

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1144

SPONSOR: Children and Families and Senator Diaz-Balart

SUBJECT: Representation of Dependent Children

DATE: March 16, 2000 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barnes</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

CS/SB 1144 directs the Statewide Public Guardianship Office (SPGO) within the Department of Elderly Affairs to establish a three-year pilot Attorney Ad Litem Program in Broward, Escambia, and Sarasota counties by October 1, 2000. This program will represent the legal rights of children who require a shelter hearing pursuant to s. 39.402, F. S. All children for whom an attorney ad litem is appointed in the pilot program counties must also have a guardian ad litem appointed pursuant to s. 39.822, F.S. The bill authorizes the Legislature to appropriate funds for each pilot program and compensation of attorneys ad litem.

It allows the SPGO to contract with a private entity with expertise in representing children in establishing each pilot program. The programs shall operate independently of any other state agency responsible for the care of children taken into custody. The bill also requires the SPGO to:

- Designate for each of the three counties a qualified attorney with experience in the area of child advocacy, child welfare or juvenile law to oversee the administration of each pilot program,
- Identify measurable outcomes for the pilot programs,
- Represent, upon court appointment, all children within the pilot program counties who are continued in out-of-home care at the shelter hearing conducted under s. 39.402, F.S., and
- Develop a training program for all attorneys ad litem based on the American Bar Association (ABA) Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases.

The Supreme Court is requested to adopt rules of juvenile procedure, by October 1, 2000. These rules should outline the duties, responsibilities, and conduct of attorneys ad litem consistent with the ABA standards for representation of children. The Office of the State Court Administrator is required to evaluate the pilot program in meeting the legal needs of dependent children and to submit interim reports to the Legislature by October 1 of the years 2001 and 2002, and a final report by October 1, 2003. The final report must also include information regarding program evaluation, feasibility of a statewide program, and recommendations, if any, on the location, establishment and operation of a statewide program.

II. Present Situation:**Appointment of Attorneys for Children**

Currently, s. 39.4085, F.S., establishes as legislative intent certain goals for dependent children, including that children in shelter or foster care have a guardian ad litem appointed to represent their best interests and where appropriate, an attorney ad litem be appointed to represent their legal interests. There are legislative purposes and intent set forth in section 39.001, F.S., relating to assuring due process and enforcement of constitutional and other legal rights of interested parties in proceedings under chapter 39, F.S. *See* s. 39.001(1)(l) and (3), F.S.

Section 39.822(1), F.S., requires that a guardian ad litem be appointed for any child involved in a child abuse, neglect, or abandonment proceeding; however, unofficial reports indicate that as few as 50 percent of eligible children are appointed a guardian ad litem. The 1998 Legislature provided parents involved in any judicial proceeding under ch. 39, F.S., the right to counsel (ch. 98-403, L.O.F.), but children involved in such proceedings are not guaranteed counsel under current law.

There is no current statutory definition for “attorney ad litem” nor instructions or procedures as to an attorney ad litem’s appointment and representation of a child’s legal interests in ch. 39, F.S.

Privileges

Generally, all privileges with the exception of the attorney-client privilege or clerk privilege are abrogated in cases of abuse, neglect or exploitation. *See* s. 39.204, F.S. Section 90.502(2), F.S., recognizes the attorney-client privilege to protect confidential communications made during the rendition of legal advice to the client. The right to assert the attorney-client privilege lies with the client although the privilege may be asserted by the attorney on behalf of the client. Similarly, only the client may waive the privilege.

Appointment of Guardians Ad Litem

Section 39.820(1), F.S., defines a “guardian ad litem” as a person who is appointed by the court as a representative of the child, to represent the *best* interests (as opposed to *expressed* interests) of a child in a proceeding under ch. 39, F.S., or in any judicial proceeding. The law specifies that a guardian ad litem serves until discharged by the court and can be one of the following: a certified guardian ad litem program, a duly certified volunteer, a state attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court-appointed attorney; or a responsible adult.

Section 39.822, F.S., provides that a guardian ad litem be appointed by the court at the earliest possible time to represent the child in any civil or criminal child abuse, abandonment, or neglect judicial proceeding. Any person participating in a civil or criminal judicial proceeding resulting from the appointment must be presumed *prima facie* to be acting in good faith and in so doing is immune from civil or criminal liability that otherwise might be incurred or imposed. In cases in which the parents are financially able, the parent or parents of the child must reimburse the court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services is not contingent upon successful collection by the court from the parent or parents. The guardian ad litem or the program representative must

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. Written reports are filed with the court and served on all parties whose whereabouts are known at least 72 hours prior to the hearing.

Section 39.402(8)(c), F.S., requires that, whenever a shelter hearing is held for a child in the custody of the department, the court must appoint a guardian ad litem to represent the child unless the court finds that representation is unnecessary.

Section 39.001(3), F.S., specifies the general protections to be provided for children which include an independent, trained advocate whenever that intervention is necessary and a skilled guardian or caregiver in a safe environment whenever an alternative placement is necessary.

Florida Rules of Juvenile Procedure

The Florida Rules of Juvenile Procedure do not contain provisions relating to attorneys ad litem. The rules address the appointment of guardians ad litem in several instances, most notably in Rule 2.215, which provides that a guardian ad litem may (or may not) be an attorney, and which lists the responsibilities of a guardian ad litem. These duties specifically include representing the best interests of the child.

Parents' Right to Counsel

Section 39.013(8), F.S., requires that all parents of children involved in dependency proceedings be informed of their right to counsel at each stage of the proceedings, and that parents be appointed counsel when they are unable to afford counsel. This law requires that the court determine whether waivers of counsel by parents are knowing and intelligent and must make its findings on this issue in writing. It also requires that once counsel has been appointed or has entered an appearance, the attorney continues to represent the parent throughout the proceedings. If the attorney-client relationship is discontinued, the court must advise the parent of the right to have new counsel retained or appointed for the remainder of the proceedings.

Compensation of Counsel

All court-appointed counsels in dependency proceedings under chapter 39, F.S., who are entitled to compensation are compensated according to a rate established by each county. *See s. 39.0134(1)*, F.S. However, in proceedings for termination of parental rights, the rate is statutorily set at a maximum of \$1,000 for representation at the trial level and a maximum of \$2,500 for representation at the appellate level. *See s. 39.0134(1)*, F.S.

ABA Standards

The American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (ABA Standards)¹ defines a "child's attorney" as a lawyer who provides legal

¹In February, 1996, the ABA House of Delegates adopted standards of practice for lawyers representing children in abuse and neglect cases. The standards were developed by a committee within the ABA's Family Law Section in an attempt to provide guidance in this area. The non-binding standards emphasize the need for specially trained lawyers and the use of multidisciplinary resources, particularly regarding issues of child development. State and local bar associations and courts may opt to adopt these standards and in some cases. They have become de facto standards of practice in the field.

services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. These standards contemplate representation of the child's *expressed interest*, in all cases except those children with exceptional problems such as children with limited language development, mental retardation, or serious mental illness. Section B-3 of the ABA Standards rejects the idea that children of certain ages are incapable of effectively directing representation on their behalf. In cases when an attorney ad litem is unable to ascertain the child's legal interests, the attorney may seek the advice and consultation of experts and other knowledgeable people in making the determination.

According to the ABA Standards, a lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences. In those circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

The ABA Standards recognize that there may be occasions when a child's expressed preferences would be injurious to the child. The standards state that if the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's best interest), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Statewide Public Guardianship Office

Public Guardianship is addressed in Part IX of ch. 744, F.S. The Statewide Public Guardianship Office was established in 1999, and was given oversight responsibilities over all public guardians. See s. 744.7021(2), F.S. SPGO is placed under the Department of Elderly Affairs which has responsibility for providing administrative support only.

III. Effect of Proposed Changes:

CS/SB 1144 directs the Statewide Public Guardianship Office within the Department of Elderly Affairs to establish a 3-year pilot Attorney Ad Litem Program in Broward, Escambia, and Sarasota counties by October 1, 2000. The program is to represent the rights of children who are maintained in out-of-home care by court order under s. 39.402, F.S. The Office may contract with a private entity for each pilot program but that entity must have the appropriate expertise in representing the rights of children.

The bill specifies that the Statewide Public Guardianship Office designate an attorney within each of the three counties to conduct the administrative oversight of pilot program.. The attorney responsible for administrative oversight of the pilot program must be a member in good standing with The Florida Bar and must have 5 years or more of experience in the area of child advocacy, child welfare, or juvenile law. The SPGO would, however, be responsible for supervising that oversight function

The bill requires that the Statewide Public Guardianship Office identify measurable outcomes including but not limited to: the impact of counsel on child safety, improvements in the provisions of appropriate services, and any reduction in the length of stay of children in state care. These pilot programs must operate independently of any other state agency responsible for the care of children taken into custody.

The bill requires that the court appoint the Statewide Public Guardianship Office or the entity under contract with the office to represent all children in the counties under each pilot program who are continued in out-of-home care at the shelter hearing conducted under s. 39.402, F.S. The bill requires that an attorney ad litem be assigned by the attorney who has oversight responsibility for the program to represent the child's wishes. The child's attorney must in all circumstances fulfill the same duties of advocacy, loyalty, confidentiality, and competent representation which are due an adult client. The bill specifies that the attorney ad litem represents the child until the program is discharged by order of the court because permanency has been achieved or the court believes that the attorney ad litem is no longer necessary.

A training program must be established for attorneys ad litem by the Statewide Public Guardianship Office that includes, at a minimum, appropriate standards of practice for attorneys who represent children.

The bill requires that upon the court appointing the Statewide Public Guardianship Office or its entity to represent the child, the Department of Children and Family Services must provide information to the pilot program administrator that includes, at minimum, the name of the child, the location and placement of the child, the name of the department's authorized agent and contact information, copies of all notices sent to the parent or legal custodian of the child, and other information or records concerning the child.

The bill specifies that the court must appoint a guardian ad litem pursuant to s. 39.822 F. S., for all children who have been appointed an attorney ad litem.

The bill requests that the Florida Supreme Court adopt rules of juvenile procedure which include the duties, responsibilities, and conduct of an attorney ad litem that must be consistent with the American Bar Association's Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA Standards).

The bill requires that the Office of the State Court Administrator evaluate the establishment, operation, and impact of the pilot programs in meeting the legal needs of dependent children and submit reports to the Legislature by October 1, 2001 and October 1, 2002, regarding its findings. A final evaluation report is due October 1, 2003, to include information regarding program evaluation, feasibility study on the implementation of a statewide program and recommendations, if any, for the establishment of a statewide program.

The bill specifies that each pilot program will receive an appropriation to be used solely for establishing and operating that program and for compensating attorneys ad litem.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill provides additional employment opportunities for private-sector attorneys.

This bill may benefit a significant pool of children who are subject to dependency proceedings under chapter 39, F.S., and who would otherwise be without legal representation. *Note:* The Department of Children and Family Services reports that during FY 1998-99, 1,089 children were admitted to emergency shelter in Broward County (708 children), Escambia County (315 children) and Sarasota County (66 children).

C. Government Sector Impact:

The preliminary cost analysis for this bill is based on the requirement that each of the three pilot programs include an attorney administrator, training capacity, and administrative support personnel. The Department of Elderly Affairs (DOEA) estimates that the Statewide Public Guardianship Office (SPGO) would need three additional full-time equivalent positions costing \$218,650 and monies for developing training materials that would be delivered to each program to implement CS/SB 1144, exclusive of any cost for staff in the central Statewide Public Guardianship Office in the Department of Elderly Affairs.

According to the Department of Children and Family Services, there will be costs associated with providing access to the Statewide Automated Child Welfare Information System (SACWIS) in order for the pilots to retrieve information from and enter data into the system. [See chart below].

According to the State Court Administrator's Office (OSCA), the bill is expected to have logistical and fiscal impact, albeit indeterminate in some areas, on the judiciary, including

increased judicial workload due to additional hearings and potential appeals as the law is developed in this area. Judges in dependency cases, however, will benefit significantly from increased access and availability to information in these cases and be better able to determine what and how to serve the needs and interests of these children. At a minimum, OSCA estimates additional costs in conjunction with the mandated appointment of guardians ad litem in every case where an attorney ad litem is appointed. [See chart below] According to OSCA, the Guardian ad Litem Program currently only has enough fiscal and legal resources to represent 50% of the dependent children statewide. At this time, each judicial circuit guardian ad litem program has at least one staff attorney to assist lay volunteers and to address legal issues in cases to which the program is assigned.

Pilot Attorney Ad Litem Program in Broward, Escambia, and Sarasota counties			
	<i>Cost</i>	<i>Total for Each Pilot Program</i>	<i>Total</i>
Sr. Attorney (Rate is \$55,000)	\$68,396	\$169,397	\$508,191
Operations Management Consultant	\$48,438		
Expenses	\$43,002		
Operating Capital Outlay	\$9,561		
Statewide Attorney Training Costs			\$30,000
Attorney compensation	\$2,500 ²		\$2,722,500 ³
Access to Department of Children and Family Services' SACWIS database at each terminal: Non-Recurring OPC- Recurring line connection to terminal-	\$4,348	\$13,044	\$39,132
	\$40	\$120	\$360
Additional guardians ad litem support (including 5 additional attorneys, 14 case coordinators, and 5 support staff handle additional caseload.)			\$1,104,764
Evaluation costs for all three pilot programs			\$75,000
TOTAL ESTIMATED COST	\$4,453.619⁴		

The bill does not address a number of other areas which could significantly impact the decision regarding the amount of funds to be appropriated for the pilot program. For

²Based on maximum statutory amount awarded attorneys at the appellate level in termination of parental rights proceedings set forth in section 39.0134(2), F.S. The maximum statutory amount for these proceedings at the trial court level is \$1,000.

³Based on \$2,500 times the number of children in shelter care during the fiscal year 1998-1999, i.e., 1,089.

⁴These preliminary figures are based on SB 1144 before it was amended as a committee substitute. These costs may vary due to the actual number of children in shelter care for the counties included in the pilot program and the actual amount of attorney compensation fees.

example, the bill does not set forth a rate of compensation (i.e., flat fee, hourly rate or rate based on complexity of case) for attorneys ad litem. The bill also does not clarify whether ancillary costs (e.g., service of subpoenas, transcription of hearings and depositions, expert witness testimony, etc.) will be reimbursed. It also contemplates attorney ad litem representation of these children until the Attorney Ad Litem program has been discharged because the child has been permanently placed or because the court believes the attorney is no longer needed.⁵ No criteria is provided for the court to discharge the Attorney Ad Litem in a case when the court believes the attorney is no longer needed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- It is uncertain at this time what legal conflict, if any, may arise from the roles of the attorney ad litem and the guardian ad litem in the representation of children in dependency cases. Judges currently appoint guardians ad litem to advocate the *best interests* of the child in dependency cases although the guardian ad litem is required to report to the court any child's expressed wishes when making a recommendation to the court. Judges in dependency cases make their determinations based on the best interest of the child. See ss. 39.402(8), 39.504(3)(a), 39.506.(6), 39.508(8)(b), F.S. However, the attorney ad litem is appointed to represent the *expressed interest* of the child based on the American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (ABA Standards).

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

⁵Currently, jurisdiction by the court terminates when the court affirmatively relinquishes jurisdiction or when the child reaches 18 years of age, whichever occurs first. See s. 39.013(2), F.S.