

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 775 Appointment of a Guardian Ad Litem

SPONSOR(S): Judiciary Committee; Justice Appropriations Subcommittee; Civil Justice Subcommittee; Powell

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 922

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Robinson	Bond
2) Justice Appropriations Subcommittee	10 Y, 0 N, As CS	Schrader	Lloyd
3) Judiciary Committee	18 Y, 0 N, As CS	Robinson	Havlicak

SUMMARY ANALYSIS

Service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a civil action. In some cases, a plaintiff is unable to effectuate actual service of process on a party because the party's identity or location may be unknown, the party may be evading service, the party may be away on active military service, or the party may have died. Despite the inability to effect actual service of process on such persons, a plaintiff may proceed in certain actions by providing such persons constructive service of process through publication of a legal notice.

In such actions, constitutional due process may require that a court appoint a representative for the party who is unknown or who cannot be found. Such representative may be known as a "guardian ad litem," an "attorney ad litem", or an "administrator ad litem," depending upon the interests represented. The ad litem has the responsibility to ensure that the absent party's due process rights are considered by the court, even if the person cannot ultimately be located. Practitioners report that some courts are reluctant to appoint an ad litem because there is no statutory authority for such appointments.

This bill creates a statutory framework for the appointment of a guardian ad litem, attorney ad litem, or administrator ad litem to represent certain persons in civil litigation who are unknown or cannot be located.

The bill does not appear to have a fiscal impact on state or local governments.

The effective date of the bill is July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Constructive Service of Process

The basic due process guarantee of the United States Constitution and the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.¹ Procedural due process ensures that defendants in legal actions are given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure before being deprived of property.² In civil actions, this usually requires that a person being sued receive notification of the lawsuit so that he or she can assert his or her rights and lawful defenses.³ This notice in a civil action is commonly referred to as "service of process." Service of original process or "actual service of process" is made by personally delivering notice along with a copy of the complaint, or other initial pleading or paper, of the civil action to the person to be served.⁴ However, in some cases, actual service of process may be impossible because a party's identity or location may be unknown, the party may be evading service, the party may be away on active military service, or the party may have died.

Where the goal of the lawsuit is to obtain a judgment against the person, due process requires that such person receive actual service of process to confer personal jurisdiction over such person upon the court,⁵ and in the absence thereof, the lawsuit may not proceed. Examples of such lawsuits include tort claims, actions to collect on a debt, and injunctions.

However, s. 49.011, F.S. specifies 15 actions or proceedings that may proceed even if actual service of process cannot be made because a party is unknown or cannot be located, including foreclosure, repossession, probate, and quiet title actions.⁶ Such proceedings are actions *in rem*, the purpose of which are to determine title to or to affect interests in specific property.⁷ Courts have subject matter jurisdiction to adjudicate the class of cases listed in s. 49.011, F.S. and have territorial jurisdiction or authority over the property, or "res" that is the object of the action,⁸ therefore the court does not need personal jurisdiction over the defendant. Although the court needs no personal jurisdiction over the defendant, service of process upon the defendant is still required in order to obtain a valid judgment over the "res" of the action. In cases or proceedings specified in s. 49.011, F.S. where the party is unknown or cannot be found, service of process may be accomplished service of process by publication, otherwise known as "constructive service of process." Chapter 49, F.S., authorizes

¹ U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, s. 9.

² *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991); *See also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (procedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

³ *State ex rel. Merritt v. Heffernan*, 195 So. 145, 147 (Fla. 1940).

⁴ Section 48.031(1)(a), F.S.; A copy of the notice may also be left at the party's home with another resident who is at least 15 years of age.

⁵ *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986) (holding that a personal judgment against a defendant based upon constructive service of process would deprive a defendant of his property without due process of law).

⁶ The law prefers actual service of process in all cases, and there are drawbacks to a suit without actual service of process. If constructive service of process must be used, then it confers only *in rem* or quasi *in rem* jurisdiction upon the court. For instance, a foreclosure suit can proceed against a party without actual service of process, but cannot yield a deficiency judgment as part of the suit because a personal judgment against a defendant based upon constructive service of process would deprive a defendant of his property without due process of law. Likewise, a divorce without actual service of process cannot provide for alimony or child support. *See Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986).

⁷ *Rosado v. Bieluch*, 827 So. 2d 1115, 1117 (Fla. 4th DCA 2002).

⁸ *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobile Oil Corp.*, 455 So. 2d 412, 415-16 (Fla. 2d DCA 1984).

constructive service through publication of a legal notice provided certain conditions are met. An in rem proceeding, when properly commenced and noticed, becomes binding as to the resulting adjudication.⁹

Court Appointed Representatives of an Unknown or Absent Party

One or more of the known or unknown parties in such actions may be a minor, an incompetent person, or a person under some other legal disability. Because the court's ruling may bind such persons, due process may further require that the trial court appoint one or more of an administrator ad litem, a guardian ad litem, or an attorney ad litem to protect the interests of the known or unknown party.

The distinction between a guardian ad litem, attorney ad litem, or administrator ad litem depends upon the interests they were appointed to represent.

- Guardian ad litem: A court appoints a guardian ad litem to represent a minor or incompetent person.¹⁰
- Attorney ad litem: A court appoints an attorney ad litem to represent the interests of an unknown entity or person, including a person who is away on active military service.¹¹
- Administrator ad litem: A court appoints an administrator ad litem to represent the estate of a decedent.¹²

The ad litem has the legal duty to make a diligent effort to find the interest for which he or she was appointed and to determine if the interest is competent to handle their own affairs, and if the interest is competent, to inform the interest of the pending litigation.¹³ If the absent party is not located before the case is submitted to the court for judgment, the ad litem is nevertheless obligated to represent the absent party's interest in good faith.¹⁴

Current law and court rules provide for the appointment of a guardian ad litem, administrator ad litem, or attorney ad litem for the estates of a deceased person, minors, persons under a legal disability, or unknown parties in specific contexts and situations, for instance:

- Quiet title actions.¹⁵
- The administration of or in judicial proceedings involving estates of decedents.¹⁶
- Termination of parental rights proceedings.¹⁷
- Dissolution of marriage or custody proceedings.¹⁸
- Claims against a dissolved limited liability company, corporation, or limited partnership.¹⁹
- Eminent domain proceedings.²⁰
- Conservatorships.²¹
- Guardianship.²²
- Settlement of certain civil claims by a minor.²³

However, under current law, there is no statute that specifically authorizes a court to appoint an ad litem to protect the rights and lawful defenses of all persons who have been constructively served in a proceeding specified in s. 49.011, F.S. In light of various statutes expressly mandating or permitting the

⁹ *Pitts v. Pitts*, 162 So. 708 (Fla. 1935).

¹⁰ Fla. R. Civ. P. 1.210(b).

¹¹ The Servicemembers Civil Relief Act of 2003 requires that a court appoint an attorney to represent a member of the armed services on active duty. 50 App. U.S.C. § 521(b)(2).

¹² s. 733.308, F.S.; Fla. Prob. R. 5.120.

¹³ *Rodriguez v. Levin*, 524 So. 2d 1107, 1108 (Fla. 3d DCA 1988).

¹⁴ *Id.*

¹⁵ s. 65.061(2), F.S.

¹⁶ ss. 731.303(4) and 733.308, F.S.

¹⁷ s. 39.807(2)(a), F.S.

¹⁸ s. 61.401, F.S.

¹⁹ ss 605.0711(7), 605.0713(3), 607.1406(7), 608.4421(7), 617.1408(7), and 620.1806(7), F.S.

²⁰ s. 73.021(4), F.S.

²¹ ss 747.031(3) and 747.052(5), F.S.

²² s. 744.1075(4)(b), F.S.; Fla. Prob. R. 5.120.

²³ s. 744.3025, F.S.

appointment of ad litem in specific contexts/cases, some courts have concluded that absent express statutory authority to appoint an ad litem in a particular case, the court lacked inherent authority to appoint an ad litem - even in cases where the court thought it otherwise appropriate.²⁴ As a result of the lack of such specific authority, there has been inconsistency among the courts, in that some courts have nevertheless appointed an ad litem, while other courts have refused to do so.²⁵

The inability to obtain the appointment of an ad litem may affect the sufficiency of certain legal proceedings, particularly those involving real property, such as quiet title actions and foreclosures. Accordingly, lack of an ad litem may impair the marketability of real estate titles at the conclusion of such litigation.²⁶

Effect of Proposed Changes

The bill creates s. 49.31, F.S., to allow the court to appoint a guardian ad litem, attorney ad litem, or administrator ad litem ("ad litem"), as appropriate, for any party served by publication in a proceeding specified in ch. 49, F.S., who fails to respond to an action in the time required by law. The ad litem:

- Is not required to post a bond or designate a resident agent in order to serve.
- Serves through final judgment unless otherwise discharged by the court.
- Is entitled to a fee for services and costs which are assessed against the party requesting the ad litem or as otherwise ordered by the court. However, state funds may not be used to pay such fees unless state funds were previously used to pay fees for an ad litem in the same circumstance prior to July 1, 2015.
- May not be appointed to represent an interest for which a personal representative, guardian of the property, or trustee is serving.

If an ad litem is appointed and he or she discovers that a personal representative, guardian of the property, or trustee is serving and represents the interest for which the ad litem was appointed, the ad litem must promptly report that finding to the court and must file a petition for discharge as to any interest for which a personal representative, guardian of the property, or trustee is serving. If an ad litem is appointed to represent an interest and discovers that the person whose interest is represented is deceased and there is no personal representative, guardian of the property, or trustee to represent the decedent's interest, the ad litem must use reasonable efforts to locate any spouse, heir, devisee, or beneficiary of the decedent, must report to the court the name and address of any such person the ad litem locates, and must petition for discharge as to any interest of the person located.

These statutory requirements regarding the conduct of an ad litem are consistent with normal practice and expectations of an ad litem.

The bill provides that a proceeding adjudicated before the effective date of the bill in which the court appointed an ad litem may not be declared ineffective solely due to lack of statutory authority to have appointed an ad litem.

The bill does not abrogate the common law authority of a court to appoint an ad litem.

B. SECTION DIRECTORY:

Section 1 creates s. 49.31, F.S., relating to appointment of an ad litem.

Section 2 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

²⁴ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to §49.021, Fla. Stats., Concerning Appointment of Ad Litem*s (on file with the Civil Justice Subcommittee, Florida House of Representatives).

²⁵ *Id.*

²⁶ *Damiano v. Weinstein*, 355 So. 2d 819, 820 (Fla. 3d DCA 1978).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Office of the State Courts Administrator reports that discretionary appointment of an ad litem would require assessment of fees and costs, review of reports, and petitions for discharge, which would result in an expenditure of additional judicial time.²⁷ The fiscal impact is indeterminate due to the unavailability of data needed to establish the exact increase in judicial time, but may be absorbed by the courts.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The bill prohibits the use of state funds to pay fees for services rendered by the ad litem unless state funds would have been expended for such services in the same circumstance before July 1, 2015.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Civil Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

²⁷Office of the State Courts Administrator, *SB 922: 2015 Judicial Impact Statement* (March 13, 2015) (on file with the Florida House of Representatives Judiciary Committee).

- Created a new section of the Florida Statutes for the substantive changes made by the bill.
- Clarified that all provisions of the bill apply to guardian ad litem, attorney ad litem, and administrator ad litem.
- Changed the effective date of the bill to July 1, 2015.
- Made organizational, stylistic, grammatical, and technical revisions.

On March 18, 2015, the Justice Appropriations Subcommittee adopted one amendment to the committee substitute and reported the bill favorably as amended. The amendment provides that no state funds may be used to pay fees for services rendered by the ad litem.

On April 8, 2015, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides an exception to the prohibition against the use of state funds to pay fees for services rendered by an ad litem if state funds would have been expended in the same circumstance prior to July 1, 2015.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.