (FAC 2021 Virtual Conference Oct. 7, 2021) (on file with author) [hereinafter Whyte, Webinar Recording]. Dr. Whyte's research focuses on the long-term impact of attachment disorders on development. He sought to answer a question asked of him by a judge while testifying as a bonding expert: "What actually

and reciprocal process between a child and caregiver[211] throughout the different stages of the child's development.[212] The bond between a child and caregiver is an ongoing process that leads to the child forming an individual attachment, and a secure attachment is the goal for a healthy, developed child.[213] Attachment is essential to the best interest of the child,[214] and the predictable time for this bonding process leading to the formation of a child's attachment is the first three years of life.[215] The timeframe for a child to form an attachment is within the first three years of life, but each child's attachment development is unique, and the duration necessary for establishing an attachment varies from child to child.[216] The ideal secure attachment typically begins forming by eight months for a child who has been with the same caregiver.[217]Attachment, once formed, persists even though the primary bond may be lost, depending on the strength and duration of the attachment.[218] If bonding forms into an attachment, a child experiences loss when removed from the person with whom they are bonded, but since the attachment is individual to the child, a child who has been securely attached is capable of forming a secure attachment with another caregiver.[219] Although a child is capable of forming a new attachment once one has already been established, interrupting a child's secure attachment with a caregiver who is willing to provide permanency should be avoided because there is still a risk that the child will

happens to these children who suffer from attachment disorders?" Whyte, Telephone Interview, *supra*. Dr. Whyte's longitudinal research studied forty prisoners who likely had attachment disorders as children and families who have adopted from, and been impacted by, the foster care system. *Id.*

211. Bonding typically occurs between the child and primary caregiver but can also occur between multiple primary caregivers. *See* Whyte, Webinar Recording, *supra* note 210.

212. *Id.*

213. *Id.*

214. *Id.* (noting that numerous longitudinal studies show the development of a secure attachment in the first three years of life leads to positive outcomes for the child by effecting developmental areas of: self-esteem; independence and autonomy; resilience in the face of adversity; ability to manage impulse; long term friendships; relationships with parents, caregivers, and authority figures; prosocial coping skills; trust, intimacy, and affection; positive, hopeful belief systems; empathy, compassion, and conscious; behavioral performance; academic success in school; and promotion of secure attachment with their own children).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

not be able to bond and form another secure attachment with a new caregiver. Since bonding is the first step to forming an attachment, a child can be bonded to a caregiver without having an attachment but cannot have an attachment to a caregiver without first forming a bond.[220] Therefore, the court's determination is not if there is a bond to the caregiver, but whether the child is securely attached and whether severing that bond would be detrimental to the child.

For the adoption intervention statute, an attachment-theory based rebuttable presumption would provide direction to the court when determining whether it is in the child's best interest to be transferred to the adoptive home or remain in the current placement. If a child has been in the same foster home for less than six months, a rebuttable presumption should exist in favor of the transfer of custody because the child had not been in the placement long enough to form an attachment that would be detrimental to the child's development to disrupt. Similarly, if a child has been placed with the same caregiver for more than twelve months, in a placement that also guarantees permanency for the child, there should exist a rebuttable presumption against the transfer of custody because the child had been in the placement long enough to have established a bond that would be detrimental to the child's attachment to disrupt. Rebutting the presumption would require an attachment study, which delays the intervention process, but a statutorily proscribed presumption would eliminate the need for attachment studies in many cases. More guidance to the court, through rebuttable presumptions, will cause less frustration for the court and parties involved and will continue to quickly provide permanency for children through the adoption intervention statute.

VI. CONCLUSION

The Fourteenth Amendment protects the fundamental right "to make decisions concerning the care, custody, and control of children."[221] Although the right is not an absolute right for parents, it "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the

220. *Id.*
221. Troxel v. Granville, 530 U.S. 57, 66 (2000).

State."[222] The adoption intervention statute protects a parent's right to select an appropriate adoptive placement for a child subject to a dependency proceeding while providing judicial oversight for the child's best interest. The statute, in its current form, does not provide enough judicial direction, making it difficult to consistently apply to contentious cases involving parties with competing interests. Amending the statute to provide more clarity to the court on how to balance a parent's fundamental right with the child's best interest will help lessen the frustrations that have been realized by all parties across the state and live up to the statute's legislative intent. As a result, more children will be awarded permanency, and Florida's foster care system will be less burdened.

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