

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 496

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

SUBJECT: Guardians

DATE: March 9, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	<b>Fav/CS</b>
2.	Brown	Cibula	JU	<b>Pre-meeting</b>
3.			AP	
4.				

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

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 (DCF) to need a guardian when the child becomes an adult.

Current law grants the dependency court jurisdiction over children in foster care who have developmental disabilities and lack capacity. When children turn 18, the probate court assumes jurisdiction to appoint a guardian in cases where a guardian is needed. A gap exists, however, between the time that a person in need of a guardian transitions from dependency court to probate court.

This bill addresses the gap in several ways by:

- Creating a process for the DCF to identify through updated case plans and multidisciplinary reports the need for guardians and guardian advocates for children with developmental disabilities or incapacity in advance of the child's 18th birthday;
- Authorizing probate court to initiate proceedings for the minor;
- Granting the same due process rights in guardian proceedings to children who are developmentally disabled as that conferred to developmentally disabled adults; and

- Allowing the child's parents to be considered natural guardians unless the dependency or probate court determines it is not in the child's best interest or the parents' rights have been terminated.

The bill will have a fiscal impact on state government, requiring the staffing, training, and support of DCF attorneys to initiate guardianship proceedings in probate court. The bill will also require expenditures on litigation fees including filing fees, expert witnesses, service of process, and the publication of notices in newspapers.

## II. Present Situation:

Dependency courts operate primarily under ch. 39, F.S., handling 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.<sup>1</sup> 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.<sup>2</sup>

#### *Limited Guardians*

Limited guardians are guardians who have been appointed by the court to exercise legal rights and powers specifically designated in the 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.<sup>3</sup>

#### *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.<sup>4</sup>

#### *Guardian Advocates*

Guardian advocates are appointed by the court for persons with developmental disabilities.<sup>5</sup>

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<sup>1</sup> Section 744.102(9), F.S.

<sup>2</sup> Section 744.301(1), F.S.

<sup>3</sup> Section 744.102(9)(a), F.S.

<sup>4</sup> Section 744.102(9)(b), F.S.

<sup>5</sup> Section 744.102(11), F.S.

## Court and DCF 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 a child's 17th birthday.<sup>6</sup> At this hearing, the 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.<sup>7</sup> 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.<sup>8</sup>

### *Court Review of Young Adults who Remain in Care*

The term "young adult" is defined as a person who has reached 18, but not 21 years of age.<sup>9</sup> Young adults may stay in foster care until the age of 21 years old. In 2013, the Florida Legislature passed 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.<sup>10</sup> An average of 60 young adults with developmental disabilities reach 18 years of age annually while in licensed foster care.<sup>11</sup> 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.<sup>12</sup>

### **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.<sup>13</sup>

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.<sup>14</sup> 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

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<sup>6</sup> Section 39.701(3)(a), F.S.

<sup>7</sup> Section 39.701(3)(b), F.S.

<sup>8</sup> Section 39.701(3)(d), F.S.

<sup>9</sup> Section 39.6251(1), F.S.

<sup>10</sup> The Independent Living Act took effect January 2014 (ch. 2013-178, Laws of Fla.)

<sup>11</sup> Department of Children and Families, *2015 Agency Legislative Bill Analysis of SB 496* (on file with the Senate Committee on Judiciary).

<sup>12</sup> *Id.*

<sup>13</sup> 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.

<sup>14</sup> Section 744.331(5) and (6), F.S.

recommendation of an examining committee.<sup>15</sup> For guardianship of a minor, none of the following are required: counsel, the minor's presence at the hearing, or an adjudication of incapacity.<sup>16</sup> 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 upon reaching 18 years of age.

The probate court does not assume jurisdiction in guardianship determinations until a child turns 18. Often probate court proceedings take 6 months or longer before a final order is entered.<sup>17</sup> This results in a gap between the time the child turns 18 and when a guardian is appointed.

### III. Effect of Proposed Changes:

CS/SB 496 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.

Under current law, when a minor<sup>18</sup> with developmental disabilities or some level of incapacity ages out of the dependency system, a gap exists between the time he or she turns 18 years of age and the time a guardian advocate, plenary guardian, or limited guardian is appointed. This creates a period in which a person in need of a guardian is considered an adult but is unable to adequately make decisions on his or her own. 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.

This 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 who lack capacity in advance of the child's 18th birthday.
- Authorizing probate 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 dependency or probate court determines it is not in the child's best interest or the parents' rights have been terminated.

#### **Court Review of Young Adults who Remain in Care**

Under existing law, while a young adult remains in foster care, the dependency court maintains jurisdiction and oversight over the young adult's case plan, individual education plan, and transition plan. The court reviews the status of the young adult at least every 6 months and the permanency review hearing at least annually. This bill provides that if a guardian or guardian

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<sup>15</sup> Section 744.331, F.S.

<sup>16</sup> Sections 744.3021 and 744.342, F.S.

<sup>17</sup> *Id.*

<sup>18</sup> A minor is defined in law as any person who has not reached the age of 18 years (s. 1.01(13), F.S.)

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, requiring the court to include review of guardianship at permanency hearings provides additional oversight of the young adult.

### **Updated Case Plans**

Under existing law, at the initial judicial review hearing for children who have reached 17 years of age, the DCF must provide the court with an updated case plan that includes specific information related to the independent living skills that the child has acquired since the age of 13 or the date the child came into foster care, whichever was later.

This 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, DCF must:

1. Complete a multidisciplinary report, including a psychosocial evaluation if one has not been completed within the previous 2 years;
2. Identify one or more individuals willing to serve as the guardian advocate, plenary guardian or limited guardian. 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
3. 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 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 probate court, not dependency court.

### **Jurisdiction of Probate Court**

This bill authorizes the probate court to assume jurisdiction of a minor in need of a guardian determination, and 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**

This 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 takes effect July 1, 2015.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

This bill does not contain a mandate because the bill does not affect cities or counties.

### **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:**

This bill requires DCF to file or initiate guardianship proceedings in probate court for youths who are aging out of foster care and who may meet the requirements for appointment of a guardian or guardian advocate. The DCF estimates that 60 youths each year reside in continuing care with documented developmental disabilities.<sup>19</sup> However, the number of youth that would meet the requirements for guardianship or for a guardian

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<sup>19</sup> Department of Children and Families, *supra* note 10 at 2.

advocate cannot be determined. The department estimates the annual cost for legal work for each case at approximately \$5,500 to \$8,000. Costs for psychosocial evaluations, service of process, background screening fees for potential guardians and other case related fees are unknown.<sup>20</sup>

The cost of the guardian or guardian advocate cannot be determined. If the guardian volunteers pro bono then there is no cost; however, if a public guardian from the Office of Statewide Public Guardianship is appointed there is a cost to the Department of Elder Affairs.

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

The Committee Substitute:

Amends s. 39.6251, F.S., to provide that for a youth in continuing care that 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.

Amends s. 39.701, F.S., to provide that for a child that may meet the requirements for an appointment of a guardian or guardian advocate, the department 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 department shall 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.

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<sup>20</sup> *Id.*

B. Amendments:

None.

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

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