

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/SB 496

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senator Detert

SUBJECT: Guardians

DATE: April 15, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Crosier</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>C. Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>A. Brown</u>	<u>Kynoch</u>	<u>AP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 496 addresses a gap that can exist between the time that children with developmental disabilities or who lack capacity age out of the foster care system at 18 years old and are appointed a guardian. This bill provides for guardianship proceedings to begin in advance of a child's 18th birthday when the child is pre-determined by the Department of Children and Families to need a guardian when the child becomes an adult.

The bill creates no significant fiscal impact.

The bill provides an effective date of July 1, 2015.

II. Present Situation:

Dependency courts operate primarily under ch. 39, F.S., and handle cases dealing with the abandonment, abuse, and neglect of children. Chapters 731 through 735, 744, and 747, F.S., govern wills, trusts, estates, guardianships, conservatorships, and other property and succession matters.

Types of Guardians

A guardian is defined as a person appointed by the court to act on behalf of a ward's person, property, or both.¹ The law recognizes various types of guardians.

Natural Guardians

Parents are considered natural guardians of their biological and adopted children, up until the time that their children cease to be minors.^{2,3}

Limited Guardians

Limited guardians are guardians who have been appointed by the court to exercise legal rights and powers specifically designated in a court order. These guardians have limited authority in that the ward is able to either provide some self-care or the ward has voluntarily petitioned the court for a guardian.⁴

Plenary Guardians

A plenary guardian is appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to provide any self-care.⁵

Guardian Advocates

Guardian advocates are appointed by the court for persons with developmental disabilities.⁶

Oversight for Children in Foster Care

Updated Case Plans

The dependency court is required to hold periodic hearings to review the cases of children in care. In addition to hearings held earlier, the court must hold a judicial review hearing within 90 days after the 17th birthday of a child in care.⁷ At this hearing, the Department of Children and Families (DCF) must provide the court with an updated case plan. The updated case plan must address the independent living skills that the child has acquired since the age of 13 or the date the child came into foster care, whichever is later.⁸ At the last review hearing before the child turns 18 years of age, the court must consider whether the child plans to remain in foster care. At this hearing, the court must ensure that the child has been informed of the right to continued support and services from the DCF.⁹

¹ Section 744.102(9), F.S.

² Section 744.301(1), F.S.

³ Section 1.01(13), F.S., defines a minor as any person who has not reached the age of 18 years.

⁴ Section 744.102(9)(a), F.S.

⁵ Section 744.102(9)(b), F.S.

⁶ Section 744.102(11), F.S.

⁷ Section 39.701(3)(a), F.S.

⁸ Section 39.701(3)(b), F.S.

⁹ Section 39.701(3)(d), F.S.

Court Review of Young Adults Who Remain in Care

The term “young adult” is defined as a person who has reached 18 years of age but not 21 years of age.¹⁰ Young adults may stay in foster care until the age of 21 years old. In 2013, the Florida Legislature enacted a law to enable the dependency court to retain jurisdiction over young adults with disabilities and allow them to remain in foster care until the age of 22.¹¹ An average of 60 young adults with developmental disabilities reach 18 years of age annually while in licensed foster care.¹² Some of these young adults reside in supportive housing provided by the Agency for Persons with Disabilities (APD). Unless a court adjudicates the young adult incapacitated and appoints a guardian, the young adult is able to leave APD-licensed housing.¹³

Guardianship

A wide range of options are available to provide decision-making assistance to those with developmental disabilities or who lack capacity which are not as restrictive as guardianships.¹⁴

Guardianships that place decision-making authority for a ward’s property and person with a guardian require an examining committee to determine that the alleged incapacitated adult lacks capacity. Only then may a judge enter a finding of an adjudication of incapacity.¹⁵ This form of guardianship is considered the most restrictive and should be a last resort, as it removes fundamental and civil rights of an individual.

Before a guardian can be appointed for an adult, Florida law requires appointed counsel, the presence of the adult at the hearing, and an adjudication of incapacity based on the recommendation of an examining committee.¹⁶ For guardianship of a minor, none of the following are required: counsel, the minor’s presence at the hearing, or an adjudication of incapacity.¹⁷ These due-process protections for minors are waived under current law because the minor is not an adult and the guardianship of a minor terminates by law when the minor reaches 18 years of age.

The probate court does not assume jurisdiction in guardianship determinations until a child turns 18. Probate court proceedings often take six months or longer before a final order is entered.¹⁸ This results in a gap between the time the child turns 18 and when a guardian is appointed. During this gap, a person in need of a guardian is considered an adult but is unable to adequately make decisions on his or her own.

¹⁰ Section 39.6251(1), F.S.

¹¹ The Independent Living Act took effect January 2014 (ch. 2013-178, Laws of Fla.)

¹² Department of Children and Families, *2015 Agency Legislative Bill Analysis of SB 496* (on file with the Senate Committee on Judiciary).

¹³ *Id.*

¹⁴ The Florida Developmental Disabilities Council, *Lighting the Way to Guardianships and Other Decision-Making Alternatives: A Manual for Individuals and Families. 2010: Florida Developmental Disabilities Council, Inc.* (2010), pg. 19-20.

¹⁵ Section 744.331(5) and (6), F.S.

¹⁶ Section 744.331, F.S.

¹⁷ Sections 744.3021 and 744.342, F.S.

¹⁸ *Id.*

Two separate issues create this gap. The first is the lack of a procedure within the dependency system to identify adults willing to serve as guardians or guardian advocates for these minors as they reach the age of 18 years of age. The second issue is jurisdictional in that probate courts only exercise jurisdiction and begin guardianship proceedings after the child reaches 18 years of age.

III. Effect of Proposed Changes:

The bill addresses the gap that exists between the time that children with developmental disabilities or who lack capacity age out of the foster care system at 18 years old and are appointed a guardian. The bill addresses the gap in several ways by:

- Creating a process for the Department of Children and Families (DCF) to identify, through updated case plans and multidisciplinary reports, the need for guardians and guardian advocates for children with developmental disabilities, or those who lack capacity, in advance of the child's 18th birthday;
- Authorizing the court to initiate proceedings for the minor;
- Providing the same due-process rights guaranteed to adults; and
- Allowing the child's parents to be considered natural guardians unless the parents' rights have been terminated or the dependency or probate court determines it is not in the child's best interest to remain under the parents' guardianship.

Court Review of Young Adults who Remain in Care

The bill provides that if a guardian or guardian advocate has been appointed to the young adult, the court must review at the permanency review hearing the necessity of continuing the guardianship and whether the court needs to hold guardianship proceedings when the young adult reaches 22 years of age.

For young adults who have guardians, authorizing the court to review guardianship at a hearing that is separate from a chapter 39, F.S., review hearing, provides additional oversight of the young adult.

Updated Case Plans

The bill requires the DCF, for children who are being considered for guardians as adults, to develop updated case plans in a face-to-face conference with the child, the child's attorney, guardian ad litem, temporary custodian, and the parent if the parent's rights have not been terminated.

If the dependency court determines at the first judicial review hearing after the child's 17th birthday that the child qualifies for an appointment of a guardian or guardian advocate and there is no less-restrictive decision making assistance to meet the needs of the child, the DCF must:

- Complete a multidisciplinary report, including a psychosocial evaluation if one has not been completed within the previous two years;
- Identify one or more individuals willing to serve as the guardian advocate, plenary guardian, or limited guardian, and the child's parents may not be considered unless the court issues a written order finding such an appointment is in the child's best interest; and

- Initiate proceedings within 180 days after the child's 17th birthday for the appointment of a guardian advocate, plenary guardian, or limited guardian for the child in the court of proper jurisdiction.

If another interested party initiates proceedings for the appointment of a guardian advocate, plenary guardian, or limited guardian, the bill requires the DCF to provide all necessary documentation and information to the petitioner within 45 days after the first judicial review hearing after the child's 17th birthday. The bill also specifies that any proceeding seeking appointment of a guardian advocate, plenary guardian, or limited guardian be conducted in a court hearing separate from dependency court.

Jurisdiction of Probate Court

This bill authorizes the probate court to assume jurisdiction of a minor in need of a guardianship determination and to initiate guardianship proceedings once the minor reaches the age of 17 years and 6 months, or anytime thereafter. This provision will ensure that a child in need of a guardian who is approaching the age of 18 will be eligible for guardianship when the child turns 18 years old.

Natural Guardians

This bill clarifies that parents can be a guardian or a natural guardian of a minor child who is the subject of a ch. 39, F.S., proceeding, unless the court has terminated parental rights or finds that having the parents be the guardian or natural guardian is not in the child's best interest.

Parity in Due Process Rights for Minors in Adult Guardianship Proceedings

The bill provides that the same due-process rights given to adults in guardianship proceedings apply to minors aged 17 years and 6 months or older who are the subject of proceedings under ch. 39, F.S. The court may issue an order of adjudication of incapacity and letters of limited or plenary guardianship upon the minor's 18th birthday or as soon thereafter as possible.

The bill provides an effective date of July 1, 2015.

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:

The Agency for Persons with Disabilities reports that CS/CS/SB 496 has no fiscal impact. The Department of Children and Families (DCF) does not anticipate handling the guardianship proceedings under the bill and therefore estimates no fiscal impact. If an attorney is not available to handle a proceeding, there could be a cost to the DCF, but those costs are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 39.6251, 39.701, 393.12, 744.301, and 744.3021.

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 by Judiciary Committee on March 10, 2015:

The CS/CS:

- Requires a guardianship determination to be made in a separate proceeding for guardianship and not during a judicial review of a young adult in continuing care in a dependency court under ch. 39, F.S. This change enables parties other than the Department of Children and Families (DCF), such as a guardian ad litem or an attorney for the young adult, to initiate a petition; and
- Removes references to court rules.

CS by Children, Families, and Elder Affairs Committee on February 19, 2015:

The CS:

- Amends s. 39.6251, F.S., to provide that for a youth in continuing care who has been appointed a guardian or guardian advocate, the court, at the annual permanency

review hearing, determine whether it is necessary to continue the guardianship and whether restoration of guardianship proceedings are needed when the child reaches age 22 years of age; and

- Amends s. 39.701, F.S., to provide that for a child who may meet the requirements for an appointment of a guardian or guardian advocate, the DCF is to develop an updated case plan in a face-to-face conference with a child, if appropriate, and include certain individuals at the conference. At the judicial review, if the court determines, pursuant to ch. 744, F.S., and the Florida Probate Rules, that there is a good faith basis to believe the child qualifies for the appointment of a guardian or guardian advocate, the DCF must complete certain reports and identify one or more individuals who are willing to serve as the guardian advocate or as the plenary guardian or limited guardian.

B. Amendments:

None.