

**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: SB 922

INTRODUCER: Senator Latvala

SUBJECT: Appointment of an Ad Litem

DATE: March 16, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	<b>Pre-meeting</b>
2.			ACJ	
3.			FP	

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**I. Summary:**

SB 922 authorizes a court to appoint an ad litem, which is an attorney, administrator, or guardian ad litem, for a person who is constructively served 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.

**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 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

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

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

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

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

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;
- 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 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>

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, claims to title or interest, quiet title or 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>

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<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.

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

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 which specifies the following:

- That a diligent search and inquiry has been made to discover the name and residence of the person to be served;
- That the person is either over or under the age of 18 years old, if known, or that age is unknown; and
- That if the residence of the person is unknown, in another state or country, or if in the state, 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 must address in the sworn statement:

- That 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>

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

- 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,

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

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

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

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

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

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.<sup>19</sup>

### **III. Effect of Proposed Changes:**

This bill authorizes a court to appoint an ad litem to represent the interest of a party who fails to respond to a lawsuit after constructive service of process has been made. An ad litem is an attorney, administrator, or guardian ad litem. An ad litem may represent a party in any case for which constructive service of process is authorized, such as cases relating to real property, probate, and certain kinds of family law issues.

The court:

- May not require the ad litem to post a bond or designate a resident agent.
- May not appoint an ad litem to represent an interest for which a personal representative, guardian of property, or trustee is already serving.
- 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.

If an ad litem discovers that a personal representative, guardian of property, or trustee is serving who represents the same interest as the ad litem, the ad litem must notify the court and petition for discharge where representation would overlap.

If the court has appointed an ad litem to represent an interest and the ad litem discovers that the person whose interest he or she represents is deceased, and there is no personal representative, guardian of property, or trustee to represent the decedent, the ad litem must:

- Make a reasonable attempt to locate any spouse, heir, devisee, or beneficiaries of the decedent,
- Report to the court the name and address of any persons located, and
- Petition for discharge as to the interest of the person located.

The bill provides that in all cases adjudicated in which the court appointed an ad litem, a proceeding may not be declared ineffective solely because of lack of statutory authority to appoint an ad litem. The bill clarifies that these provisions do not impede the common law authority of a court to appoint an ad litem.

This bill takes effect July 1, 2015.

### **IV. Constitutional Issues:**

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

The bill does not affect cities or counties.

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

<sup>19</sup> Section 49.10(2), F.S.

**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, this 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.

**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. However OSCA cannot accurately determine the fiscal impact.<sup>21</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 49.021, Florida Statutes.

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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).

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

**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.

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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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