

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 Children, Families, and Elder Affairs

BILL: SB 972

INTRODUCER: Senators Galvano and Bradley

SUBJECT: Attorneys for Dependent Children with Disabilities

DATE: March 14, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sanford	Hendon	CF	Pre-meeting
2.			JU	
3.			AP	

I. Summary:

SB 972 expresses the intent of the Legislature that the court appoint an attorney to represent each dependent child who has a known or suspected disability. It provides a definition for “dependent child with a suspected or known disability.”

The bill requires that orders appointing attorneys under this provision be in writing. It provides that appointments of attorneys for dependent children with disabilities remain in effect until the attorney is allowed to withdraw or is discharged by the court, or the case is dismissed. It directs that the attorney representing the child provide the complete range of legal services from removal from the home or initial appointment through all available appellate proceedings. It authorizes the attorney, with court permission, to arrange for supplemental or separate counsel to handle appellate matters.

The bill requires that attorneys appointed to represent dependent children with disabilities be adequately compensated and be provided with access to funding for expert witnesses, depositions, and other costs of litigation.

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

The bill will have a significant fiscal impact. Its implementation is made subject to appropriations made expressly for that purpose. The bill has an effective date of July 1, 2014.

II. Present Situation:

Dependent Children

Chapter 39, F.S., describes the Florida judicial system as designed to protect children about whom reports have been made to the Department of Children and Families (DCF or department) alleging abuse, neglect, or abandonment.

“Dependency,” “dependent child,” and “adjudication of dependency” are terms used throughout ch. 39, F.S., to describe the legal process whereby parental rights and responsibilities are partially or fully surrendered to the state. The statutes do not define “dependency,” but defines “dependent child.”¹

The dependency process in Florida begins with a call into the Florida Abuse Hotline (hotline).² 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.³ If warranted, a dependency petition is filed with the court by DCF.⁴ 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.⁵ In that instance, a judicial hearing must be held within 24 hours after the removal of the child from the home.⁶ A Guardian ad Litem (GAL) must be appointed at the time of the shelter hearing.⁷ If needed, an Attorney ad Litem (AAL) may be appointed at this time as well.⁸

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.⁹ If the child is found to be dependent, a disposition hearing is held to determine the appropriate services and placement settings for the child.¹⁰ At this hearing, the court also reviews and approves a case plan outlining the services and the desired goals for the child.¹¹

The dependency court holds periodic judicial reviews, generally every six months, until supervision is terminated to determine the child’s status, the progress in following the case plan, and the status of the goals and objectives of the case plan.¹² If after 12 months, the case plan

¹ Section 39.01(15), F.S.

² Section 39.201, F.S.

³ Section 39.301, F.S.

⁴ Section 39.501(3)(c), F.S.

⁵ Section 39.402(1), F.S.

⁶ Section 39.402(8), F.S.

⁷ Section 39.822(1), F.S.

⁸ 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.

⁹ Section 39.507, F.S.

¹⁰ Section 39.521, F.S.

¹¹ Section 39.521(1), F.S.

¹² *Id.*

goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.¹³

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,¹⁴ there is no provision in Florida law or rule requiring the appointment of counsel for dependent children, with a few exceptions, including children placed in a skilled nursing facility¹⁵ and children facing involuntary commitment for mental health treatment under The Baker Act.¹⁶

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

In general, the federal and state scheme for safeguarding the legal needs of children in the dependency system relies upon the appointment of GALs or AALs. The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing a GAL to represent the child's best interest in every case of child abuse or neglect that results in a judicial proceeding.¹⁸ The Florida GAL program funds programs supporting both lay volunteers to assist children in dependency proceedings and AALs. The GAL program has been successful in recruiting attorneys who wish to satisfy their *pro bono* expectations by representing children with various legal needs in dependency court.¹⁹ When there are insufficient *pro bono* lawyers available and there are sufficient resources to do so, the GAL program may contract with legal aid, other programs, or private attorneys for the provision of these services.²⁰

Florida law requires the appointment of a GAL for every child who is the subject of a dependency proceeding.²¹ While the GAL program has requested funds to allow it to meet this mandate, so far the goal has not been met. As of November 2013, there were 29,285 dependent children under court supervision, of whom 22,281 (76 percent) had been appointed a GAL. The GAL program also funds the current AAL Program. The GAL attorney is required by the program standards to request the appointment of an AAL 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 AAL at any point in the dependency process.²²

¹³ Section 39.621(1), F.S.

¹⁴ Section 39.013, F.S.

¹⁵ Section 744, conference report on SB 1500 (2013 Reg. Session)

¹⁶ 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 Chapter 394, known as The Baker Act (s. 394.451, F.S.)

¹⁷ *Lassiter v. Dept. of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S.Ct. 2153 (1981), *In the Interest of D.B.*, 385 So.2d. 83 (Fla. 1980), *In the Interest of C.T.*, 503 So.2d 972 (Fla. 4th DCA 1987).

¹⁸ 42 U.S.C. ss. 5101 *et seq.*

¹⁹ 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.

²⁰ Office of the Florida Guardian ad Litem, informal communication, (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs).

²¹ Section 39.402(8)(c)1, s. 39.807(2), s. 39.822, F.S.

²² Fla. R. Juv. P. 8.217(a).

Common reasons for seeking appointment of an AAL in dependency court include cases in which a child needs a legal guardianship or where special expertise is needed in areas such as immigration law, disability law, or administrative forums. There is no statewide tracking mechanism for the appointment of AALs for dependent children, since they are appointed at the state court circuit level. The budget for the GAL program in FY 2012-2013 was \$34.1 million dollars.²³ Last year, the GAL program spent approximately \$360,000 in contracts for AAL services. Each AAL is typically paid \$500-\$1000 annually per child per year.²⁴

In addition to the services of the GAL-provided AALs, there are several pockets of legal services for children available across the state. The Florida Bar Foundation has provided grants to legal services providers, several law schools have established clinics which serve children, and several Children's Councils²⁵ fund lawyers for children. Notable among the efforts to provide legal services to children 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 GAL, 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 department estimates that the number of children who meet the definition of "dependent child with disabilities" is 3,915.²⁶ This number is approximately 21 percent of all children in out-of-home care.²⁷

Dependent Children in Nursing Homes

The state is currently a 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 that alleges that the state violated the Americans with Disabilities Act (ADA).²⁸ 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 provided in home health services. In addition, the Department of Children and Families and the Agency for Persons with Disabilities have worked with medically complex children and their families that they serve to ensure the least restrictive placement.

²³ Office of the Florida Guardian ad Litem, *ibid*

²⁴ Office of Florida Guardian ad Litem, *ibid*

²⁵ 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 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. available at <http://flchildrenscouncil.org/about-the-council/overview/> (last visited March 14, 2014).

²⁶ This number does not include those children where the disability is unknown, children in in-home placements, children in extended foster care, children with psychotropic medications, or children being considered for placement in a residential treatment center.

²⁷ Florida Department of Children and Families, *ibid.*, p. 3. The information is supplied as of January 27, 2014.

²⁸ *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.

The department reports that currently there are 11 dependent children in nursing homes.²⁹ According to the GAL program, all these children are currently represented by counsel.

III. Effect of Proposed Changes:

Section 1 creates s. 39.01305, F.S., to provide a definition of “dependent child with a suspected or known disability” as:

- A medically dependent or technologically dependent child who because of a medical condition requires continuous therapeutic interventions or skilled nursing supervision and resides in a skilled nursing facility or is being considered for placement in a skilled nursing facility;
- A dependent child who has been prescribed a psychotropic medication;
- A dependent child with a suspected diagnosis of developmental disability as defined in s. 393.063, F.S.;
- A dependent child being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- A dependent child who has been a victim or perpetrator of sexual abuse or human trafficking and who is suspected to be in need of mental health treatment.

This section also sets forth the legislative intent that the court appoint an attorney to represent each dependent child who has a suspected or known disability.

It requires that the appointments of lawyers be in writing and that they remain in effect until the attorney is allowed to withdraw or is discharged by the court, or the case is dismissed. Attorneys appointed under this section are to provide the complete range of legal services to the child from the time of removal from the home or initial appointment through all available appellate proceedings. With permission of the court, the attorney is authorized to arrange for supplemental or separate counsel to handle proceedings at appellate hearings.

Attorneys appointed under this section must be adequately compensated and provided with access to funding for expert witnesses, depositions, and other costs of litigation.

This section explicitly does not limit the authority of the court otherwise to appoint attorneys for children in dependency proceedings, and implementation of this section is subject to appropriations made specifically for that purpose.

Section 2 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁹ Department of Children and Families, Informal communication, (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs.)

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:

According to the terms of the bill, the cost to the state will be limited to the amount specifically appropriated for this purpose. However, the state's experience with paying for court-appointed counsel in dependency cases and for capital collateral counsel has shown that costs are difficult to control. The bill requires that attorneys be "adequately compensated" and be provided funds for costs of litigation. It sets no standard for the determination of fees and costs, nor is there a limit. Other statutes providing for attorneys' fees predetermine those fees in some fashion, and have a "reasonable" standard for costs and fees.³⁰ The Legislature created the regional conflict counsel in 2007 to represent indigent criminal cases and indigent parents in dependency court because increasing private attorney costs created deficits in the budget of the Justice Administration Commission. 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 that their individual case warrants higher reimbursement. The courts have in such instances awarded higher fees. The Florida Supreme Court has held that attorneys' fees and costs for court appointed counsel can exceed statutory limits in certain circumstances.³¹ The bill does not include any cost controls other than the amount of funding provided. Having a set amount of funding available for this function is not likely to dissuade the court from appointing attorneys when the amount of funding is exhausted.

The number of children in the dependency system that would qualify for appointed attorneys under the bill is unknown. The department reports that there are currently 3,951 children in out-of-home care with a known disability. This number does not include children in in-home care, children with an unidentified disability, children in extended foster care, children being considered for placement in a residential treatment facility, or

³⁰ See, for example, ss. 16.0155(5) and 27.5304, F.S.

³¹ *Mackemson v. Martin County*, 491 So.2d 1109 (Fla. 1986); *Bd. of County Comm'rs of Hillsborough County v. Scruggs*, 545 So2d 910 (Fla. 2nd DCA 1989) (expanding *Mackemson* to court-appointed attorneys in civil dependency hearings).

children who may suffer from mental illness as the result of human trafficking. Using the current amount (\$1,000) paid by the GAL program for AALs, the attorney fees for the 3,951 children identified by the department would be \$3,951,000 annually. This does not include case-related costs such as transcripts, depositions, and expert witnesses. The cost of the bill would likely be significantly higher than \$3,951,000 when the other dependent children meeting the definition are considered and the actual attorney fees and case-related costs are paid.

DCF reports that some expenditures may be required to modify the Florida Safe Families Network (FSFN) to accommodate the requirements for appointed counsel.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 39.01305 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.