

**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 Fiscal Policy

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BILL: CS/SB 922

INTRODUCER: Judiciary Committee and Senator Latvala

SUBJECT: Appointment of an Ad Litem

DATE: April 14, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	<b>Recommend: Favorable</b>
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<b>Pre-meeting</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 922 authorizes a court to appoint an ad litem, which is an attorney, administrator, or guardian ad litem, for a person who is served by publication with notice of a lawsuit and fails to respond to the lawsuit. The purpose of the ad litem is to represent the interests of an absent party during a legal action if the party is not otherwise represented. An ad litem is not required to post bond. Additionally, the ad litem is entitled to reasonable fees and costs, assessed against the party requesting the appointment of the ad litem, or as otherwise ordered by the court. However, state funds may not be used to pay for services rendered by the ad litem, unless the state requested the ad litem.

The bill does not have a fiscal impact.

**II. Present Situation:**

**Ad Litem**

The term “ad litem” means “for the suit.”<sup>1</sup> An ad litem can take several forms, such as a guardian ad litem or an attorney ad litem. A guardian ad litem is typically an attorney, appointed by the court to appear in a lawsuit on behalf of an incompetent party or minor child.<sup>2</sup> An attorney ad

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<sup>1</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>2</sup> *Id.*

litem is a court-appointed lawyer who represents a child during the course of a legal action, such as a divorce, termination of parental rights, or child abuse case.<sup>3</sup>

### **Service of Process**

The sheriff of the county where the person is to be served is generally responsible for serving as process server. The role of a process server is to serve summons, subpoenas, and other forms of process in civil and criminal actions.<sup>4</sup> The term “to serve” means to make legal delivery of a notice or a pleading.<sup>5</sup> A summons is a writ or a process beginning a plaintiff’s legal action and requiring a defendant to appear in court to answer the summons.<sup>6</sup> A subpoena is a legal writ or order commanding a person to appear before a court or other tribunal.<sup>7</sup> A subpoena can command a person to be present for a deposition or for a court appearance.

A process server generally must effect service of process by personal service or substitute service. Typically these types of service occur by:

- Serving the person directly or by leaving a copy of a complaint, petition, or initial pleading or paper at the person’s usual place of abode with a person who is 15 years old or older;
- Serving a person at his or her place of employment in a private area designated by the employer;
- Providing substitute service on a spouse if the cause of action is not an adversarial proceeding between the spouse and the person to be served, if the spouse requests service, and if the spouse and person to be served live together; or
- Providing substitute service during regular hours at a business by leaving delivery with an employee or other person in charge, if the person to be served is a sole proprietor and two attempts have been made to serve the owner.<sup>8</sup>

### **Constructive Service of Process**

Constructive service of process is service accomplished by a method or circumstance that does not give actual notice.<sup>9</sup> This method of providing notice is accomplished by publishing notice of a lawsuit in a newspaper in the county where the court is located or, in some circumstances, posting notice of a lawsuit in three different conspicuous places in the county.<sup>10</sup> Constructive service is authorized only if personal service of process cannot be accomplished.<sup>11</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> Sections 48.011 and 48.021, F.S.

<sup>5</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Section 48.031(1) and (2), F.S.

<sup>9</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>10</sup> Sections 49.10 and 49.11, F.S.

<sup>11</sup> Section 49.021, F.S.

Florida law enumerates a number of legal actions for which constructive service of process is authorized:

- In real or personal property cases, to partition property within the jurisdiction of the court, enforce legal or equitable liens, enforce claims to title or interest, quiet title, or to remove an encumbrance, lien, or cloud on property;
- For the dissolution of marriage or in an annulment case;
- For the termination of parental rights, temporary custody of a minor child, adoption, and in certain paternity actions;
- For the construction of a will, deed, contract, or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest; and
- For a case in which a writ of replevin, garnishment, or attachment has been issued and executed.<sup>12</sup>

Service of process by publication may be made to:

- Known or unknown persons, and in some instances, persons unknown to be dead or alive;
- Corporations or other legal entities, whether foreign, domestic, or unknown, and dissolved or existing; and
- Any group, firm, entity, or persons who operate or do business, or have operated or done business, in the state; and
- All claimants under any of the above intended recipients of process.<sup>13</sup>

Before effecting service on a person by publication, the plaintiff or the plaintiff's agent or attorney must file a sworn statement with the court specifying that:

- A diligent search and inquiry has been made to discover the name and residence of the person to be served;
- The person is either over or under the age of 18, if known, or that age is unknown; and
- The residence of the person is
  - Unknown;
  - In another state or country other than this state, stating the residence if known; or
  - In the state, but the person has been absent from the state for more than 60 days or concealed himself or herself in the state so as not to be found.<sup>14</sup>

Before effecting service on a corporation by publication, the plaintiff or the plaintiff's agent or attorney must address in the sworn statement:

- That a diligent search and inquiry has been made to discover the true name, domicile, principal place of business, and status (foreign, domestic, or dissolved) of the corporate defendant and others who would bind the corporation;
- Whether the corporation has ever qualified to do business in this state, unless the corporation is a Florida corporation; and
- That all officers, directors, managers, cashiers, and agents of the corporation are absent or cannot be found in the state, conceal themselves to avoid process, or that their whereabouts are unknown.<sup>15</sup>

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<sup>12</sup> Section 49.011, F.S.

<sup>13</sup> Section 49.021, F.S.

<sup>14</sup> Section 49.041, F.S.

<sup>15</sup> Section 49.051, F.S.

Within 60 days after filing the sworn statement, the clerk or judge must issue a notice of action providing:

- The names of the known defendants or a description of the unknown defendants;
- The nature of the action or the proceeding;
- The name of the court in which the plaintiff initiated the action; and
- If relevant, the description of real property.<sup>16</sup>

Most notices of action are published once a week for 4 consecutive weeks in a newspaper published in the county where the court is located.<sup>17</sup> If the county does not have a newspaper, three copies of the notice must be posted in three different and conspicuous places in the county, including the front door of the courthouse.<sup>18</sup> Proof of publication is made by affidavit of the owner, publisher, editor, business manager, or other officer or employee of the newspaper or of the person posting the notice.<sup>19</sup>

### III. Effect of Proposed Changes:

The bill creates s. 49.31, F.S, which authorizes the appointment of an ad litem. An ad litem is an attorney, administrator, or guardian ad litem. An ad litem may represent a party in any case for which service of process by publication is authorized, such as cases relating to real property, probate, and certain kinds of family law issues.

A court may appoint an ad litem to represent the interest of a party who fails to respond to a lawsuit after service of process by publication has been made. However, a court may not appoint an ad litem to represent an interest for which a personal representative, guardian of property, or trustee is already serving.

If an appointed ad litem discovers that a personal representative, guardian of property, or trustee is already serving, the ad litem must report the finding to the court and file a petition for discharge as to any interest which is already represented. If an appointed ad litem discovers that the person whose interest he or she is representing is deceased and there is not a personal representative, guardian of the property, or trustee to represent the interest, the ad litem must:

- Make a reasonable attempt to locate any spouse, heir, devisee, or beneficiary of the decedent
- Report to the court the name and address of all such persons who are located; and
- Petition for discharge as to any interest of a person that is located.

If a court appoints an ad litem, the court:

- May not require the ad litem to post a bond or designate a resident agent.
- Must discharge the ad litem when final judgment is entered or as otherwise ordered by the court.
- Must assess the reasonable fees and costs of the ad litem against the party requesting the appointment of an ad litem, typically the plaintiff, or as otherwise ordered by the court.

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<sup>16</sup> Section 49.08, F.S.

<sup>17</sup> Section 49.10(1)(a), F.S.

<sup>18</sup> Section 49.11, F.S.

<sup>19</sup> Sections 49.10(2) and 49.11, F.S.

However, the bill prohibits the use of state funds for services rendered by the ad litem unless the state requested the ad litem.

The bill also expressly validates the adjudication of cases in which a court appointed an ad litem without statutory authority to make the appointment. Specifically, the bill states: “In all cases adjudicated in which the court appointed an ad litem, a proceeding may not be declared ineffective solely due to the lack of statutory authority to appoint an ad litem.”

The bill clarifies that it does not impede the common law authority of a court to appoint an ad litem.

This bill is effective 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:

According to the Real Property Probate, and Trust Law Section of the Florida Bar, the bill will help protect the property rights of individuals who cannot be notified of lawsuits. The bill also preserves the marketability of title to real estate, which might be questioned if a person is not represented in a quiet title action or foreclosure proceeding.<sup>20</sup>

The bill also validates previous legal proceedings in which a court appointed an ad litem to represent an unknown or unavailable defendant without express statutory authority to do so. This retroactive validation of legal proceedings likely benefits foreclosing lenders and title insurance companies by eliminating a potential ground for setting aside a foreclosure or judgment in a quiet title action.

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<sup>20</sup> Real Property Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Revisions to s. 49.021, Fla. Stats., Concerning Appointment of Ad Litem* (Nov. 23, 2013) (on file with the Senate Committee on Judiciary).

**C. Government Sector Impact:**

The Office of the State Courts Administrator (OSCA) anticipates that the discretionary appointment of an ad litem will require the assessment of fees and costs, review of reports, and processing petitions for discharge, all of which would result in additional judicial time. While OSCA cannot accurately determine the bill's fiscal impact, if any, OSCA did not offer data to support the need for additional court resources to address the bill's workload requirements.<sup>21</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 49.31 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 by Judiciary on March 24, 2015:**

The committee substitute:

- Removes the requirement that a personal representative must notify the court and petition for discharge where representation would overlap if the ad litem discovers that the person for whom the ad litem is serving is already represented;
- Removes the requirement that if an ad litem discovers that the person he or she represents is deceased, the ad litem must reasonably attempt to notify relatives and heirs, report to the court the contact of any persons located, and petition for discharge; and
- Prohibits the use of state funds for services rendered by the ad litem unless the state requested the ad litem.

**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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<sup>21</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement* (Mar. 13, 2015).