

STORAGE NAME: h1417z.flc
DATE: May 19, 2000

****FAILED TO PASS THE LEGISLATURE****

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FAMILY LAW AND CHILDREN
FINAL ANALYSIS**

BILL #: HB 1417
RELATING TO: Dependent Children/Representation
SPONSOR(S): Representative Detert and others
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) FAMILY LAW AND CHILDREN YEAS 6 NAYS 0
 - (2) CHILDREN AND FAMILIES
 - (3) GOVERNMENTAL RULES AND REGULATIONS
 - (4) HEALTH AND HUMAN SERVICES APPROPRIATIONS
 - (5)
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I. SUMMARY:

HB 1417 provides for the establishment of a three-year pilot Attorney Ad Litem Program in Broward, Escambia, and Sarasota Counties by October 1, 2000. The program is to be established and supervised by the Statewide Public Guardianship Office within the Department of Elderly Affairs. The bill provides procedures to be followed by the Statewide Public Guardianship Office and the Department of Children and Family Services in facilitating the operation and evaluation of the pilot program.

The purpose of this pilot program is to provide legal representation to children in these counties who have been taken into the temporary legal and physical custody of the Department of Children and Family Services. Attorneys appointed to represent these children are to represent the wishes of the child.

The Supreme Court of Florida is requested to adopt rules for the attorney ad litem program which should outline the duties, responsibilities, and conduct of attorneys ad litem that are consistent with the American Bar Association standards for representation of children.

The bill requires that the Statewide Public Guardianship Office 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, that includes not only the evaluation information, but also findings on the feasibility of a statewide program and recommendations, if any, on locating, establishing, and operating a statewide program.

The bill also requires an appropriation for establishment and operation of the pilot program and will take effect upon becoming law

This bill will have a significant fiscal impact.

Similar language passed as section 88 of HB 2125.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Appointment of Attorneys for Children

Under s. 39.4085, F.S., the Legislature has established certain goals for dependent children. Included among those goals is 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 appointed to represent their legal interests. See s. 39.4085(20) and (21), 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, according to the Office of State Courts Administrator (OSCA), the Guardian Ad Litem Program only has enough resources to represent approximately 50% of dependent children statewide.

In 1998, the Legislature provided parents involved in any judicial proceeding under ch. 39, F.S., the right to counsel. See ch. 98-403, L.O.F.; s. 39.013(1), F.S. Children involved in such proceedings are not guaranteed counsel under current law. Current law also does not provide for a definition of "attorney ad litem". Nor does it provide for the appointment of an attorney ad litem to represent a child under chapter 39 proceedings.

Appointments of Guardians Ad Litem

A guardian ad litem is defined as a person who is appointed by the courts as a representative of a child to represent the **best** interests, not the **expressed** interests, of the child in a proceeding under ch. 39, F.S., or in any judicial proceeding. s. 39.820(1), F.S. 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. *Id.*

Pursuant to s. 39.822(1), Florida Statutes, a guardian ad litem should 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. *Id.* 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 providing guardian ad litem services. s. 39.822(2), F.S. Reimbursement to the individual providing guardian ad litem services is not contingent upon successful collection by the court from the parent or parents. *Id.* 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. s. 39.822(3), F.S. Written reports are filed with the court and served on all parties whose whereabouts are known, at least 72 hours prior to the hearing. *Id.*

Under s. 39.402(8)(c), F.S., whenever a shelter hearing is held for a child in the custody of the Department of Children and Family Services, 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, including an independent, trained advocate, when intervention is necessary, and a skilled guardian or caregiver in a safe environment when alternative placement is necessary.

Parents' Right To Counsel

Pursuant to s. 39.013, Florida Statutes, all parents of children involved in dependency proceedings must be informed of their right to counsel, at each stage of the proceedings, and parents must be appointed counsel when they are unable to afford legal representation. The court must determine whether waivers of counsel by parents are knowing and intelligent and must provide written findings on this issue. Once counsel has been appointed or has entered an appearance, the attorney must continue 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.

If court appointed counsel is entitled to receive compensation in a dependency proceeding, the counties are instructed to establish compensation. s. 39.0134, F.S. In termination of parental rights proceedings, compensation of a court-appointed attorney shall not exceed \$1000 at the trial level, and \$2500 at the appellate level. *Id.*

Statewide Public Guardianship Office

The Legislature created the "Public Guardian Act" in 1986. See ch. 86-120, L.O.F. The Legislature found that private guardianship is inadequate where there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person, and such person does not have adequate income or wealth for the compensation of a private guardian. See s. 744.702, F.S. The purpose of the legislation was to provide a public guardian only to those persons whose needs cannot be met through less drastic means of intervention. *Id.* The Statewide Public Guardianship Office was established in 1999, and was given oversight responsibilities for all public guardians. See s. 744.7021, F.S. The Office is placed under the Department of Elderly Affairs which has responsibility for providing administrative support. *Id.*

ABA Standards

The American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (ABA Standards) defines a "child's attorney" as a lawyer who provides legal 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. ABA Standards s. A-1. These standards contemplate representation of the child's expressed interest, in all cases except those children with exceptional problems such as limited language development, mental retardation, or serious mental illness. ABA Standards s. B-4. The ABA Standards reject the idea that children of certain ages are incapable of effectively directing representation on their behalf. In cases when a child's attorney is unable to ascertain the child's legal interests, the ABA Standards state the attorney may seek the advice and consultation of experts and other knowledgeable people in making the determination. See Commentary to ABA Standards s. B-5.

The ABA Standards differentiate between a child's attorney and a guardian ad litem. A lawyer appointed as guardian ad litem for a child is an officer of the court appointed to protect the child's interest without being bound by the child's expressed preferences. The child's attorney must advocate the child's articulated position. See Commentary to ABA Standards s. A-1. The standards state that 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. See Commentary to ABA Standards s. B-4(2).

The ABA Standards recognize that there may be occasions when the 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 must not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position. ABA Standards s. B-4(3).

The ABA Standards are advisory and have no legal authority in individual states.

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 be an attorney, and provides the responsibilities of a guardian ad litem. These duties specifically include representing the best interests of the child.

C. EFFECT OF PROPOSED CHANGES:

This bill directs the Statewide Public Guardianship Office 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, to represent the rights of children who are taken into temporary legal and physical custody by the Department of Children and Family Services. The Office may contract with a private entity to establish the 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 the pilot program. The Office would be responsible for supervising that oversight function. The attorney responsible for administrative oversight of the pilot program must be a member in

good standing with The Florida Bar and must have five years or more of experience in the area of child advocacy, child welfare, or juvenile law.

The Statewide Public Guardianship Office would be required to 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 Statewide Public Guardianship Office would also be responsible for establishing a training program for attorneys ad litem that includes, at a minimum, appropriate standards of practice for attorneys who represent children.

The bill requests that the Supreme Court of Florida 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.

The bill requires that the Statewide Public Guardianship Office 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, that includes not only the evaluation information, but also findings on the feasibility of a statewide program and recommendations, if any, on locating, establishing, and operating a statewide program.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 39.4095, F.S., relating to a pilot program for attorneys ad litem for dependent children. This section provides legislative intent for the pilot program. The responsibilities of the Statewide Public Guardianship Office, in establishing and implementing the pilot program in Broward, Escambia, and Sarasota Counties, are delineated. Those responsibilities include: adopting rules and procedures for the pilot program; identifying measurable outcomes; developing an attorney ad litem training program; employing and establishing attorneys as attorneys ad litem within the three specified counties; conducting research and gathering statistics to evaluate the establishment, operation, and impact of the pilot program in meeting the legal needs of dependent children; and to provide reports to the Legislature on October 1, 2001, October 1, 2002, and October 1, 2003. The final report would include an evaluation of the pilot program, findings on the feasibility of a statewide program, and recommendations.

This section also provides for a pilot program administrator for each county, designated by the Statewide Public Guardianship Office. The administrator must be an attorney, a member in good standing of The Florida Bar, and have five or more years experience in the area of child advocacy, child welfare, or juvenile law.

This section also provides that the Department of Children and Family Services immediately notify the pilot program administrator, prior to the shelter hearing, that a child has been taken into custody. This section further provides the specific information that DCF must give to the administrator. The pilot program administrator would be required to designate an attorney ad litem to represent the child. The attorney ad litem must represent the child until court jurisdiction of the child terminates.

This section also requests that the Supreme Court adopt any rules of juvenile procedure by October 1, 2000, to include the duties, responsibilities, and conduct of an attorney ad litem

consistent with the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.

Section 2. Provides for appropriation from the General Revenue Fund to the Statewide Public Guardianship Office. The appropriation shall be an amount sufficient to establish and operate the pilot program in Broward, Escambia, and Sarasota Counties. Each appointed attorney ad litem shall be paid from these funds.

Section 3. Provides that this act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments" Section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

The Department of Children and Family Services cannot determine the actual number of children taken into temporary legal and physical custody before a shelter hearing. DCF does report that during FY 1998-99, 1089 children were admitted into emergency shelter in Broward (708), Escambia (315), and Sarasota (66) Counties. These numbers do not reflect the children who were temporarily taken into custody but released prior to a shelter hearing.

The bill requires that each of the three pilot counties have an attorney administrator and administrative support personnel. Therefore, for local oversight of the program, one senior attorney position and one support staff in each of the three counties would be needed. In addition, the Department of Elderly Affairs estimates that the Statewide Public Guardianship Office would need three additional full time equivalent positions to implement this bill. The Senate Committee on Children and Families has determined, through an

analysis of SB 1144, companion to HB 1417, that centralized staff would not be necessary, and that research, data gathering, and the reports required by this bill could be assumed by the local pilot project staff. According to the Department of Elderly Affairs, current staff within the Statewide Public Guardianship Office could not take on the additional responsibilities required by this bill, such as pilot program oversight and rule-making and implementation. Therefore, they request the three central staff employees.

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. For each terminal needed at a pilot site, the department estimates a system cost of \$4348 in non-recurring operating capital outlay and \$40 in recurring line connection costs per terminal. In addition, DCF may have additional costs associated with DCF workers adding the pilot program administrator to those who must be notified prior to a shelter hearing.

The Office of State Courts Administrator estimates that the greatest impact on the judiciary will be the increase of information available to judges when hearing dependency cases with attorney ad litem involvement. The resulting fiscal impact is indeterminate. In addition, the ABA Standards support the appointment of a guardian ad litem. Judges currently appoint guardians ad litem to advocate for best interests of the child in dependency cases. Each circuit's guardian ad litem program has at least one staff attorney to assist lay volunteers and to address the legal issues in cases to which the program is assigned. According to OSCA, this bill would require an increase in resources for the Guardian Ad Litem Program, with an emphasis on legal resources. OSCA estimates that in order to increase the guardian ad litem program to support children with an attorney ad litem, the Program would need five additional attorneys, 14 case coordinators, and five support staff to handle the additional caseload.

Based on these estimates from the Office of State Courts Administrator, the Department of Elderly Affairs, and the Department of Children and Family Services, the following is a summary of estimated costs associated with this bill:

Statewide Public Guardianship Office (as requested by the Department of Elderly Affairs)

One FTE Senior Attorney	\$68,396	
One FTE Operations Management Consultant	\$48,438	
One FTE Staff Assistant	\$27,752	
Non-recurring expenses	\$7,148	
Recurring expenses	\$25,954	
Training materials	\$22,365	
Travel	\$9,036	
Operating Capital Outlay	\$9,561	
Evaluation Costs	<u>\$75,000</u>	
	SUBTOTAL	\$293,650

Local Pilot Projects

Three FTE Senior Attorneys (one for each county)	\$205,188
Three FTE Staff Assistants (one for each county)	\$83,256
Expenses for three pilot offices	\$129,006
OCO for three pilot offices	\$28,683
SACWIS for three pilot offices	\$13,044
Recurring line connection costs (\$40 per year)	\$120

Attorney Ad Litem Compensation*	<u>\$2,722,500</u>
SUBTOTAL	\$3,181,797
Guardian Ad Litem Program	
Salaries of 24 addition staff	\$833,516
Expenses of local program	\$161,784
Expenses of GAL Program Administration	\$61,464
OCO	<u>\$48,000</u>
SUBTOTAL	<u>\$1,104,764</u>
TOTAL	\$4,580,211

* Attorney compensation using attorneys fees of \$2,500 (based on maximum compensation for attorneys in parental-rights proceedings) for 1089 children (based on the number of children admitted into emergency shelters in the three pilot project counties for FY 1998-99)

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.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or take an action requiring expenditures of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state sales tax shared with municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

According to the provisions of this bill, the assignment of a lawyer to a child is made, not by the court, but by another lawyer. Ordinarily, in both civil and criminal cases, the appointment of counsel is made by the court. The court has the responsibility for determining indigency, intelligent waiver of counsel, and any other issues relating to the appointment. None of those issues are addressed in this bill. There appears to be the potential for a separation of powers issue in that an attorney working for the executive branch is essentially appointing counsel for a child in a judicial proceeding.

B. RULE-MAKING AUTHORITY:

In accordance with s. 120.536(1), F.S., the Administrative Procedure Act, this bill provides direction to the Statewide Public Guardianship Office to adopt rules for the establishment of a 3-year pilot "Attorney Ad Litem Program" in Broward, Escambia, and Sarasota Counties.

C. OTHER COMMENTS:

According to OSCA, the Guardian Ad Litem Program currently has resources to represent approximately 50% of dependent children. Therefore, in the pilot project counties where attorneys ad litem are appointed for all children, approximately half of the dependency cases will present to the court, the child's expressed interests without the child's best interests being represented. This is significant because when judges evaluate issues in dependency, the standard which they employ is the best interests of the child. See ss. 39.402(8)(h)2., 39.504(3)(a), 39.506(6), and 39.508(8)(b), F.S. If there is only an attorney ad litem appointed to the case, it could make it more difficult for judges to make findings as to what is in the child's best interests. OSCA finds that while judicial decision making can be enhanced by legal advocacy for children, having a child's expressed interests presented without representation of the child's best interests can leave judges without sufficient information to make judicial findings and result in an undesirable outcome for the child.

A child's expressed interests and best interests can be the same, but there are cases when they will conflict, particularly in situations involving abused children and children too young to appreciate the consequences of their decisions. Assuming that an attorney ad litem is supposed to represent the child's expressed interests, under the ABA Standards, the attorney ad litem may not present to the court any information which would jeopardize the child's desired outcome, regardless of the child's best interests. Even if the child directs the attorney to advocate for a position that is dangerous or detrimental, the most the attorney ad litem could do is seek appointment of a guardian ad litem. Even if a guardian ad litem is appointed at the request of the attorney ad litem, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer because the guardian ad litem may never learn of the disclosed danger. The practical effect is that the bill would provide a child with an attorney who, in some cases, is required to work to return the child to an environment where the child is in danger.

This bill does not define the term "attorney ad litem." The bill does not make clear whether the attorneys ad litem are appointed to represent the best interests of children, or to represent the rights of children, or to represent the wishes of children, or some combination of these possibilities.

The bill does not specify that attorneys ad litem are exempt from the confidentiality provisions of s. 39.202, F.S., and therefore, they may have difficulty obtaining records pertinent to the child's case. It is not clear whether the attorney ad litem would qualify for the exemption, under paragraph (d) of subsection (2), as "the parent or legal custodian of any child who is alleged to have been abused, abandoned, or neglected, and the child, **and their attorneys....**" *Id.* Clarification may be needed to allow the attorneys ad litem access to the records.

In addition, some parents may already be represented by the Statewide Public Guardianship Office. The bill does not address issues that may arise when that office is expected to represent both parents and children. In many instances, the interests of these parties may conflict.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 4, 2000, the Committee on Family Law and Children adopted a strike everything amendment to the bill. The amendment made the following changes:

1. 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 the pilot program who are continued in out of home care at the shelter hearing if the court deems attorney ad litem representation necessary.
2. Clarifies that the attorney ad litem represents the child's wishes.
3. Requires that the court approve any action by the attorney ad litem to restrict access to the child by the guardian ad litem or by any other party.
4. Provides that the court must appoint a guardian ad litem for all children who have been appointed an attorney ad litem. The guardian ad litem is to represent the child's best interests.
5. Provides that the Office of the State Courts Administrator rather than the Statewide Public Guardianship Office will conduct the evaluation of the pilots.

VII. SIGNATURES:

COMMITTEE ON FAMILY LAW AND CHILDREN:

Prepared by:

Staff Director:

Carol Preston

Carol Preston

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON FAMILY LAW AND CHILDREN:

Prepared by:

Staff Director:

Carol Preston

Carol Preston