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IN THE SUPREME COURT OF FLORIDA

K.N., et al.,

Petitioner,

v.

CASE NO.: SC23-0665
L.T. CASE NO.: 4D22-2273;
2018-DP-42

DEPARTMENT OF CHILDREN AND FAMILIES and STATEWIDE GUARDIAN AD LITEM OFFICE,

Respondents.
_____/

STATEWIDE GUARDIAN AD LITEM OFFICE'S REPLY BRIEF

On Petition for Discretionary Review
of a Decision of the
Fourth District Court of Appeal

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INTRODUCTION

There is no substitute for a sibling relationship, especially for dependent children who often lose connections with parts, if not all of their biological family. The importance of these relationships is robustly recognized in Florida law. The Legislature has found siblings "can provide a significant source of continuity throughout a child's life and are likely to be the longest relationships that most individuals experience." § 39.4024(1)(a), Fla. Stat. (2023). "[H]ealthy connections with siblings can serve as a protective factor for children who have been placed in out-of-home care." § 39.4024(1)(c). In fact, the Legislature has placed "the responsibility of all entities and adults involved in a child's life, including, but not limited to, the department, community based care lead agencies, parents, foster parents, guardians ad litem, next of kin, and other persons important to the child to seek opportunities to foster sibling relationships to promote continuity and help sustain family connections." § 39.4024(1)(d). The former caregivers did not live up to this grave responsibility; they actively thwarted it. And now they beseech this Court to find they have an unenumerated, fundamental right worthy of constitutional

protection, to permit them to keep one sibling in their care, despite their rejection of the other.

At issue in this case is not, as the former caregivers suggest, a right to familial association between them and a child placed in their custody by the state. No such right has ever been recognized by the federal or Florida constitutions for what are essentially foster caregivers of seven months who desire to adopt a child. What is at issue here is the former caregivers' attempts to insert themselves into dependency litigation to disrupt what the parties and the trial court have otherwise determined to be in the child's best interest—in this case, maintenance of a sibling relationship between A.R.L. and S.C.R. that has existed for A.R.L's entire life.

As the Fourth District correctly recognized below, to properly "keep the focus on the children's best interests," nonparty intervention into dependency matters is prohibited. Opn. at 3. This is confirmed by chapter 39 and the Florida Rules of Juvenile Procedure. Nonetheless, because of the conflict on this issue arising out of the Fourth District Opinion under review and the Third District's Opinion in *T.R.-B. v. Department of Children and Families*, 335 So. 3d 729 (Fla. 3d DCA 2022), an inconsistent and

unpredictable legal landscape for courts and practitioners in this area of law exists, and the ensuing litigation over the application of the Civil Rules to specific issues—let alone litigation over the merits of the underlying claims in cases where nonparty intervention is permitted—is detrimentally affecting children's best interests by delaying permanency.

Moreover, in virtually all cases where a litigant not enumerated in section 39.01(58), Florida Statute (2023), asserts party status, it is little more than an attempt to find some legal vehicle to authorize the trial court to consider their asserted interests when the court is not otherwise authorized to do so by law. A definitive determination from this Court, resolving the conflict between this case and *T.R.-B.* and finding that chapter 39 and the Juvenile Rules mean what they say in the way they have delineated parties and participants will end this sort of litigation, which distracts—and detracts—from achieving timely permanency for the child. And for A.R.L. and S.C.R., in particular, it will help bring about a conclusion to this years-long litigation, move them out of limbo and allow them to finally move forward toward permanency, together.

FACTS AND PROCEDURAL BACKGROUND

Five-year-old A.R.L. and her nine-year-old brother S.C.R. have been in the care and custody of the Department since March 2018, when A.R.L. was two months old. R. 40. At the time of shelter, the Statewide Guardian ad Litem Office was appointed, and during the case, she was represented by a multi-disciplinary team including a lay volunteer for a part of the case, child welfare professional, and an attorney appeared as guardian ad litem for A.R.L. R. 28.

A.R.L. and S.C.R. were initially placed together, and visitation was pre-emptively ordered for them should they become separated. R. 46-47. They remained placed together until sometime in the second half of 2019 or early 2020. R. 107, 120, 134, 137. By February 2020, A.R.L. and S.C.R. were placed separately, but they visited weekly, and they attended therapy to ensure that their sibling bond remained strong during their separation. R. 172. At the February judicial review hearing after their separation, the trial court expressly noted the negative effect the separation was having on them. R. 176. An ICPC placement request was submitted October 2020 for placement with the children's aunt in North Carolina, and in March of 2021 A.R.L. and S.C.R. were placed with her together.

R. 210, 300. Unfortunately, the adoption home study subsequently was denied, and the children returned to Florida, where they remained placed together for a period of time. R. 305.

In November 2021, the sibling unit matched with the Former Caregivers, who now are the petitioners before this Court (who will be referred to as "Former Caregivers" in this brief). At that time, they were in separate placements, and the transition plan approved was for A.R.L. to move first, with S.C.R. to be placed twelve days later. R. 327. Both children were placed in the Former Caregivers' home in January 2022. R. 331.

As a condition of placement, the Former Caregivers signed a "Memorandum of Agreement" for both children, in which they agreed to take in the children and care for them and further acknowledged:

> We understand that this placement is made with the expectation of legal adoption after a period of agency supervision, if at that time we and the agency mutually agree that this placement is in the best interests of the child and family. It is further understood that the placement of this child may be terminated by either party prior to the legal adoption. R. 348.
>
> We understand and accept the department's commitment to maintaining the siblings together in the same home, and agree that it is in the best interests of the siblings to

> remain together. We understand that if we accept siblings for placement and it becomes necessary to terminate placement of one of the children, it will be the intent of the department to terminate the placements of all children in the sibling group, so that the children can remain together in subsequent placements.
>
> We further agree not to file a petition for adoption or attempt to instigate any legal proceedings to adopt this child until the consent of the Department of Children and Families have been given. R. 354, 355.

Sometime after placement, the Former Caregivers expressed concern to the Guardian ad Litem about some sexualized behaviors they observed, and they specifically identified the children being able to get into each other's bedrooms without the Former Caregivers hearing them in the night. R. 531. The Guardian ad Litem recommended door alarms so they would know immediately if a child was out of bed, and she attempted personally to secure that for the Former Caregivers. R. 532. Instead, the Former Caregivers placed a video recorder in A.R.L.'s room, which would not have alerted them of movement between the children in real time, but would only have recorded any problematic behavior for them to use as evidence in the future, after the behavior had already occurred. R. 532. A child-on-child sexual abuse report made around this same time regarding the

children was determined not to be verified by the Department. R. 357.

Then, in March, K.N. and D.N. demanded that the Department remove S.C.R. from their home immediately. R. 349. At that time, K.N. told the Department she had found S.R. with his hand on the back of A.R.L.'s head or neck, with A.R.L.'s face in the couch, and had told him he could have killed her. R. 568. The Former Caregivers insisted S.C.R. needed to be removed before A.R.L. came home, so the children were not able to say goodbye. R. 349, 517. At the multi-disciplinary team meeting (MDT) after S.C.R. left the home, K.N. described then eight-year-old S.C.R. as having tried to "murder" his sister and advocated the children should not receive visitation. R. 362, 517, 568.

Exactly eleven days after demanding A.R.L. be removed from their home and without the consent of the Department, The Former Caregivers filed a petition to adopt A.R.L. alone. R. 349.

A second MDT was convened April 22, 2022 to discuss A.R.L.'s potential removal from the Former Caregivers' home. That MDT resulted in a non-consensus, with the children's behavior analyst

agreeing to continue to observe sibling visits and gather data regarding the sibling relationship. R. 349.

After S.C.R.'s abrupt removal in March, the trial court ordered bi-weekly visitation. Those visits were observed by a behavior analyst who was familiar with the children, Angelique Walsh. R. 490-91. Ms. Walsh is a nationally board-certified behavior analyst with a master's degree in psychology and specialization in applied behavioral analysis. R. 488-90. Between February and August 2022, she spent more than 400 hours working A.R.L. on a variety of topics. R. 490-91. This included the visitation, sometimes lasting up to eight hours with the siblings together. R. 494.

When A.R.L. and S.C.R. visit together, they engage together in imaginative play, share, and A.R.L. asks S.C.R. when she wants help with something. R. 500-01. In fact, she voices a strong preference for seeking help from S.C.R., to the exclusion of others. R. 501. However, A.R.L. began to miss scheduled sibling visits in the early summer of 2022. The reason provided to Ms. Walsh for A.R.L.'s missed visits was other therapy sessions initiated by the Former Caregivers, that happened to often be scheduled the same day of the week as the visits. R. 505-06. By mid-August 2022, the children

had only received seven of their bi-weekly ordered visits that summer. R. 494.

Based on her observations of the sibling relationship, when a second MDT meeting was held in July 2022, Ms. Walsh's opinion changed to support A.R.L.'s change of placement so that she could be adopted as a sibling group with her brother. R. 504. Indeed, the recommendation of the MDT as a whole was to support the placement change to facilitate the siblings being adopted together and put regular visitation more robustly in place.

This changed recommendation was also based, in part, on new information that had come to light and additional events that had occurred since S.C.R.'s removal. During the period after removal, the Former Caregivers erected barriers that prevented the children from maintaining their relationship. R. 521. And none of the concerns the Former Caregivers reported about the highly dysfunctional relationship between the children were confirmed. To the contrary, no such reports had been made by any other placement the children had resided in together, and those working closely with the children had not observed the extreme behaviors that Former Caregivers

reported, and nothing they observed rose to the level of a safety concern. R. 520.

Moreover, while A.R.L. was on a waitlist for play therapy on referral from the Department, the Former Caregivers privately enrolled her with a therapist who appeared to be a personal friend or acquaintance of theirs without the Department's consent. R. 524. When the Department's original referral became available, K.N. refused to take her to see the referred provider unless a court order required her to do so. R. 524.

In July 2022, the Guardian ad Litem and Department discovered a Gofundme site had been set up for the Former Caregivers' benefit, seeking money for legal expenses to litigate the placement issue and containing confidential case information. Despite multiple requests it be taken down, it remained accessible for at least four weeks. R. 521-22.

The Department held the second MDT staffing as to A.R.L. in late July, and subsequently the Department filed an "urgent motion for modification of placement," alleging it was in A.R.L.'s best interests to change her placement to licensed foster care. R. 350. In response, the Former Caregivers filed an ex parte motion for a

determination of their party status and an "urgent motion to intervene." R. 375, 409.

At the motion hearing, the trial court determined the Former Caregivers were not parties and could only be heard before the court as statutory participants. R. 463. In that vein, it permitted them to make opening and closing remarks and to testify in a narrative fashion, but it did not permit them to cross-examine witnesses or put on their own evidence. R. 477, 537, 540.

Ms. Walsh and the Guardian ad Litem testified in support of the Department's motion. In accordance with the facts described above, they both provided the trial court with historical information about the children and their relationship, the therapeutic progress they had made, and the basis for their recommendations that A.R.L. should be removed from the Former Caregivers' care.

K.N. and D.N. both testified regarding their desire to keep A.R.L. in their care and adopt her. K.N. began, at length, discussing her hesitation in taking placement of these siblings, and behavior from S.C.R., even before placement, that was of particular concern to her. T. 544-45.

K.N. also testified that Ms. Walsh had first brought up the issue of A.R.L.'s sexualized behavior to her, and after that, "[w]e started noticing the same behaviors, and it was always when she was with her brother." R. 548. Then, in late February, K.N. reported that A.R.L. had disclosed S.C.R. had touched her inappropriately. She also noted multiple occasions prior to this disclosure, where she had found S.C.R. on top of A.R.L. in a bed and had to pull him off, but she did not explain why she had left the children alone, after observing these behaviors. R. 549. She testified that on the advice of the Department, she did not call in an abuse report to the hotline on this disclosure for nearly a week. R. 549. She also detailed other violence she alleged S.C.R. had perpetrated against A.R.L. and at school, culminating in the final event that made her demand his removal. R. 549, 551-52.

On that day, the Former Caregivers had been cooking dinner, and K.N. "sens[ing] something was wrong" went to see what the children were doing. R. 553. She walked into the living room,

> And I found him on top of her back. He was growling. She was -- she -- he had her facedown on the couch and he was holding her with both of his - - by the back of her head. And he was shoving her face into the cushion so hard that I

> couldn't even see her face. And she wasn't making any sound and she wasn't breathing. I dropped the phone at some point. My husband told me that I was screaming, but I couldn't even hear the sound of my own voice because my heart was beating so loud. It was the most horrific thing I've ever seen, watching a child being smothered. And her arms were trying to -- were just like flailing, trying to get him off of her. So we put him in his room to separate them. And I said to him, You could have killed her, and he looked up at me with a smile on his face and said, I know. R. 553-54.

After the Former Caregivers completed their testimony, the Department called a rebuttal witness, the case manager, LaChristie Rosier. R. 566. She testified that since the date of S.C.R.'s removal, she had heard K.N. talk about the triggering incident four times, and in court that day was the first time K.N. had ever reported that A.R.L. stopped breathing as her brother held her against the couch. R. 567. And, despite the severity testified to by K.N., they did not inform her at any time that they had sought any kind of emergency care after A.R.L. stopped breathing. R. 567. She testified that each time K.N. has told this story, the details have escalated. What was once "that S.R. had his hand on the back of either A.L.'s head or neck, and her face was in the couch," became murder, attempted killing, and now smothering to the point A.R.L. was not breathing. R. 568.

Ms. Rosier testified similarly about other incidents recounted in K.N.'s testimony, where her testimony did not match either her prior versions of the same incident or other witness accounts. R. 569. These inconsistencies had been occurring since at least February 2022, and particularly concerned Ms. Rosier because they prevented her from obtaining an accurate picture of what was going on in the home and with A.R.L.'s continued care. R. 570-71. She expressed further concerns of coaching and home visits being recorded, and ultimately concluded that it was in A.R.L.'s best interests to change placements to facilitate her placement and adoption with her brother. R. 572.

After closing arguments, the trial court ruled from the bench. The court was particularly troubled by the Former Caregivers' behavior, which it characterized as "strategic decisions that are being made by [the Former Caregivers] to thwart any effort of the Court to reunite these siblings." R. 593. The court found "at this particular point in time, . . . continued placement in the [Former Caregivers'] home would be one of harm to the child A.L., and that the modification of placement is in the best interest of A.L." R. 594. Nonetheless, the court noted in its ruling "this Court is not ruling on

an adoption. This Court is ruling on a modification of placement. So what happens after this modification of placement is going to be up to the [Former Caregivers], and the Department, and the attorneys for the [Former Caregivers]. R. 596.

The trial court issued two written orders, one granting the Department's motion for change of placement, and one denying the Former Caregivers' motions to intervene and for party status. R. 443, 456. The Former Caregivers sought appellate review of both orders. The Fourth District affirmed the order denying their motion to intervene and dismissed their appeal from the placement order, finding they were not parties in the dependency and did not have a right of intervention that would grant them standing to challenge the placement order. Opn. at 1-2. On motion for rehearing filed by the Former Caregivers, the Fourth District also certified conflict with the Third District's Opinion in *T.R.-B.*, 335 So. 3d 729 "regarding the applicability of Florida Rule of Civil Procedure 1.230 to dependency proceedings." *K.N. v. Dep't of Children & Families*, 359 So. 3d 792, 793 (Fla. 4th DCA 2023). This Court then granted review.

SUMMARY OF THE ARGUMENT

Chapter 39 is designed to protect the best interest of dependent children and to achieve permanency for the child within twelve months. The Former Caregivers' arguments in this case give precedence to their own interests while ignoring the focus on the dependent child's interest. They have not raised any issues of merit.

First, the Fourth District opinion correctly determined that the liberal intervention standard in Florida Rule of Civil Procedure 1.230 does not govern in dependency proceedings. While the Former Caregivers focused on this issue below, and actually sought certification of the conflict with *T.R.-B.* by that Court, they have abandoned this argument before this Court now and concede that the Fourth District's holding was correct on this issue. Nonetheless, both the Department and the GAL ask this Court to resolve the conflict between the Fourth District, the Fifth District, and the Third District on this issue and hold that the Fourth District correctly held that rule 1.230 does not apply in dependency proceedings.

Moreover, the Fourth District correctly concluded K.N. and D.N. were not parties for purposes of the modification of placement hearing in this dependency proceeding. Chapter 39 and the Florida

Rules of Juvenile Procedure expressly identify the groups who can be parties in dependency actions, and neither caregivers nor adoption petitioners are among those groups. Instead, the trial court properly gave them statutory participant status, a category of individuals who may be given notice when the trial court finds their participation is in the child's best interest. The Former Caregivers contend, incorrectly, that they were made parties to the dependency case by virtue of filing a petition to adopt A.R.L. Not only does the plain language of the statute not support this, the legislative history of the definition of "party" in section 39.01 does not support this argument, either. The statutory scheme added participants the same year it added a definition for parties. The existence of participants in the statutes recognizes a need for certain groups to participate for the sake of the dependent child, but maintains a small circle of actual parties in order to avoid the litigation of interests that would detract from the focus on the child.

Furthermore, the Former Caregivers do not possess a familial liberty interest in their relationship with A.R.L. They do not identify any authority attaching such a constitutional right to former caregivers who received placement of a child via contract with the

state when that child removed from their care seven months after placement. They are asking this Court, for the first time, to recognize a constitutionally-protected interest in dependency caregivers maintaining custody of a dependent child in their care. But, neither the Federal nor the Florida Constitution recognizes such a right. The strongest support the Former Caregivers offered is found in a stray sentence of dicta *Grissom v. Dade County*, 293 So. 2d 59, 62 (Fla. 1974). The issue in *Grissom* did not concern the same issue in this case, however, and the dicta in *Grissom* does not constitute precedent.

The children in this case deserve to reach permanency as soon as possible. Their interests have been advocated by the GAL throughout this case, so to the extent the Former Caregivers suggest the child did not have adequate representation, that plainly is not the case.

STANDARD OF REVIEW

The Former Caregivers' arguments primarily raise questions of statutory interpretation and other questions of law related to the right of intervention by nonparties in dependencies. These issues are pure question of law, and the standard of review for such questions

in these matters is de novo. *D.M.T. v. T.M.H.*, 129 So. 3d 320, 332 (Fla. 2013).

However, to the extent the former caregivers are raising issues related to the order granting the change of placement, such orders are only reviewable in certiorari. Therefore, the standard of review of that issue would be under the heightened standard applicable to such writs—whether they have established a departure from the essential requirements of law resulting in irreparable harm. *M.M. v. Fla. Dep't of Children & Families*, 189 So. 3d 134, 137-38 (Fla. 2016).

ARGUMENT

I. THE FOURTH DISTRICT OPINION CORRECTLY DETERMINED THAT K.N. AND D.N. WERE NOT PARTIES FOR PURPOSES OF THE MODIFICATION OF PLACEMENT HEARING.

Five-year-old A.R.L. has been in foster care for all but two months of her life. She remains there today, in part, due to the already year-long appellate litigation her former caregivers have continued to maintain, though, at this point, she has not lived with them in more than a year—almost twice as long as the period of time that she was in their care. Former Caregivers go to great lengths in their Initial Brief to cast themselves as wronged parties from whom

A.R.L. was ripped by an unfeeling, manipulative child welfare system. They speak at length of *their* rights as adoption petitioners, *their* rights as caregivers, and *their* rights to the family of their choosing. But this proceeding is not about them. Chapter 39 is not about them. Chapter 39 is about the best interests of dependent children, and this proceeding is about A.R.L. The delay and complication this extended litigation has caused is precisely the reason their unfounded arguments should be rejected.

A. Chapter 39 and the Florida Rules of Juvenile Procedure Conclusively Limit Parties in Dependency Actions.

i. Chapter 39 and the Rules of Juvenile Procedure Were Designed to Give Primacy to Permanency.

Because of the unique needs of dependent children and the need for a trial court, acting *in loco parentis*, to protect and effectuate the child's best interest in dependency cases, chapter 39 was constructed on the maxim: "'There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.'" *Lehman v. Lycoming Cty. Children's Servs. Ag.*, 458 U.S. 502, 513-14 (1982); *I.T.*

v. Dep't of Children & Families, 338 So. 3d 6 (Fla. 3d DCA 2022) (*parens patriae* "necessarily encompasses the child's need to achieve permanency and the correlating harm that results when such permanency is unduly delayed"). To that end, the legislature made timely permanency the lynchpin of dependency proceedings and the guidepost of a child's best interests. *See,* § 39.001(1)(h)-(i), Fla. Stat. (2023); § 39.0136(1), Fla. Stat. (2023) ("time is of the essence for establishing permanency for a child in the dependency system"); § 39.621(1), Fla. Stat. (2023)(noting time is of the essence for permanency of dependent children and a permanency hearing must be held within 12 months of removal); *S.M. v. Fla. Dep't of Children & Families*, 202 So. 3d 769, 782-83 (Fla. 2016) (explaining children suffer harm when permanency is unduly delayed); *J.B. v. Fla. Dep't of Children & Families*, 170 So. 3d 780, 792 (Fla. 2015) (recognizing children are harmed when permanency is unduly delayed).

This uniquely constructed statutory scheme resulted in trial court proceedings that differ substantially from those found generally in civil practice, both in their focus on a child's best interests and in the procedure necessary to ensure best interests are protected. Indeed,

> [i]n Florida the circuit judge acting as juvenile judge has succeeded to all of that exceptional common law jurisdiction of courts of chancery to act on the court's own volition to protect the interests of infants. In addition section 39.40(2), Florida Statutes [now, section 39.013(2), Florida Statutes (2023)], explicitly recognizes the continuing jurisdiction of the juvenile court over a child adjudicated to be dependent. The proper exercise of this unusual jurisdiction recognized by the common law and by statute imposes a duty to affirmatively act in the interest of a child in a manner which is abnormal to the usual judicial function of acting only on matters presented by pleadings filed by the parties. Such duties and obligations include protection of the interests and best welfare of the minor children adjudicated by the court to be dependent.

In re Interest of J.S., 444 So. 2d 1148, 1149-50 (Fla. 5th DCA 1984); *see also J.B.,* 170 So. 3d at 798 (Pariente, J. concurring) ("the legislature created a process that while considering a child's right to permanency, provides judicial oversight by a judge who is not merely an unbiased fact-finder but instead actively oversees the proceedings") (internal quotation omitted).

This construction was a calculated choice to balance the competing rights and interests of dependency litigants in the creation of a statutory structure that gives primacy to permanency and the child's best interests while respecting the fundamental due process

rights of parents and interests of the State. *See, e.g.*, *S.M.*, 202 So. 3d at 781-82 ("While the Court and the legislature understand the importance of the parent-child bond . . . ultimately, the health, welfare, and safety of the child must be paramount."); *C.J. v. Dep't of Children & Families*, 756 So. 2d 1108, 1109 (Fla. 3d DCA 2000) ("In determining whether a continuance should be granted under the circumstances presented by this case, the trial court must consider two primary concerns. First and foremost is the best interest of the child, which ordinarily requires a permanent placement at the earliest possible time. . . . The second consideration is affording fairness to the parents involved.").

This balancing is evident in the tightly constrained manner in which chapter 39 and the Juvenile Rules identify and limit parties to a dependency, to the exclusion of a general procedural mechanism allowing intervention. This limitation sits in contrast to other areas of civil litigation in which intervention by non-parties is liberally permitted and expressly a by Civil Rule 1.230.

ii. The Juvenile Rules are self-contained, and neither the Civil Rules generally nor Civil Rule 1.230 in particular apply.

In the trial court proceedings and on appeal to the Fourth District, the thrust of the Former Caregivers' argument was that their status as adoption petitioners and A.R.L.'s placement made them eligible to intervene in the dependency under Civil Rule 1.230 and other case law applying that rule in dependency cases. The Fourth District rejected their argument, concluding "the liberal intervention standard in Florida Rule of Civil Procedure 1.230 does not apply in dependency proceedings" and further determining that the Juvenile Rules limit who may be a party to a dependency in order "[t]o keep the focus on the children's best interest." Opn. at 3.

Though the applicability of Civil Rule 1.230 was the substantial focus of the Former Caregivers' arguments to the trial court and in the Fourth District—including successfully seeking conflict with *T.R.-B.* on this point—the Former Caregivers abandoned that argument in this Court and have affirmatively conceded that the Civil Rules—Rule 1.230 in particular—do not apply in dependency cases. IB at 7; Pet. Juris. Brief at 4-5. Nonetheless, both the Guardian ad Litem and the Department in their jurisdictional briefs identified the "conflict

certified by the Fourth District" as an issue in addition to those raised by the Former Caregivers that they would address in the event the Court took jurisdiction. GAL Juris. Brief at 1; Dep't Juris Brief at 1. *See,* Fla. R. App. P. 9.120(f); 9.210(c).

Indeed, whether or not the Former Caregivers wish to seek further review of this issue at this point, the fact remains that a conflict exists between *K.N.* and *T.R.-B.* on the specific issue whether Civil Rule 1.230 applies in dependency proceedings. *K.N.*, 359 So. 3d at 794. And where conflict exists, so does confusion and the potential for delay—matters of special concern in dependency proceedings. The concern for delay, in particular, is evident in the three opinions that have been generated on this issue since the Former Caregivers first sought review of the trial court's decision in this case, each of which are in conflict to some degree with *T.R.-B.*'s conclusion nonparties may intervene in dependency proceedings. *See Statewide Guardian ad Litem Office v. J.B.*, 361 So. 3d 419, 423 (Fla. 1st DCA 2023) ("order allowing relatives not 'parties' to intervene in a dependency action depart[s] from the essential requirements of law" unless permitted under section 39.522(3); *Dep't of Children & Families v. S.T.*, 353 So. 3d 1246 (Fla. 5th DCA 2022) ("The trial court

departed from the essential requirements of the law by allowing Respondents to intervene when they do not fall within the definition of "parties" under the statute and rule." *See,* 5D22-0511 (Fla. 5th DCA May 20, 2023) (quashing order granting maternal grandmother party status in dependency proceeding).[1] This Court's exercise of jurisdiction over this conflict is thus both necessary and appropriate.

Resolution of the conflict begins with the text of chapter 39 and the Juvenile Rules. Florida adheres to the supremacy-of-the-text principle, which compels application of a legal text, like statutes and procedural rules, as written. *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020). Thus, courts "must examine the actual language used" to "determin[e] the objective meaning of the text." *Id.* This is where the *T.R.-B.* Opinion's analysis went wrong.

Both chapter 39 and the Juvenile Rules expressly define and limit who may be a party in a dependency action and provide a non-

[1] Upon its release, it appears this Opinion was miscategorized, and it has not been published in any Reporters at this time. The Guardian ad Litem is actively trying to resolve this issue, and, in the meantime, has provided a copy of this Opinion in the concomitantly filed Appendix.

exhaustive list of who may participate in dependency proceedings. As the *K.N.* Opinion notes, the language of sections 39.01(57), (58), and Juvenile Rule 8.210(a) confirm that parties to dependencies are limited to those enumerated in statute. A participant is, by definition, "not a party," though they "may be granted leave by the court to be heard without the necessity of filing a motion to intervene." § 39.01(57); Fla. R. Juv. P. 8.210(b). Rule 8.210(b) further clarifies that participants "shall have no other rights of a party except as provided by law." Thus, by creating an exhaustive list of parties and a non-exhaustive list of participants, including the caveats that participants "are not parties" and "shall have no other rights of a party except as provided by law," the preclusion of non-party intervention in dependency cases is clear.

Despite this clear language, when presented with a question of potential party rights, the Third District in *T.R.-B.* acknowledged the definitions of party and participant in sections 39.01(57) and (58) and Juvenile Rule 8.210, but did not "examine the actual language used" to ascertain "the meaning of the text." *Advisory Op.*, 288 So. 3d at 1078; *see, T.R.-B.*, 335 So. 3d at 735. Instead, without explanation, the Third District moved on to Civil Rule 1.230, noting it

"further . . . provides" for liberal nonparty intervention in the trial court's discretion, applying case law from the Fifth District Court of Appeal. *Id.*

But as the *K.N.* Opinion correctly recognized, "Although the concept of intervention is liberally applied in general civil procedure, the Rules of Juvenile Procedure, not the Rules of Civil Procedure, apply" in dependencies. Opn. at 3. The history of Juvenile Rule 8.000, which addresses the scope of the Juvenile Rules, is instructive on this point. Rule 8.000 provides the Juvenile Rules "shall govern the procedures in the juvenile division of the circuit court in the exercise of its jurisdiction under Florida law." In 1991, it was amended to add a provision permitting reference to the Civil Rules in dependency matters when the Juvenile Rules were silent. *In re Petition of The Fla. Bar to Amend the Fla. Rules of Juv. P.*, 589 So. 2d 818, 836 (Fla. 1991). That language was deleted the very next year, however, and the Rule now contains a comment explaining "Reference to the civil rules, previously found in [what is now Rule 8.000], has been removed because the rules governing dependency and termination of parental rights proceedings are self-contained and no longer need to reference the Florida Rules of Civil Procedure." Fla.

R. Juv. P. 8.000, 1992 Comment; *see also, In re Amendments to Fla. Rules of Juv. P.*, 608 So. 2d 478, 480 (Fla. 1992).

"When 'substantial and material change[s]' are made to the wording of a legal text, the changes are "presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear." *State v. Flansbaum-Talabisco*, 121 So. 3d 568, 576 (Fla. 4th DCA 2013) (quoting *Punsky v. Clay County Bd. of County Comm'rs*, 60 So. 3d 1088, 1092 (Fla. 1st DCA 2011)). This principle is embodied in the reenactment canon. *Jackson v. State*, 289 So. 3d 967, 969 (Fla. 4th DCA 2020); see also, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012)). Unlike the disfavored review of legislative history, changes to the language in a legal text provides context from which a change in meaning can be determined. Scalia & Garner, *Reading Law* 256. This change provides further context confirming the interpretation of section 39.01(57) and (58) and Rule 8.210.

Finally, it is also notable that while the Florida Rules of Civil Procedure, Rules of Family Law Procedure, and even other parts of the Juvenile Rules pertaining to non-dependency actions contain express provisions for non-party intervention, Part III of the Juvenile

Rules, applicable here, does not. *See* Fla. R. Civ. P. 1.230; Fla. Fam. L. R. P. 12.230; Fla R. Juv. P. Part IV, V. The Omitted-Case Canon instructs, with the myriad ways the Legislature and this Court permitted for the addition of parties in civil, family, and certain juvenile proceedings, if they had wanted to provide for the addition of parties in dependency cases, they would have done so. *See Nunes v. Herschman*, 310 So. 3d 79, 84 (Fla. 4th DCA 2021) (*citing Reading Law* at 93) (discussing the Omitted-Case Canon of statutory construction).

Thus, considering the language of section 39.01(57), (58) and Juvenile Rule 8.000 in their full context, the Third District's error in *T.R.-B.* is clear—neither the Civil Rules in general nor Florida Rule of Civil Procedure 1.230 in particular apply in dependency proceedings, and the conflict identified between this case and *T.R.-B.* should be resolved in favor of the Fourth District's Opinion in this case.

B. Former Caregivers' Status as Adoption Petitioners Does Not Give Them Party Status in a Dependency.

Because the Former Caregivers cannot intervene into the dependency action as parties, they can only succeed on review in this Court if they qualify as parties under section 39.01(58) and Juvenile

Rule 8.210(a). The Former Caregivers ask this Court to ignore the long-established statutory scheme governing who can be a party to a dependency proceeding based on their own unsubstantiated view of legislative history and American history, as well as their tenuous status as adoption petitioners. Contrary to the former caregivers' arguments, however, the plain language in chapter 39 identifies who can be a party and provides participant status to anyone else whose participation may be in the child's best interest. § 39.01(58).

The statutory definition of parties does not change when the placement of a child is at issue; in fact, the statutes expressly recognize that there may be a limited need for foster parents/caregivers to become parties for purposes of placement change hearings and they expressly provide a mechanism for party status if the caregivers qualify. *See* § 39.522(3). Having failed to qualify as parties under chapter 39 as written, the former caregivers in this case now ask the Court to create a new class of party status in dependency cases for individuals who simply have filed adoption petitions. However, the former caregivers' arguments are not supported by the statutory scheme, legislative history, or decades of precedent.

When an adoption proceeding follows a termination of parental rights, section 39.812 applies along with certain provisions of chapter 63 of the Florida Statutes. *See* § 39.812; § 63.037 (providing that section 39.812 applies and identifying the specific provisions in chapter 63 from which these adoptions are exempt). The former caregivers' assertion that they were entitled to party status in the dependency as mere adoption petitioners conflates these two chapters without observing their distinctions.

Chapter 39 and chapter 63 are two different creatures with two different functions: the first provides a framework for dependency proceedings while the second provides a framework for general adoption proceedings. § 39.001; § 63.022 (setting forth the legislative intent for chapter 63). While a dependency case may eventually involve an adoption, the posture and the parties are different than they are in an adoption case that does not involving a dependency proceeding. In dependency, the best interest of the *dependent child* controls at all times, including in permanency decisions, until the adoption is finalized. *See* § 39.621(1); § 39.812(4). The Department has legal custody of the child until the adoption is finalized. § 39.812(4). And time is of the essence in dependency proceedings

at all times, so one of the paramount goals of chapter 39 is to help the child achieve permanency within twelve months. § 39.812(4).

Consistent with the goals of dependency, the plain language of section 39.01(58) does *not* include adoption petitioners in its definition of parties. § 39.01(58) (the word "party" means "the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child"). The absence of former caregivers and adoption petitioners from the statutory definition of parties is presumed to be intentional under the doctrine of *inclusio unius est exclusio alterius*. *See Gay v. Singletary*, 700 So. 2d 1220, 1221 (Fla. 1997) ("Under this doctrine, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded").

The statute does not ignore caregivers, though. Significantly, it expressly permits participant status for foster parents/caregivers and actual custodians of the dependent child, as well as any other person whose participation *may be in the best interest of the child*. § 39.01(57) (emphasis added) (defining a "participant," "for purposes

of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding, means any person who is not a party but who should receive notice of hearings involving the child, including the actual custodian of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child"). Participants "may be granted leave by the court to be heard without the necessity of filing a motion to intervene." *Id.*

In creating participant status for those individuals whose participation may be in the child's best interest—rather than granting party status—chapter 39 delicately balances the unique and sensitive interests involved in dependency, and is grounded in the notion of permanency and the child's best interests. It is not designed to accommodate permanency-delaying litigation of collateral concerns.

Here, the former caregivers correctly were deemed participants. R. 456, ¶4. As participants they had notice of A.R.L.'s placement change hearing, attended the hearing, and were permitted to make statements to the trial court regarding A.R.L.'s best interest during the hearing. *See generally* R. 543; R. 560.

The former caregivers try to argue that the history of the definition of "party" in section 39.01(58) supports their interpretation of "petitioners" to include *all* kinds of petitioners, including adoption petitioners. This argument is not borne out in the statute or its history, however.

As pointed out previously, the statute currently only includes the following as parties: "the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child." § 39.01(58). The former caregivers focus on the word "petitioner" in their argument that they had party status. They note that the Legislative added a definition of "party" to the statute in 1994 "for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding" that includes the "petitioner." Ch. 94-164, §1, Laws of Fla. (creating new subsection (71) to add the definition of "party" to the statute).

Notably, the Legislature also added a definition of "participant" that year, specifying that "for purposes of a shelter proceeding, dependency proceeding, or termination of parental rights proceeding," a "participant" means:

> [Any person who is not a party but who should receive notice of hearings involving the child, including *foster parents*, identified prospective parents, grandparents entitled to priority for adoption consideration under section 63.0425, actual custodians of the child, and any other person whose participation may be in the best interest of the child. Participants may be granted leave by the court to be heard without the necessity of filing a motion to intervene.

Ch. 94-164, § 1, Laws of Fla. (creating new subsection (70) to add the definition of "participant"). Thus, from the outset, caregivers like K.N. and D.N. were eligible for participant status without needing to file a motion to intervene. Furthermore, the statute permitted participant status for any other person whose participation may be in the best interest of the child, as it still does to date. *Id.*

The former caregivers assert that the 1994 definition of a party in chapter 39.01 limited "petitioners" to three types of chapter 39 petitions (shelter, adjudication, and termination of parental rights petitions), and they go on to concede that adoption petitioners were not granted party status in the original definition of "party." They insist that the amendments that followed over the next few years—none of which included adoption petitioners—somehow resulted in an expanded notion of who constitutes a petitioner. They assert the

notion of "petitioner" became broader when the Legislature removed the reference to shelter, adjudication, and TPR petitions in the statutory definition of "party." However, the former caregivers do not persuasively show that the legislative history supports their interpretation of "petitioner" to include adoption petitioners.

Not only does the statute not give adoption petitioners party status, there are sound policy reasons why foster parents, caregivers, and adoption petitioners are given participant status rather than party status. Such groups may participate to the extent their participation is in the child's best interest but their own interests are not permitted to become the focus of the dependency. And, with respect to adoption petitioners in particular, not every adoption petition results in an adoption. The litigation of collateral issues in the child's dependency case detracts from the focus of the child's best interest. The interpretation of "petitioner" advocated by K.N. and D.N. is unsupported by policy reasons in addition to the statutory scheme.

C. The Fourth District's Decision Does Not Amount to an Implied Repeal of Section 39.01(58).

While the former caregivers assert the Fourth District Opinion presumed an implied repeal of section 39.01 based on the amendments to section 39.522 (and in turn, Florida Rule of Juvenile Procedure 8.345), this is a misreading of the Fourth's District's decision. In reasoning that prior intervention case law predates the amendment of rule 8.345 (which governs the procedures to modify a child's placement and which the Court amended in February 2022 to conform with recent changes to section 39.522), the lower appellate court did not presume an implied repeal of section 39.01(58); nothing in its decision logically leads to that conclusion. Nor does it logically follow that K.N. and D.N., having failed to qualify for the rebuttable presumption of party status set forth in section 39.522(3), are parties by virtue of section 39.01(58).

The Former Foster Parents' logic is, essentially, that since they did not qualify for party status under section 39.522, they must qualify under section 39.01(58) unless the Fourth District's decision impliedly repealed section 39.01(58). This analysis does not hold up. As discussed before, section 39.01(58) does not afford adoption

petitioners or foster parents party status; in fact, section 39.01(57) recognizes that these groups might be given participant status if their participation is in the best interest of the dependent child. Section 39.522 provides a mechanism for certain qualifying caregivers to receive party status in placement modification decisions, and there is no dispute that K.N. and D.N. did not qualify. The Fourth District correctly determined that the trial court properly denied their motion to intervene as parties while giving them participant status and affording them the chance to inform the court about the child's best interests from their perspective.

II. FORMER CAREGIVERS DO NOT POSSESS A CONSTITUTIONALLY RECOGNIZED "FAMILIAL LIBERTY INTEREST" THAT PRECLUDED THE REMOVAL OF A.R.L. FROM THEIR CARE PURSUANT TO SECTION 39.522 AFTER THEY BREACHED THE MEMORANDUM OF UNDERSTANDING AND CONTINUED PLACEMENT OF A.R.L. IN THEIR CARE WAS NO LONGER IN HER BEST INTERESTS.

The second portion of Former Caregivers' brief is devoted to a convoluted, contrived, and ultimately unconvincing argument that the federal and Florida constitutions afforded them a greater due process right to be heard at the time of A.R.L.'s removal than that of participants because they have a "familial liberty interest" in keeping her in their care. The Former Caregivers fail to cite and the Guardian

ad Litem is unaware of any authority recognizing a "familial liberty interest" attaching to former caregivers who have received placement of a child via contract with the state when that child removed from their care seven months after placement. Instead, they ask this Court to recognize, for the first time, that caregivers desiring to adopt a child acquire a constitutionally protected interest in continued custody of the child when they later want to adopt the child. This unfounded entreaty should be rejected.

A. The Constitution Does Not Recognize a Dependency Caregiver's Unenumerated Right to Maintain Custody of a Foster Child Placed in Their Custody by the State.

Former Caregivers begin their argument with a history lesson reaching back to Biblical times on the practice of adoption to support their conclusion adoption is "deeply rooted in tradition." I.B. at 40. Based on that tradition, they argue, "adoptive families" have rights to familial association or integrity. But they never clearly define the phrase "adoptive families," as they use it, and their use of it in this context is misleading. Acknowledging that adoption is a legal term of art in the modern context, they nonetheless refer to their "family" relationship with A.R.L as "adoptive" because the term historically was used to describe the "commitment" of a caregiver to bring a child

into their home, not the legal process to obtain parental rights as to a child. IB at 34. *But see, Lindley v. Sullivan,* 889 F.2d 124, 130-31 (7th Cir. 1989) ("The adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been governed by legislative enactment. See generally, Zainaldin, The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851, 73 Nw.U.L.Rev. 1038, 1042 (1979)"). But this characterization of the nature of their "family" relationship fails utterly to account for their abrupt and unilateral withdrawal of this alleged constitutionally protected family association from S.C.R., whom, though placed in their home under identical circumstances and hopeful expectations as A.R.L., they not only demanded be removed from their home but actively tried to sever the relationship with his sister when they did not like his behavior. The ease with which they discarded theirs and A.R.L.'s relationship with him reveals the myopic, self-serving manner in which they are trying use this loaded phrase. Choosing to identify themselves as an "adoptive family" does not convert their state-created, contractual agreement to care for A.R.L. into a familial association entitled to constitutional protection, as discussed below.

i. The federal constitution does not recognize a right of familial association under the circumstances present in this case.

"We must analyze a substantive due process claim by first crafting a "careful description of the asserted right." *Butler v. State*, 923 So. 2d 566, 569 (Fla. 4th DCA 2006) (*quoting [Reno v.] Flores,* 507 U.S. 292, 302 (1993)). As discussed above, and admitted by the Former Caregivers, the claimed unenumerated right at issue here is not the right of adoption. This appellate proceeding does not arise out of an adoption case, and the right or ability of the Former Caregivers to adopt is not the matter presently in controversy. What is at issue here is the claimed right of a caregiver who wants to adopt a child placed in their custody by agreement with the Department of Children and Families to maintain that child in their custody. In other words, the right they claim does not arise from a recognized fundamental liberty interest, but is strictly circumscribed state law and contract. Properly characterized, this claimed right is distinguishable from the rights of familial association previously

recognized by the United States Supreme Courts without need of further discussion.[2]

To be entitled to constitutional protection, this claimed unenumerated right must fall within one of two categories of substantive rights, only one of which is relevant here—those "'deeply rooted in [our] history and tradition' and 'scheme of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (*quoting Timbs v. Indiana*, 586 U.S. ___, ___, 139 S. Ct. 682, 689 (2019).

Whatever the history of *voluntary* child-placing by *parents with intact parental rights* described in the Former Caregivers' initial brief, A.R.L.'s foster care-type placement with the Former Caregivers was conceived of and executed wholly pursuant to state law and subject to the contract they entered into with the State. In other words, far from a deeply rooted, fundamental right, the legal issue presented in

[2] *See e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to direct child's upbringing); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce fees); *Grissom v. Dade Cnty.*, 293 So. 2d 59 (Fla. 1974) (adoption fees); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (the right to reside with relatives); and *Troxel v. Granville*, 530 U.S. 57 (2000) (grandparent visitation).

this case is a mundane matter of child custody of a dependent child to be decided on state law grounds alone.

ii. Neither the Florida Constitution nor the laws of this state recognize a right of familial association under the facts of this case.

With no unenumerated right recognized under the federal constitution at issue, the Former Caregivers arguments fail unless Florida law provides them, as A.R.L.'s contracted nonrelative caregivers, some greater measure of protection of their foster family relationship. To that end, they argue authority from this Court establishes their "constitutional right to access the Court to protect their existing family relationship through adoption." IB at 49. In particular, they rely on a sentence this Court's opinion in *Grissom*, 293 So. 2d at 62, in which the Court noted, "The fundamental right to have children either through procreation or adoption is so basic as to be inseparable from the rights to 'enjoy and defend life and liberty, [and] to pursue happiness, . . .'" *Id. (quoting* Art. I, § 2, Fla. Const.).

As a preliminary matter, this sentence is dicta, as it concerns a matter not at issue in the *Grissom* Opinion. *Grissom* concerned an indigent adoption petitioner's inability to pay the filing fee to adopt a child who had been born in her home approximately fifteen years

earlier and whose parent had voluntarily agreed for the adoption petitioner to care for her for the entirety of that time. *Id.* at 60. In deciding that case, the Court expressly noted, "The merits of the appellant's right to adopt this child is clearly not the issue." *Id.* at 62. The Court's passing remark on the nature of the right to adopt is thus *obiter dictum* and does not create precedent. *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) ("[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value.'"). This understanding of *Grissom* is confirmed by subtantial precedent, before and after *Grissom* was decided, affirming that adoption is a statutory right. *In re Palmer's Adoption*, 129 Fla. 630, 633, 176 So. 537, 538 (Fla. 1937); *State, Dep't of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1215 (Fla. 2d DCA 1993), *affirmed in relevant part*, 656 So. 2d 902 (Fla. 1995); *Buckner v. Family Servs. of Cent. Fla., Inc.*, 876 So. 2d 1285, 1288 (Fla. 5th DCA 2004)

More importantly, as discussed at length above, this is not an adoption case and whatever the nature is of the asserted "right to adopt," it is simply not at issue here. The underlying question in this case of placement in the dependency matter has no bearing on the Former Caregivers' access to the courts to file an adoption petition seeking to adopt A.R.L. or any other child. Indeed, the former caregivers have successfully filed and continue to maintain an adoption petition seeking to adopt A.R.L. *Grissom* and the "right of adoption" thus are irrelevant here.

What is at issue here is the state law pertaining to the rights of state-contracted foster placements who receive dependent children in their homes. The Former Caregivers have not asserted any constitutional rights accruing from such status under the facts of this case, and the Guardian ad Litem would submit no such rights exist. Nothing in the law of this state provides a right of foster families to "stay together." Quite the contrary, "the paramount consideration in cases of child dependency is the welfare and best interest of the child," and the focus of the proceeding is to protect those best interests, not the interests of nonparties. *Fitzpatrick v.*

State, Dep't of Health & Rehab. Servs., 515 So. 2d 319, 320 (Fla. 3d DCA 1987).

Because it is the best interests of the children that are paramount in dependency cases, any interest that a nonrelative caregiver may develop with respect to a child in their custody derives from the child's best interests in that continued custody and does not independently attach to the caregivers. Their subjective expectancies and desires for continued custody are subordinate to the child's best interests. This is clear from the manner in which chapter 39 and the Juvenile Rules were constructed, as discussed in the beginning of this brief. And this is precisely why the Legislature and this Court, through the Juvenile Rules, have expressly limited the ability of Former caregivers similarly situated to K.N. and D.N. to obtain and exercise party rights in dependency cases. The interposition of their own issues and exorbitant delay that sort of litigation causes do not serve the child's best interest and are often antagonistic toward it. This case is a perfect example.

Prior to meeting A.R.L. through the Department's matching process, the Former Caregivers had no connection whatsoever to A.R.L. and S.C.R. It was only because the Department introduced

them in the hopes of facilitating the children's permanency that they came to know each other. And when the Former Caregivers took placement, they did so under conditions that made the parameters of the placement crystal clear: 1) Former Caregivers and the agency were required to "mutually agree" adoption was in the best interest of the child before it would move forward; 2) Either party could terminate placement prior to adoption; 3) The Department and Former Caregivers agreed that maintaining the siblings together was in their best interest; 4) The Former Caregivers were on notice that if they could not adopt one of the children, it would be the Department's "intent . . . to terminate the placements of all children in the sibling group, so that the children can remain together in subsequent placement"; and 5) The Former Caregivers agreed not to file an adoption petition until receiving the Department's consent. R. 354, 355.

The Former Caregivers exercised their authority to terminate placement of S.C.R. in March 2022 under this agreement. R. 332. And then they breached the agreement eleven days later by filing a petition to adopt A.R.L. and, for the last fifteen months, have

challenged at every opportunity the Department's subsequent actions in conformity with that agreement. R. 349.

And in those challenges, the Former Caregivers have complained that the law is unfair and does not adequately protect their interest in keeping custody of the child they chose to keep. Indeed throughout their Initial Brief, they focus nearly exclusively on their interests and the maintenance of the family of *their* choosing, all the while ignoring the biological sibling relationship they attempted to unilaterally sever in the span of one afternoon. Their focus on their claimed constitutional rights to the family *they* chose to the exclusion of the familial association A.R.L. and S.C.R., formed over the five years of A.R.L.'s life, exposes the fallacy in their argument. Having acquired their "interest" in the children under these circumstances, the fairness to which they are entitled is in the terms and execution of their placement contract with the state and as otherwise provided by the Legislature, not the constitution.

B. The Guardian ad Litem is the Court-Appointed Representative of A.R.L.; Dependency Caregivers Therefore Lack Standing to Assert A.R.L.'s Interests in this Matter.

The Former Caregivers briefly detour from their focus on their rights in this case to raise A.R.L.'s interest in the trial court hearing from "her custodians in a meaningful manner" and lament that A.R.L. did not have an attorney ad litem who could raise this claim for her. IB at 42. But even this argument is not really about A.R.L. It is another avenue through which they assert their interests should be heard.

As they acknowledge, A.R.L. has been represented throughout these proceedings by a Guardian ad Litem, whose role it is to advocate for her in court. IB at 42 n.21. They appear to take issue with the Legislature's policy regarding the representation of dependent children and have fashioned themselves as the defenders of A.R.L.'s interests in this case, asserting their authority to raise claims on her behalf as her self-appointed next friends. IB at 42-43.

The Former Caregivers assertion there is a lack of clarity as to their ability to act on their own accord as A.R.L.'s next friends is grossly specious. As discussed at length above, parties to

dependencies are expressly limited by chapter 39 and the Juvenile Rules, and they contain no provision for the representation of dependent children via a next friend in the dependency action. In contrast, chapter 39 and the Juvenile Rules are express in their requirement for a guardian ad litem without reference in any provision to the appointment of a next friend. *See* § 39.822(1) ("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.") (Emphasis added.); *see also* Fla. R. Juv. P. 8.215(a) ("At any stage of the proceedings, . . . the court may appoint *a guardian ad litem to represent any child alleged to be dependent.*") (Emphasis added.); Fla. R. Juv. P. 8.215(b) ("The court *shall appoint a guardian ad litem to represent the child* in any proceeding as required by law . . . .") (Emphasis added.); Fla. R. Juv. P. 8.215(c)(3) (…To *represent the interests of the child* until the jurisdiction of the court over the child terminates or until excused by the court.) (Emphasis added.); and, Fla. R. Juv. P. 8.305(7)(A) (In the shelter order, "The court *shall appoint: . . . . a guardian ad litem to represent the child* unless the court finds representation unnecessary.") (Emphasis added.).

Instead, the concept of a next friend representation is codified in Civil Rule 1.210(b), which for all of the reasons discussed above *and conceded by the Former Caregivers*, is inapplicable in this matter governed exclusively by the Juvenile Rules. Moreover, by its own terms, that Rule permits next friends only for a "minor . . . who does not have a duly appointed representative" and then provides such unrepresented minors "may sue by next friend or by guardian ad litem." Fla. R. Civ. P. 1.210(b). There is no dispute A.R.L. is and has been represented by a guardian ad litem for the duration of the dependency—indeed years longer than the Former Caregivers have even known her. There is, therefore, no authority to support the Former Caregivers' claim they possessed the authority to act as A.R.L.'s next friend below, and they consequently lack standing to raise claims on her behalf.

The former caregivers claim that A.R.L. was essentially unrepresented in the proceedings below because she had no one advocating her "express wishes" to the court. IB at 43-44. Preliminarily, the guardian ad litem is required by statute to inform the court of the child's expressed wishes. § 39.807(2)(b)(1), Fla. Stat. (2023). In any event, however this complaint is a matter better suited

to the Legislature than this Court. Since the late 1970s, our state, in concert with the federal Child Abuse Prevention Act, has required guardian ad litem representation for Florida's dependent children. *See,* 42 U.S.C. § 5106(b)(2)(B)(xiii); §§ 39.820(1); 39.822(1); 39.8296(1)(a), Fla. Stat. (2023). "[C]hildren have a very special place in life which law should reflect." *May v. Anderson,* 345 U.S. 528, 536 (1953) (Frankfurter, J. concurring). Thus, our courts have

> held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

Bellotti v. Baird, 443 U.S. 622, 635 (1979). And for that reason, "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 550 (1971) (per curiam).

These concerns and adjusted procedures are evident in the manner in which Florida addresses minors and the disability of non-age. At common law the disability of nonage precludes minors from entering into contractual agreements, including securing their own legal counsel. The disability of nonage is a matter of public policy, recognized both in the Florida Constitution and Florida Statutes. Art. III, § 11(a)(17), Fla. Const.; §§ 743.01 - .07, Fla. Stat. Thus, unemancipated minors cannot engage counsel in their own right except where a constitutional right to counsel exists or through legislative act. *In re T.W.*, No. 74,143, 1989 Fla. LEXIS 1226, at *49 (Fla. 1989) ("The legislature has the power to set forth certain instances where the disability is removed.").

The legislature has, in fact, removed this disability in limited fashion to provide for the appointment of counsel for certain dependent children. *See*, § 39.01305. Such counsel have an attorney-client relationship with the child, are bound by attorney-client privilege, and provide advocacy based on the child's expressed wishes, irrespective of best interests. *See*, *R.L.R. v. State*, 116 So. 3d 570, 574, 574 n.8 (Fla. 3d DCA 2013). But the mere appointment of counsel does not alleviate the underlying concerns giving rise to the

disability of nonage in the first place. A minor's lack of the judgment, experience, and insight necessary to reasonably and consistently be expected to make appropriate choices does not evaporate upon the appointment of an attorney ad litem. Indeed, that attorney, when appointed, is ethically bound by the expressed wishes of the child, even though the child may wholly lack the capacity to fully understand and appreciate the legal proceeding in which they are engaged.

For that reason, consistent with legislative policy, our courts have repeatedly held the appointment of an attorney ad litem not insufficient to fully protect the interests of children in litigation, including dependency, and required the appointment of a guardian ad litem or next friend to protect those interests. *See, In Interest of D.B.,* 385 So. 2d 83, 91, 93 (Fla. 1980) (rejecting argument children constitutionally entitled to counsel; noting guardian ad litem appointment appropriate to protect child's due process); *Kingsley v. Kingsley,* 623 So. 2d 780, 785 (Fla. 5th DCA 1993) ("The necessity of a guardian ad litem or next friend, the alter ego of a guardian ad litem, to represent a minor is required by the orderly administration of justice and the procedural protection of a minor's welfare and

interest by the court and, in this regard, the fact that a minor is represented by counsel, in and of itself, is not sufficient."); *see also Roberts v. Ohio Casualty Insurance Co.,* 256 F.2d 35, 39 (5th Cir. 1958)*; Zaro v. Strauss,* 167 F.2d 218 (5th Cir. 1948)*; Buckner*, 876 So. 2d at 1286; *Brown v. Ripley,* 119 So. 2d 712 (Fla. 1st DCA 1960).

In the dependency context, that appointment has been limited to a guardian ad litem. § 39.822(1). Section 39.822(1) requires "[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." "'The guardian ad litem serves as the child's representative in court to represent the child's best interest.'" *D.H. v. Adept Cmty. Servs.*, 271 So. 3d 870, 879 (Fla. 2018); (*quoting C.M. v. Dep't of Children & Family Servs.*, 854 So. 2d 777, 779 (Fla. 4th DCA 2003)). There is no dispute in this case that A.R.L. has been appointed a guardian ad litem since October 2018, and the guardian ad litem has fulfilled both the investigative and information gathering function and provided high-quality legal advocacy through a best-practice multidisciplinary team model that includes a child welfare professional, attorney, and, for part of the case, a lay volunteer, all assigned to A.R.L. to represent

her as her guardian ad litem. R. 28. Thus, A.R.L. has received the representation to which she is entitled by law, and the Former Caregivers' self-serving arguments that her interests require they be heard in excess of the manner provided by law should be rejected.

C. The Former Caregivers Received All Process to Which They Were Entitled.

Finally, the Former Caregivers argue that "[b]ut for the denial of due process, the[y] . . . would have been able to prove that it was in the Child's best interests to stay with them." IB at 57. Wrapped in this argument is an assertion they had a right "to be meaningfully heard in the child custody dispute, whether in the removal action or the 63.062(7) claim." IB at 50. The Guardian ad Litem does not dispute the Former Caregivers' right to be heard in the section 63.062(7) hearing regarding the withhold of the Department's consent. But as stated repeatedly above, their right to be heard in the adoption proceeding is not at issue here.

This matter concerns A.R.L.'s dependency. In the dependency, the Former Caregivers were participants; no more, no less. They have no rights beyond those attached to that status or as otherwise provided by law. Their status as participants entitled them to notice

and, in the trial court's discretion, to be heard. *Clingerman v. J.F.*, 276 So. 3d 398, 400, 400 n.3 (Fla. 5th DCA 2019). They have not asserted to this Court any violation of these requirements, and in fact the trial court exercised its discretion and allowed them to be heard through opening and closing arguments and narrative testimony at the change in placement hearing.

Beyond this, Florida law permits caregivers to be heard as parties in two limited circumstances—under section 39.522(3)(b)-(c), Florida Statute (2023) and section 62.082(6), Florida Statute (2023). Under both of these statutes, the legislature has deemed nine months of placement the minimum length of time at which a child's interest in maintaining caregiver ties reaches a critical threshold requiring additional consideration be given to that caregiver relationship. This is a matter solely within the legislature's discretion.

"[T]he legislature possesses broad discretion in determining what measures are necessary for the public's protection, and [an appellate court] may not substitute [its] judgment for that of the legislature insofar as the wisdom or policy of the act is concerned." *K.A. v. Dep't of Children & Families*, 332 So. 3d 501, 506 (Fla. 4th DCA 2021) (*quoting Barnes v. B.K. Credit Serv., Inc.,* 461 So. 2d 217,

219 (Fla. 1st DCA 1984) (internal quotation omitted); *see Hamilton v. State,* 366 So. 2d 8, 10 (Fla. 1979). Just as it is "clearly within the Legislature's province to decide that three or more out-of-home placements constitutes grounds for termination of parental rights," it is similarly "clearly within the Legislature's province" to determine the time and circumstances under which a child's potential bond to a caregiver should be given additional statutory protections. *K.A.*, 332 So. 3d at 506.

That the Department ensured that it acted to remove A.R.L. before that nine months of placement accrued is neither evidence of nefarious intent nor an "end-run" around the Former Caregivers' rights, as they claim. Based on the serious allegations at the time of S.C.R.'s removal from the home and A.R.L.'s need for permanency, the original multi-disciplinary team was not unanimous, and the participants agreed to further investigation over a period of time to determine what truly was in A.R.L.'s best interest with respect to placement and her sibling relationship. With the information it learned over the ensuring few months, the Department, supported by the Guardian ad Litem, believed continued placement with them was not in A.R.L.'s best interest. And rather than leave A.R.L. in that

environment and risk increasing the harm to her that could come from a later removal, the Department initiated change of placement proceedings before the legislatively determined critical period elapsed. And those proceedings occurred in accordance with the law—including adequate notice to the Former Caregivers and the trial court's exercise of its discretion to hear from them. The trial court properly afforded them no additional rights pursuant to section 39.522(3)(b).

"When assessing whether or not a violation of due process has occurred, 'a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process.'" *Joshua v. City of Gainesville*, 768 So. 2d 432, 438 (Fla. 2000) (*quoting Economic Dev. Corp. v. Stierheim,* 782 F.2d 952, 953-954 (11th Cir. 1986)). Here, the Former Caregivers have not established they have been deprived of any legally recognized substantive right or statutorily-provided process. They thus cannot establish a deprivation of due process, and the Fourth District correctly determined the former caregivers did not have standing to

challenge the placement order. The placement order must therefore be affirmed.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the Fourth District, affirming the trial court orders denying the former caregivers' motion to intervene and granting the Department's motion to change placement. The former caregivers are not parties within the meaning of chapter 39 and the Juvenile Rules, and have no other right of intervention. Nor do they have any constitutional rights of familial association under the facts of this case. The prolonged litigation they have pursued to vindicate their personal interests in contravention of A.R.L.'s best interests has delayed her ability to achieve permanency and consumed substantial trial court resources with collateral issues. This is the chief harm against which the preclusion of nonparty intervention in chapter 39 proceedings protects, and it compels a conclusion that *T.R.-B.* was incorrectly decided on the conflict question.

For the last fifteen months, instead of focusing on moving A.R.L and S.C.R. toward permanency, the court and parties have been distracted by the collateral issues the former caregivers have

attempted to insert into the dependency. It is imperative at this point that they be freed to move forward, so they can work toward the permanency all parties agree they desperately need.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this reply has been prepared with Bookman Old Style, 14-point type and complies with the font and word count requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.100(k).

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