

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/CS/SB 972

INTRODUCER: Appropriations Committee; Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senators Galvano and Bradley

SUBJECT: Attorneys for Dependent Children with Special Needs

DATE: April 24, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sanford</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Harkness</u>	<u>Kynoch</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 972 requires the court to appoint an attorney for any dependent children who have certain special needs.

A dependent child will qualify for an attorney if he or she:

- Already lives in, or is being considered for placement in a skilled nursing facility;
- Is prescribed a psychotropic medication but does not assent to take it;
- Has a developmental disability;
- Already lives in, or is being considered for placement in a residential treatment center; or
- Is a victim of human trafficking.

The bill requires the court to ask the statewide guardian ad litem office for a recommendation for an attorney willing to work without additional compensation, or pro bono, prior to the court appointing an attorney on a compensated basis. The attorney must be available for services within 15 days of the court's request. If, however, the statewide guardian ad litem does not make a recommendation within 15 days after the court's request, the court may appoint a compensated attorney. Any appointment by the court must be in writing.

The bill directs the attorney representing the child to provide the complete range of legal services from removal from the home or initial appointment through all appellate proceedings. With court

permission, the attorney is authorized to arrange for supplemental or separate counsel to handle appellate matters.

The bill requires that, except for attorneys working pro bono, adequate compensation must be provided to attorneys appointed to represent dependent children with disabilities and access to funding for expert witnesses, depositions, and other costs of litigation. Payment of attorneys is subject to appropriation and to review by the Justice Administrative Commission (JAC) for reasonableness. Fees are capped at \$1,000 per child per year. The bill requires the JAC to contract with all attorneys appointed by the court.

The bill requires the Department of Children and Families (DCF) to develop procedures for use in identifying a dependent child with qualifying special needs. The DCF is authorized to adopt rules for this purpose.

The bill preserves the power of the court to appoint an attorney for any dependent child under chapter 39, F.S.

The bill has a recurring fiscal impact of approximately \$1.58 million a year based upon the Department of Children and Families' estimate of the number of dependent children who will qualify for an attorney pursuant to the bill's provisions.

II. Present Situation:

Dependent Children

A child that is determined by a court to be a dependent child, is a child who is dependent on the state for care and protection.¹ A child the court finds dependent is a child found:

- To have been abandoned, abused, or neglected by parents or legal custodians;
- To have been surrendered to the Department of Children & Family Services (DCF) or a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, an adult relative, or the DCF, and after being placed a case plan expired and the parents or legal custodian failed to substantially comply with the plan;
- To have been voluntarily placed with a licensed child-placing agency for adoption and a parent or parents have signed a consent;
- To have no parent or legal custodians capable of providing supervision and care;
- To be at substantial risk of imminent abuse, abandonment or neglect by the parents or legal custodians; or
- To have been sexually exploited and to have no parent, legal custodian, or responsible adult relative currently known and capable of providing necessary and appropriate supervision and care.²

¹ See *In re M.F.*, 770 So. 2d 1189, 1193 (Fla. 2000) (stating that the "purpose of a dependency proceeding is not to punish the offending parent but to protect and care for a child who has been neglected, abandoned, or abused").

² Section 39.01(15), F.S.

The dependency process in Florida begins with a call to the Florida Abuse Hotline (hotline).³ If accepted by the hotline, the call is referred to a child protective investigator, who conducts an on-site investigation of the allegations of abuse, neglect, or abandonment.⁴ If warranted, a dependency petition is filed with the court by DCF.⁵ A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care.⁶ In that instance, a judicial hearing must be held within 24 hours after removal of the child from the home.⁷ A Guardian ad Litem must be appointed at the time of the shelter hearing.⁸ If needed, an Attorney ad Litem may be appointed at this time as well.⁹

If a petition for dependency is filed, whether or not the child is taken into custody, the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.¹⁰ If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.¹¹ At this hearing, the court also reviews and approves a case plan outlining services and desired goals for the child.¹²

The dependency court holds periodic judicial reviews to determine the child's status, progress in following the case plan, and the status of the goals and objectives of the case plan. These reviews will generally occur every six months.¹³ If after 12 months, case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.¹⁴

Lawyers for Children in the Dependency System

While all parents in dependency court are entitled to counsel, and indigent parents are entitled to appointed counsel,¹⁵ no provision in Florida law or rule requires appointment of counsel for dependent children, with a few exceptions, including children placed in a skilled nursing facility¹⁶ and children facing involuntary commitment for mental health treatment under the

³ Section 39.201(2)(a), F.S.

⁴ Section 39.301(1), F.S.

⁵ Section 39.501(1) and (3)(c), F.S.

⁶ Section 39.402(1), F.S.

⁷ Section 39.402(8)(a), F.S.

⁸ Section 39.822(1), F.S.

⁹ The term "ad Litem" means literally "for the suit." In practice, it means a representative, either lay (guardian) or lawyer (attorney) appointed for the limited purposes of a particular lawsuit.

¹⁰ Section 39.507(1)(a) and (b), F.S.

¹¹ Section 39.521(1), F.S.

¹² Section 39.521(1)(a), F.S.

¹³ Section 39.521(1)(d), F.S.

¹⁴ Section 39.621(1), F.S.

¹⁵ Section 39.013(1), F.S.

¹⁶ Section 744, conference report on SB 1500 (2013 Reg. Session)

Baker Act.¹⁷ Unlike parents, children have been found to have no constitutional right to representation by counsel in dependency court.¹⁸

In general, the federal and state approach to safeguarding the legal needs of children in the dependency system relies upon the appointment of guardians ad litem or attorneys ad litem. The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing guardian ad litem to represent the child's best interest in every case of child abuse or neglect which results in a judicial proceeding.¹⁹ The funds of the Florida guardian ad litem program support both lay volunteers who assist children in dependency proceedings and attorneys ad litem. The guardian ad litem program has succeeded in recruiting attorneys who wish to satisfy their pro bono expectations by representing children with various legal needs in dependency court.²⁰ When there are insufficient pro bono lawyers available and there are sufficient resources to do so, the guardian ad litem program may contract with legal aid, other programs, or private attorneys for the provision of these services.²¹

Florida law requires the appointment of a guardian ad litem for every child who is the subject of a dependency proceeding.²² While the guardian ad litem program has requested funds to allow it to meet this mandate, the guardian ad litem indicates they have not been fully funded. As of November 2013, there were 29,285 dependent children under court supervision, of whom 22,281 (76 percent) had been appointed a guardian ad litem.²³ The guardian ad litem program also funds the current attorney ad litem program. The guardian ad litem attorney is required by program standards to request the appointment of an attorney ad litem in any case where doing so would further the best interests of the child. In addition, the court on its own motion or upon motion of any party, including the child, can appoint an attorney ad litem at any point in the dependency process.²⁴ Common reasons for seeking appointment of an attorney ad litem in dependency court include cases in which a child needs legal guardianship or where special expertise is needed in areas such as immigration law, disability law, or administrative forums. No statewide tracking mechanism exists for the appointment of attorneys ad litem for dependent children, because attorneys are appointed at the court circuit level. The budget for the guardian ad litem program in Fiscal Year 2012-2013 was \$34.1 million dollars.²⁵ Last year, the guardian ad litem program spent approximately \$360,000 in contracts for attorney ad litem services.²⁶ Each attorney ad litem is typically paid \$500-\$1,000 annually per child per year.²⁷

¹⁷ Section 394.467(4), F.S. requires the appointment of the Office of the Public Defender to represent any person for whom involuntary placement is sought pursuant to ch. 394, known as the Baker Act (s. 394.451, F.S.)

¹⁸ *In the Interest of D.B.*, 385 So. 2d. 83, 90-91 (Fla. 1980), *In the Interest of C.T.*, 503 So. 2d 972, 973 (Fla. 4th DCA 1987).

¹⁹ 42 U.S.C. ss. 5101 *et seq.*

²⁰ The Florida Bar has an expectation that its members perform *pro bono* services. This term literally means "for good," and is applied to services performed without compensation by lawyers.

²¹ Office of the Florida Guardian ad Litem, email, (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs).

²² Section 39.402(8)(c)1, s. 39.807(2), s. 39.822(1), F.S.

²³ Florida Guardian ad Litem, November 2013 Representation Report (on file with the Senate Appropriations Committee).

²⁴ Fla. R. Juv. P. 8.217(a).

²⁵ Office of the Florida Guardian ad Litem, *supra* note 20.

²⁶ Proviso language in the budget last year included funds appropriated for contracts with Attorneys ad Litem, to be selected and contracted with by the GAL.

²⁷ Office of Florida Guardian ad Litem, *supra* note 20.

In addition to the services of the attorneys ad litem through the guardian ad litem program, other options exist for legal services for children. The Florida Bar Foundation provides grants to legal service providers, several law schools have clinics which serve children, and several Children's Councils²⁸ fund lawyers for children. Notable among efforts to provide legal services is the Foster Children's Project in Palm Beach County. This project, administered by the Legal Aid Society of Palm Beach County and funded by the Children's Services Council of Palm Beach County and the guardian ad litem program, provides every child in the foster care system between birth and 12 years of age, and their siblings, with an attorney to represent them in all court matters and to advocate for them to achieve permanency within 12 months. The project has recently been authorized to expand its representation to children zero to five years of age in relative placements.

The DCF estimates the number of children who would qualify for the appointment of attorneys under the provisions of this bill is 1,594.²⁹

Dependent Children in Nursing Homes

The state is currently party to a lawsuit related to the placement of medically complex children in more restrictive settings such as nursing homes. The United States Department of Justice joined the lawsuit which alleges the state violated the Americans with Disabilities Act (ADA).³⁰ The Agency for Health Care Administration (AHCA) has worked with the families of over 200 children in nursing homes under the Medicaid program to ensure they are aware of and are provided in home health services. In addition, the DCF and the Agency for Persons (APD) with Disabilities have worked with medically complex children and their families to ensure the least restrictive placement.

The DCF reports that currently 11 dependent children reside in nursing homes.³¹ According to the guardian ad litem program, counsel currently represent all of these children.

Dependent Children and Psychotropic Drugs

Florida law requires the DCF to obtain consent from parents or a court order before administering psychotropic drugs to a child, barring an emergency.³² The statute directs, unless parental rights have been terminated, parents should be involved in decision-making regarding administration of these drugs. By rule, when a child of sufficient age, understanding, and

²⁸ Florida Children's Councils, or Children's Services Councils, are locally established special taxing districts designed to provide services to children and families. Chapter 125, F.S., governs their creation and operation. The first Council was approved in 1946 in Pinellas County. There are currently Councils (with slight variances in names) in Broward, Duval, Hillsborough, Martin, Miami-Dade, Palm Beach, and St. Lucie counties. <http://flchildrenscouncil.org/about-the-council/overview/> and <http://flchildrenscouncil.org/about-cscs/member-cscs/> (last visited March 27, 2014).

²⁹ This number does not include those children with an unknown disability, children in in-home placements, children in extended foster care, or children being considered for placement in a residential treatment center.

³⁰ *A.R. et al. v. Dudek et al, United States V. Florida*, Consolidated Case No. 0:12-cv-60460-RSR, U.S. District Court for the Southern District of Florida.

³¹ Department of Children and Families, Informal communication (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs.)

³² Section 39.407(3)(a)1., F.S.

maturity refuses psychotropic medication, the dependency case manager or child protective investigator must request Children's Legal Services to request an attorney for the child.³³

Dependent Children and Residential Treatment Facilities

No information is available about the number of children being considered for placement in a residential treatment facility. Placement of a dependent child in a residential treatment facility is governed by the provisions of s. 39.407(6), F.S. This section provides placement must be the least restrictive alternative for the child and requires an immediate appointment of a guardian ad litem for the child if a guardian ad litem is not already provided. In addition, the Florida Rules of Juvenile Procedure requires if a child does not agree with placement in a residential treatment facility, the court appoints an attorney for the child, if one has not already been appointed.³⁴

Developmental Disabilities

A developmental disability is defined as a disorder or syndrome which manifests before the age of 18 and is due to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome, if the disability constitutes a substantial handicap reasonably expected to be permanent.³⁵

Human Trafficking

The act of human trafficking is defined as transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploiting the person.³⁶

III. Effect of Proposed Changes:

The bill requires the court to appoint an attorney for any dependent child who has a qualifying special need. Neither Florida law, nor the courts, currently guarantee legal counsel for dependent children having special needs.

This bill applies to dependent children having special needs who:

- Already live in, or are being considered for placement in a skilled nursing facility;
- Are prescribed a psychotropic medication but do not assent to take it;
- Have a developmental disability as defined in s. 393.063, F.S.;
- Already live in, or are being considered for placement in a residential treatment center; or
- Are victims of human trafficking.

The bill requires the court to ask the statewide guardian ad litem office for a recommendation for an attorney willing to work without additional compensation, or pro bono, prior to the court appointing an attorney on a compensated basis. The pro bono attorney must be available for services within 15 days after the court's request. If, however, the statewide guardian ad litem

³³ Rule 65C-35.005(3)(b), F.A.C.

³⁴ Fla. R. Juv. P. 8.350(6).

³⁵ Section 393.063(9), F.S.

³⁶ Section 787.06(2)(d), F.S.

does not make a recommendation within 15 days after the court's request, the court may appoint a compensated attorney. Any appointment by the court must be in writing. This provision prioritizes the use of pro bono attorneys or legal aid societies over other attorneys.

The bill directs the attorney representing the child to provide the complete range of legal services from removal from the home or initial appointment through all appellate proceedings. With court permission, the attorney is authorized to arrange for supplemental or separate counsel to handle appellate matters.

The bill requires, except for attorneys working pro bono or without additional compensation, adequate compensation be provided to attorneys appointed to represent dependent children with disabilities along with funding for expert witnesses, depositions, and other costs of litigation. Payment of attorneys is subject to appropriation and to review by the Justice Administrative Commission (JAC) for reasonableness. Fees are capped at \$1,000 per child per year. The bill requires the JAC to contract with all attorneys appointed by the court. Therefore, all payments and distributions of legal fees will go through the JAC.

The bill requires the Department of Children and Families (DCF) to develop procedures for use in identifying a dependent child with qualifying special needs. The DCF is authorized to adopt rules for this purpose.

The bill preserves the power of the court to appoint an attorney for any dependent child under ch. 39, F.S.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

CS/CS/SB 972 provides that the cost to the state for attorneys appointed to represent a dependent child will be limited to the amount specifically appropriated for this purpose and attorney fees may not exceed \$1,000 per child per year. However, the state's experience in paying for court-appointed counsel in criminal cases, dependency cases, and for capital collateral counsel has shown costs are difficult to control. While the Legislature may set rates to pay private attorneys and even require private attorneys to sign contracts agreeing to certain payment levels, the attorney can argue to the court their individual case warrants higher reimbursement. Courts have in some instances awarded higher fees. The Florida Supreme Court has held attorneys' fees and costs for court appointed counsel can exceed statutory limits in certain circumstances.³⁷

The number of children in the dependency system that will qualify for appointed attorneys under the bill is unknown. However, based on the Department of Children and Families' estimates, approximately 1,594 children would be entitled to an attorney at a cost of \$1.58 million for attorney fees. The fiscal impact of the bill may be reduced if pro bono attorneys are willing to represent some of these children; however, the number of cases that would be handled by pro bono attorneys is unknown. The DCF may incur costs in developing procedures to identify qualifying dependent children and in adopting rules.

The Office of State Courts Administrator (OSCA) indicates that fiscal impact cannot accurately be determined as insufficient data is available to quantify the increase in judicial workload. Still the OSCA expects an increase in workload from:

- The entry of orders of appointment or discharge;
- Longer hearings due to participation of attorneys;
- Additional motions and other filings from attorneys; and
- Hearings to determine a child's eligibility for counsel.³⁸

VI. Technical Deficiencies:

None.

³⁷ *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008) (holding that the statutory cap on attorney fees for court-appointed attorneys in postconviction relief proceedings was unconstitutional even though defendants have no constitutional right to such representation). *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986). Although this case only addressed the adequate representation of a criminal defendant based on the constitutional sixth amendment right to counsel; *Bd. of County Comm'rs of Hillsborough County v. Scruggs*, 545 So. 2d 910, 912 (Fla. 2d DCA 1989). This case applied the holding of expanding *Makemson* to attorney representation of parents in civil dependency and parental termination hearings: "Although the right to counsel in criminal cases emanates from the sixth amendment, and in civil dependency and termination of parental rights proceedings, from due process considerations, counsel is required in each case because fundamental constitutional interests are at stake. *Id.*"

³⁸ Office of State Courts Administrator, *2014 Judicial Impact Statement, CS/SB 972* (March 28, 2014); on file with the Senate Judiciary Committee.

VII. Related Issues:

The bill is unclear as to whether organizations who agree to represent a child without additional compensation can receive funds for expert witnesses, and other litigation costs.

VIII. Statutes Affected:

This bill creates section 39.01305 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Appropriations on April 24, 2014:

The committee substitute limits attorney fees to \$1,000 per child per year.

CS/CS by Judiciary on April 1, 2014:

The committee substitute:

- Narrows the class of qualifying dependent children who are entitled to an attorney;
- Requires the court to prioritize the appointment of pro bono attorneys or other attorneys who will serve without additional compensation;
- Requires the court to appoint an attorney on a time-limited basis of 15 days;
- Provides that the Justice Administrative Commission will contract with all attorneys appointed by the court; and
- Requires the Department of Children and Families to develop procedures to use in identifying dependent children who qualify for legal services under the bill.

CS by Children, Families, and Elder Affairs on March 18, 2014:

Recognizes the contributions of organizations and individuals already providing legal representation to children in the dependency system and expresses the legislative intent that the efforts of these organizations and individuals not be supplanted by the provisions of this bill:

- Replaces legislative intent regarding the appointment of attorneys for children with a directive that such attorneys be appointed for identified groups of children;
- Revises the description of the groups of dependent children for whom attorneys must be appointed;
- Provides that attorney fees are subject to review by the Justice Administration Commission for reasonableness;
- Authorizes the Justice Administration Commission to contract with attorneys selected by the GAL program; and
- Limits attorney fees to \$3,000 per child per year.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
