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HOUSE OF REPRESENTATIVES
COMMITTEE ON
ELDER & LONG TERM CARE
ANALYSIS

BILL #: HB 549

RELATING TO: Dependent Children/Broward County

SPONSOR(S): Representative Gottlieb & others

TIED BILL(S):

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

(1) JUVENILE JUSTICE YEAS 8 NAYS 0
(2) ELDER & LONG-TERM CARE YEAS 8 NAYS 0
(3) FISCAL POLICY & RESOURCES
(4) COUNCIL FOR SMARTER GOVERNMENT
(5)

I. SUMMARY:

HB 549 provides for a three-year attorney ad litem pilot program in Broward County, to be established by October 1, 2001. The purpose of the pilot program is to provide legal representation to children 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 fulfill duties of advocacy, loyalty, confidentiality, and competent representation.

The pilot program is to be launched and supervised by the Statewide Public Guardianship Office within the Department of Elderly Affairs. The bill provides procedures for the Statewide Public Guardianship Office and the Department of Children and Family Services to follow in facilitating the establishment and operation of the pilot program. The bill requires that the Office of the State Courts Administrator evaluate the establishment, operation, and impact of the pilot program in meeting the legal needs of dependent children and submit reports of such findings to the Legislature by October 1, 2002, and October 1, 2003. A final evaluation report is due October 1, 2004. The final report must include evaluation information, as well as findings on the feasibility of a statewide program and recommendations, if any, on locating, establishing, and operating a statewide attorney ad litem program.

The bill requests the Supreme Court of Florida to adopt rules for the attorney ad litem pilot program in order to outline the duties, responsibilities, and conduct of attorneys ad litem. The bill requests that such rules be consistent with the American Bar Association standards of practice for attorneys who represent children in abuse and neglect cases.

The bill authorizes appropriations from the General Revenue Fund to the Office of Statewide Guardianship within the Department of Elderly Affairs for the purpose of establishing and operating the pilot program. The bill also authorizes appropriations from the General Revenue Fund to the Office of the State Courts Administrator for the purpose of evaluating the pilot program.

The bill provides an effective date of July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [X]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes [X]	No []	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

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

Less Government

The bill requires that the court provide the services of an attorney, through the pilot program, to abused, neglected, and abandoned children who are in the legal or physical custody of the state upon the commencement of a shelter hearing. Thus, the bill expands the circumstance when government must provide legal representation to individuals. Presumably, representation by competent counsel will enhance the child's exercise of individual freedom. Parents are already afforded the right to counsel in such proceedings.

B. PRESENT SITUATION:

Appointment of Attorneys for Children

Under s. 39.4085, F.S., the Legislature has established certain goals for children in shelter or foster care. 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.[1] Section 39.822(1), F.S., provides that a guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal. However, the Office of State Courts Administrator (OSCA) reports that the Guardian Ad Litem Program only has enough resources to represent approximately 50% of dependent children statewide.

For over twenty years, the Florida Supreme Court has required the appointment of counsel for indigent parents involved in court proceedings that may result in permanent termination of parental rights.[2] Courts have generally recognized that "a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more

[1] Section 39.4085(20), F.S., expresses the goal that children in shelter or foster care have a guardian ad litem "appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem appointed to represent their legal interests; the guardian ad litem and attorney ad litem shall have immediate and unlimited access to the children they represent." Section 39.4085(21), F.S., provides that such children should "have all their records available for review by their guardian ad litem and attorney ad litem if they deem such review necessary."
[2] *See In re D.B.*, 385 So.2d 83 (Fla. 1980).

precious than any property right."[3] In 1998, the Legislature provided a statutory right to counsel for parents involved in any judicial proceeding under ch. 39, F.S.[4]

"Chapter 39, F.S. was enacted to provide judicial and other procedures to assure due process through which children and other interested parties are assured fair hearings . . . and the recognition, protection, and enforcement of their constitutional and other legal rights."[5] However, children involved in such proceedings are not guaranteed counsel under current law.

Appointments of Guardians Ad Litem

Section 39.820(1), F.S., provides that a "guardian ad litem" is a person appointed by the court to represent the best interests of a child in a civil or criminal proceeding. Under the section, the guardian ad litem is a party to any judicial proceeding as a representative of the child, and serves until discharged by the court. The law specifies that a guardian ad litem may 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 any responsible adult.

Pursuant to s. 39.822(1), F.S., 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. 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.[6] Reimbursement to the individual providing guardian ad litem services is not contingent upon successful collection by the court from the parent or parents.[7] 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.[8] Written reports are filed with the court and served on all parties whose whereabouts are known, at least 72 hours prior to the hearing.[9]

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

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[3] *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982)(internal citations omitted).
[4] *See* ch. 98-403, L.O.F.; s. 39.013(1), F.S.
[5] *See J.B. v. Fl. Dept. of Children and Family Svcs*, 14 WL 1424659, p.4 (Fla. 2000) (citing s. 39.001(l), F.S.) (internal citations omitted) (emphasis added).
[6] *See* s. 39.822(2), F.S.
[7] *See Id.*
[8] *See* s. 39.822(3), F.S.
[9] *See Id.*

Pursuant to s. 39.013, F.S., 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.[10] 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.[11]

OPPAGA Justification Review of the DCFS Child Protection Program

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently completed a justification review of the DCFS Child Protection Program.[12] The report revealed that there were 235,823 calls to the Florida Abuse Hotline reporting suspected child abuse, abandonment or neglect during FY 1999-2000. 164,464 of the calls were deemed serious enough to warrant further investigation, and 76,494 victims were identified. DCFS provided protective supervision to 27,249 families, provided out-of-home services to 31,329 children, and placed 931 children in adoptive homes during the same period.

OPPAGA reported that the DCFS child protective program "has not been timely in responding to calls to the Florida Abuse Hotline, seeing alleged victims face-to-face, or closing investigations."[13] The report also noted that the program has not met its legislative performance standards in preventing recurrences of child abuse and neglect and "has generally not met its goal to ensure that abused and neglected children are provided safe, permanent, and stable living arrangements in a timely manner" (emphasis added).[14]

Total appropriations for child protective program services during FY 2000-2001 were $721,212,035, of which 31.6% is general revenue and 68.4% is trust funds.

Statewide Public Guardianship Office

The Legislature created the Public Guardian Act in 1986.[15] 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, particularly where the incapacitated person does not have adequate income or wealth for the compensation of a private guardian.[16] The purpose of the legislation was to provide a public guardian only to those

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[10] *See* s. 39.0134, F.S.
[11] *See Id.*
[12] *See OPPAGA Report No. 01-14, March 2001 (Justification Review: Child Protection Program, Florida Department of Children and Families.*
[13] *See Id.*
[14] *See Id.*
[15] *See* ch. 86-120, L.O.F.
[16] *See* s. 744.702, F.S.

persons whose needs cannot be met through less drastic means of intervention.[17] The Statewide Public Guardianship Office was established in 1999, and was given oversight responsibilities for all public guardians.[18] The Office is housed in the Department of Elderly Affairs, which has the responsibility for providing administrative support.[19]

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.[20] 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.[21] 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 that the attorney may seek the advice and consultation of experts and other knowledgeable people in making the determination.[22]

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 "best" interest(s) without being bound by the child's expressed preferences. However, the ABA standards require that the child's attorney must advocate the child's articulated position.[23] The standards state that the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem in those circumstances in which a child may not be capable of understanding the legal or factual issues involved in the case or if the child is unable to express a position, as in the case of a preverbal child.[24]

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.[25]

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

Attorney Ad Litem Pilot Program in the 9th Judicial Circuit

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[17] *See Id.*
[18] *See* s. 744.7021, F.S.
[19] *See Id.*
[20] *See* ABA Standards s. A-1.
[21] *See* ABA Standards s. B-4.
[22] *See* Commentary to ABA Standards s. B-5.
[23] *See* Commentary to ABA Standards s. A-1.
[24] *See* Commentary to ABA Standards s. B-4(2).
[25] *See* ABA Standards s. B-4(3).

During the 2000 Session, the Legislature directed the Office of State Courts Administrator (OSCA) to establish a three-year attorney ad litem pilot program for dependent children in the 9th Judicial Circuit (Osceola and Orange Counties), by October 1, 2000.[26] Approximately $1.8 million was appropriated and 14 full-time equivalency positions (FTEs) were authorized for the pilot program. Section 39.4086, F.S., authorizes the 9th Judicial Circuit to contract with a private or public entity to establish the program. Currently, the three entities that are participating in the pilot are Barry University, Osceola County Guardian Ad Litem Program, and the Legal Aid Society of the Orange County Bar Association. Participants in the program report that the appropriation associated with the pilot is spent to procure the services of both guardians ad litem and attorneys ad litem.

In the 9th Circuit, all guardians ad litem are practicing attorneys. However when acting as guardians ad litem (as opposed to attorneys ad litem), these attorneys serve as officers of the court to identify the child's "best" interests (as opposed to advocating for the child's expressed legal interest). The pilot program allows the court to determine, on a case-by-case basis, whether an attorney ad litem is necessary for children involved in shelter proceedings.

As directed by statute, the Office of State Courts Administrator is currently conducting research and gathering statistical information to evaluate the establishment, operation, and impact of the pilot program in meeting the legal needs of dependent children. In addition, OSCA is required to submit two annual reports of their findings to the Legislature and the Governor by October 1, 2001, and October 1, 2002. OSCA must also submit a final report by October 1, 2003, which must include an evaluation of the pilot program, findings on the feasibility of creating a statewide attorney ad litem program, and recommendations on the creation of a statewide program.

According to OSCA, as of February 6, 2001, there have been approximately 15 attorney ad litem appointments.

Florida Rules of Juvenile Procedure

The Florida Supreme Court has adopted rules for the attorney ad litem pilot program. The rules provide discretion to the courts in appointing attorneys ad litem for children involved in shelter proceedings. The Florida Supreme Court adopted rule 8.217 and amended existing rules 8.305, 8.400, and 8.505 within the Florida Rules of Juvenile Procedure (Rules). The Rules outline the duties, responsibilities, and conduct of attorneys ad litem, which are consistent with the American Bar Association standards for representation of children.

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:

The bill provides for the establishment of a three-year attorney ad litem pilot program in Broward County. This pilot program differs from the pilot program that is currently operating in the 9th Judicial Circuit. Unlike the current pilot program, the bill provides that the Broward County pilot program is to be established and supervised by the Statewide Public Guardianship Office ("Office") within the Department of Elderly Affairs. More significantly, the bill **requires** the appointment of the attorney ad litem pilot program to represent any child who is the subject of a shelter hearing pursuant to s. 39.402, F.S.

[26] *See* s. 39.4086, F.S. (section 88 of HB 2125)

The bill provides procedures to be followed by the Statewide Public Guardianship Office and the Department of Children and Family Services ("DCFS") in facilitating the operation and evaluation of the pilot program. In addition, the Office must develop a training program for staff attorneys, which is to include training on the appropriate standards of practice for attorneys representing children.

The bill requires that the Office of the State Courts Administrator evaluate the establishment, operation, and impact of the attorney ad litem pilot program in meeting the legal needs of dependent children, and to submit reports to the Legislature by October 1, 2002, and October 1, 2003, regarding its findings. A final evaluation report is due October 1, 2004, that includes not only the evaluation information, but also findings on the feasibility of a statewide attorney ad litem program and recommendations, if any, on locating, establishing, and operating a statewide program.

D. SECTION-BY-SECTION ANALYSIS:

Please see "Effects of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Statewide Public Guardianship Office estimates that the fiscal impact to the agency from this bill will be approximately $573,000, based on a need for 2 FTEs and the following expenditures:

OMC Manager	$48,438
Staff Assistant	$27,752
Total	$76,190
Non-recurring expenditures	$ 7,148
Recurring expenditures	$25,954
Training materials	$22,365
Travel	$ 7,000
Total	$62,467
Total Operating Capital Outlay	$ 5,000
Contracted Services	
Reimbursement for 300 children @ $1,000 per child	$300,000*
Statewide Automated Child Welfare Information System non-recurring line connection	$ 4,348
Local Administration of program	$125,000

Total Statewide Public Guardianship Office Expenditures $573,005

In addition, Office of State Courts Administrator estimates that the fiscal impact to that agency from this bill will be approximately $471,200* annually, based on the extrapolation of information about the pilot program currently operating in the 9th Judicial Circuit. In that program, attorneys ad litem are appointed at the discretion of the judge. The 9th Judicial Circuit pilot program operates under the assumption that attorneys ad litem will be appointed in approximately 20 percent of dependency cases.

* Costs of attorney services were estimated by both the Statewide Public Guardianship Office and Office of State Courts Administrator. Neither agency gave full consideration to the fact that the bill will require the appointment of an attorney ad litem at **all** shelter hearings. Last year, 1,141 such proceedings occurred in Broward County at a maximum cost of $1,000 per child for services rendered by an attorney ad litem. The fiscal impact would be $1,141,000 for attorney services. Staff estimates that the total fiscal impact of this bill will be approximately $1.6 million.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Please refer to "Fiscal Impact on State Government – Expenditures."

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:

The bill does not reduce the authority of municipalities or counties 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:

None.

B. RULE-MAKING AUTHORITY:

The Statewide Public Guardianship Office is directed to adopt rules and procedures for the establishment of a three-year pilot program to provide legal counsel for children in Broward County.

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.

C. OTHER COMMENTS:

Proponents of the bill may rely on a recent publication from OSCA, which assessed the findings of an audit conducted by DCFS in anticipation of a 2001 federal compliance review. The preliminary findings of the DCFS audit reflected unfavorably upon the judiciary in several circuits.[27] Dade County was identified by the DCFS audit as leading the state in extended length of stays for children in out-of-home placement.[28] In attempting to validate the DCFS findings, OSCA documented anecdotal information from two Dade County dependency judges that revealed the following problems with dependency case management:

- Lack of filing an adequate case plan by DCFS;
- Lack of filing judicial review social study reports or providing judicial review order;
- Lack of services of parent and the lack of a diligent search;
- Lack of referral services for the child and/or parent(s);and
- Failure of DCFS caseworkers and attorneys to attend hearings.[29]

These judges noted that even entering Rules to Show Cause in an effort to obtain DCFS compliance had resulted in little institutional progress.[30] The Dade County Citizen Review Program cited similar failures of DCFS.[31] Proponents of the bill could argue that the OSCA report illustrates that neither DCFS, nor the courts, are currently able to satisfactorily and consistently resolve dependency matters in a timely manner under the procedures provided in current law. However, opponents of the bill may suggest that adding yet another attorney to the dependency process will further impede the timely disposition of dependency matters – and at potentially significant cost to the state. However, proponents contend that having attorneys advocating for children will result in more timely and efficient disposition of dependency cases and ultimately result in a cost-savings to the state by decreasing the time that children spend in out-of-home care.

Proponents of the bill may also cite the 1998 Interim Report of the Broward County Grand Jury, which found that:

> [t]he plight of children enmeshed in the Dependency Court system is dire. The correlation between foster care children and subsequent adult criminal conduct . . . is very strong. As this report will show, there is overwhelming evidence that the children who are in the custody and care of the Department are in danger . . . It is the opinion of

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[27] *See Office of the State Courts Administrator Assessment of the Department of Children and Families Federal Compliance Review*, January 4, 2001.
[28] *See Id.*
[29] *See Id.*
[30] *See Id.*
[31] *See Id.*

your Grand Jury that the problems facing the Department are extensive and so systemic that the children in the custody of or under the protection of the Department are in peril. We also found problems in the child welfare system extend beyond the Department into the courts as well.

The Statewide Public Guardianship Office stated that, while they are willing to accept the mission described in the bill, they feel this task is outside of their normal scope of expertise. The Office routinely provides guardianship services for adults who are unable to represent themselves and do not have the resources for a private guardian. Creation of an attorney ad litem program that trains and supervises attorneys who are appointed by the courts to protect the needs of juveniles is beyond the normal scope of duty for the Statewide Public Guardianship Office.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON ELDER & LONG TERM CARE:

Prepared by: Staff Director:

Melanie Meyer Tom Batchelor, Ph.D.