

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 686

SPONSOR: Committee on Children and Families, Committee on Judiciary and Senator Burt

SUBJECT: Legal Proceedings Involving Minor Children

DATE: February 12, 2002      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Barnes</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>APJ</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

CS/CS/SB 686 amends current representation of children in Florida courts in four major areas:

- Clarifies when a guardian ad litem or attorney will be appointed in dependency proceedings (either private or provided by government), the access of those appointed representatives to information, and the rights of the child and the guardian ad litem or attorney representing the child.
- Clarifies the role of the guardian ad litem representing a child in a dependency proceeding whether that guardian ad litem is provided at government expense, is a volunteer not associated with government guardian ad litem services or is paid by the child or the child's parents. An attorney appointed to directly represent a child will provide representation in accordance with the Florida Bar Rules.
- Places the government-funded representation of children in dependency proceedings within the Statewide Public Guardianship Office of the Department of Elderly Affairs.
- Recognizes that the appropriate representation and involvement for children varies significantly based on the age and capacity of the child, the legal needs of the child and the type of proceeding. Provides the court with the flexibility to adjust representation in dependency proceedings to the needs of the child, whether provided privately or through a government funded program.

This bill substantially amends sections 25.388, 744.7021, 27.51, 39.001, 39.01, 39.013, 39.202, 39.302, 39.305, 39.402, 39.407, 39.4085, 39.4086, 39.502, 39.504, 39.505, 39.510, 39.521, 39.701, 39.801, 39.802, 39.805, 39.806, 39.807, 39.808, 39.810, 39.811, 39.820, 39.821, 39.822, 40.24, 215.5601, 985.308, creates sections 39.8225, 39.84, 39.86, 39.8226, and repeals section 39.4086, of the Florida Statutes.

## II. Present Situation:

### CURRENT REPRESENTATION OF A CHILD IN FLORIDA

#### Civil Actions Under the Florida Rules of Civil Procedure

The courts have addressed the ability of children to bring a civil action before the courts by providing a minor access to the courts through a legal guardian or next friend.

*When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order, as it deems proper for the protection of the infant or incompetent person.*<sup>1</sup>

The courts have held that this appointment of a guardian or next friend is required to provide procedural protection of a minor's welfare and to provide for the orderly administration of justice.<sup>2</sup> Further, the courts have held that these protections cannot be provided simply by giving the minor his or her own counsel.<sup>3</sup>

Because of these limitations on the child's right to sue in Florida, the statute of limitations does not begin to run on the rights of a child to bring an action until such time as the child reaches majority or the parent or legal guardian of the minor, in his or her capacity as next friend, knew or reasonably should have known of the infringement of the child's legal rights.<sup>4</sup>

The role of the person appointed as guardian, guardian ad litem, or next friend is to conduct the litigation on behalf of the minor and look after the interests of the minor including determining if an attorney should be retained.<sup>5</sup> However, the guardian, guardian ad litem, or next friend may be required to seek approval of the court in certain matters related to the litigation, as it is the duty of the court to protect the best interest of the child.<sup>6</sup>

Part XII of ch. 39, F.S., defines guardian ad litem "for purposes of all civil and criminal proceedings brought pursuant to these rules." The term "guardian ad litem" is defined to include a certified guardian ad litem program, a duly certified volunteer, a staff attorney, a contract attorney, or a certified pro bono attorney working on behalf of a guardian ad litem or the program; a staff member of a program office; a court appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as

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<sup>1</sup> Rule 1.210, Florida Rules of Civil Procedure.

<sup>2</sup> Kingsley at 784.

<sup>3</sup> Id at 784.

<sup>4</sup> Drake v. Island Community Church, Inc., 462 So. 2d 1142, 1144 (Fla. 3d DCA 1984), pet. for rev. denied, 472 So. 2d 1181 (Fla. 1985), S.A.P. v. State Dept. of Health and Rehabilitative Services, 704 So. 2d 583 (Fla. App. 1 Dist. 1997).

<sup>5</sup> Garner v. I.E. Schilling Co., 174 So. 837 (Fla. 1937).

<sup>6</sup> Brown v. Ripley, 119 So.2d 712 (Fla. 1 Dist. 1960).

provided for by law, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.

In appointing a guardian ad litem or next friend for the child that person may be a parent or guardian, other family member, or other representative either paid or non-paid. The statutorily created guardian ad litem programs do not often provide representation in civil cases directly controlled by these procedural rules. In most civil proceedings such as personal injury and probate cases a parent or legal guardian acting as next friend represents the child. The parent or guardian then hires legal representation for the child and parent or guardian. The legal representative then takes direction from the parent or guardian as it relates to the case unless the court authorizes the child to act on their own behalf for purposes of the legal action under rule 1.210, Florida Rules of Civil Procedure. Where appropriate the guardian of the child or the parent pays for representation by the next friend and pays for legal representation.

### **Actions Brought Under the Florida Rules of Juvenile Procedure for Dependency**

Florida dependency proceedings are governed by federal requirements, ch. 39, F.S., and Florida Rules of Juvenile Procedure. In rule 8.210, Florida Rules of Juvenile Procedure, and s. 39.0015(51), F.S., a party is defined to include the petitioner, the child, the parent(s) of the child or the legal custodian if there is no parent, the department, and the guardian ad litem or the representative of the guardian ad litem program when the program is appointed. The guardian ad litem must be a responsible adult and may or may not be an attorney, or a certified guardian ad litem program.<sup>7</sup>

Section 39.402, F.S., and rule 8.305, Florida Rules of Juvenile Procedure, require that a guardian ad litem be appointed for each child at a shelter hearing unless the court finds that representation is unnecessary. Though the child is a party in a dependency case the court has held that the proceeding should not necessarily be held up by the lack of a representative for the child.<sup>8</sup> The duties and responsibilities of a guardian ad litem appointed in a dependency proceeding are set out in rule 8.215, Florida Rules of Juvenile Procedure. The guardian ad litem is to gather information concerning the allegations of the petition and to file a written report unless excused by the court. The report must include a summary of the guardian ad litem's findings, a statement of the wishes of the child, and the recommendations of the guardian ad litem. The report is to be provided to all parties and the court at least 72 hours before the hearing for which the report is prepared. The guardian is to be present at all court hearings, and is to represent the interests of the child until the jurisdiction of the court over the child terminates or the guardian ad litem is excused by the court. The rule also provides the guardian ad litem is to perform other duties consistent with the scope of the appointment. Further, the guardian ad litem is to participate in the development of the case plan pursuant to s. 39.601(1)a. F.S.

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<sup>7</sup> Fla. R.Juv.P. 8.215.

<sup>8</sup> *W.R. and B.R. v. DCF*, 701 So. 2d 651 (Fla. App. 4 Dist. 1997), (failure to have a guardian was not found to be fundamental error where Guardian ad litem program was appointed but only provided in court/administrative guardian as opposed to guardian assigned to represent interests of the children) *Fischer v. HRS*, 674 So. 2d 207 (Fla. App. 5 Dist. 1996) and *E.F. v. HRS*, 639 So. 2d 639 (Fla. App. 2 Dist. 1994). However, see *Vestal v. Vestal*, 731 so. 2d 828 (Fla. App. A5 Dist. 1999) (Where no guardian was ever appointed and there was no other entity such as DCF involved sufficiently to protect interest of child court found failure to appoint a guardian ad litem was reversible error).

The guardian ad litem also has a role in the judicial review process. Section 39.701, F.S., provides for judicial review of the status of a child in the dependency system every 6 months while under the jurisdiction of the court. To facilitate the court’s efforts to determine the action to be taken with regard to the child during a judicial review the court may rely on information provided to the extent of their probative value, even though the information is not competent in an adjudicatory hearing. This hearing will review compliance of the parties with the case plan, the status of the child, the appropriateness of the child’s placement and other relevant information. Based on the information provided, the court makes specific findings relative to action in the case such as continued out of home placement, filing for termination of parental rights, etc.

In determining the manifest best interest of the child the court is to consider, among other items, the guardian ad litem’s or child’s legal representative’s recommendations.<sup>9</sup>

Florida statutes then provide for the appointment and role of the guardian ad litem in other specific dependency court proceedings under ch. 39, F.S. Section 39.807, F.S., requires the appointment of a guardian ad litem to represent the best interest of the child in any termination of parental rights proceedings. The guardian ad litem must be present at all court hearings to represent the best interest of the child and is to present a report to the court recommending what is in the best interest of the child.<sup>10</sup>

In dependency actions and where the child has been called as a witness in a criminal action the court usually appoints a guardian ad litem program to represent the child.

**Representation Provided by Government**

In dependency proceedings and in some cases in delinquency and family law where the court appoints a guardian ad litem the circuit guardian ad litem program provides representation at government expense. In these types of cases private guardians ad litem are not often appointed and generally, no inquiry is made as to the ability of the parents to pay for the guardian ad litem representation. There are currently 21 guardian ad litem programs in the state. These programs operate with funding received from state general revenue, county general revenue, Family Court Trust Fund, Voices for Children Foundation, and other grants or donations. Current funding is approximately \$12.6 million dollars.<sup>11</sup> The programs are governed by standards adopted by the Florida Supreme Court and are assigned to the chief judge of each circuit for day-to-day supervision. Generally, each program has a state funded director, at least one state funded attorney and several volunteer coordinators who oversee the work of the volunteer guardians ad litem. These volunteers are generally not attorneys and there are not sufficient volunteers to meet

<sup>9</sup> Section 39.810(11), F.S.

<sup>10</sup> Section 39.701, F.S.

<sup>11</sup> Estimated Guardian Ad Litem Program funding;

General Revenue	\$7,271,647
County Revenue	3,100,000
Family Court Trust Fund	696,500
Voices for Children	692,500
9 <sup>th</sup> Cir. Pilot Project	535,000
Other	350,000

the need for guardians ad litem. Some circuits have retained staff guardians and additional staff attorneys through either local or grant funding. In total the 21 guardian ad litem programs are staffed with 4,512 active volunteers and 185 staff members consisting of case coordinators, attorneys, support staff, and administrative staff.

The 9<sup>th</sup> Judicial Circuit, covering Orange and Osceola Counties, is operating a pilot project that provides a staff model of a guardian ad litem representation in Osceola County and an enhanced volunteer attorney guardian ad litem model in Orange County. The Orange County program is the only guardian ad litem program in the state run by the Legal Aid Society. The judges in both counties may appoint attorneys to provide direct representation to children where the judge determines appropriate. The Orange County guardian ad litem program is operated privately by the Orange County Legal Aid Society and uses attorneys as the guardian ad litem. Several of the programs including Dade, Broward, and Palm Beach Counties, have arrangements with either a legal aide office, the Lawyers for Children Program or some other private entity to represent children when it is determined that the program can not meet that child's legal needs.

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

CS/CS/SB 686 amends current representation in four major areas:

- Clarifies when a guardian ad litem or attorney will be appointed in a dependency proceeding (either private or provided by government), the access of those appointed representatives to information, and the rights of the child and the guardian ad litem or attorney representing the child.
- Clarifies the role of the guardian ad litem representing a child in a dependency proceeding whether that guardian ad litem is provided at government expense, is a volunteer not associated with government guardian ad litem services or is paid by the child or the child's parents. An attorney appointed to directly represent a child will provide representation in accordance with the Florida Bar Rules.
- Consolidates the government-funded representation of children for dependency proceedings in the Statewide Public Guardianship Office.
- Recognizes that the appropriate representation for children in dependency proceedings varies significantly based on the age and maturity of the child, the legal needs of the child and the type of proceeding. The bill provides the court with the flexibility to adjust representation to the needs of the child, whether provided privately or through a government funded program.

#### **Section by section analysis:**

Section 1. Transfers the Guardian ad Litem Program to the Statewide Public Guardianship Office and renames each circuit guardian ad litem office to the Circuit Office of Children's Representation. A Deputy Director for Children's Representation will be hired by the Director of the Statewide Public Guardianship Office who is an attorney and knowledgeable about dependency law with management experience. The deputy director will supervise each Circuit Office of Children's Representation.

Section 2. Directs the Statewide Public Guardianship Office, in consultation with the judicial branch, Governor's Office, Attorney General, and a representative of the Justice Administrative Commission to study the organizational placement of the Statewide Public Guardianship Office, the Deputy Director for Children's Representation, and the Circuit Offices of Children's Representation and make recommendation to the Legislature by February 1, 2003.

Section 3. Transfers, by type two transfer as specified in s. 20.06(2), F.S., the guardian ad litem program in the Office of the State Court Administrator and in each judicial circuit to the Statewide Public Guardianship Office.

Section 4. Amends s. 25.388 F.S., to authorize the use of funds in the Family Courts Trust Fund to support the dependency representation of children by the public defenders. These funds are currently used to support the family court division of the circuit courts and approximately 12 positions at a cost of \$696,500 are provided to the guardian ad litem programs as part of the family court divisions.

Section 5. Amends s. 744.7021, F.S., to add specific responsibilities regarding children's representation to the Statewide Public Guardianship Office.

Section 6. Amends s. 27.51, F.S., to permit the public defenders to enter into an agreement with the Circuit Office of Children's Representation to provide representation of children in dependency proceedings when the court has determined that the child qualifies for independent counsel under s. 39.8226(2)(b) or (3), F.S.

Section 7. Replaces the Guardian ad Litem Programs with the Circuit Offices of Children's Representation appointed by the Governor in s. 39.001, F.S., for participation in the Department of Children and Family Services (department) planning for prevention of abuse, abandonment, and neglect of children.

Section 8. Amends the definition of party in s. 39.01, F.S., to reference when a child may file documents in a case, and to provide for service of documents. Additionally, the section provides when a child may choose to not appear in court in a dependency action and when the court may prohibit a child from appearing.

Section 9. Amends s. 39.013, F.S., to specify that a child is entitled to representation at each stage of the dependency proceeding under chapter 39, F.S., and for each child, the court shall appoint either a guardian ad litem under s. 39.822, F.S., or an attorney under s. 39.8226, F.S.

Section 10. Amends s. 39.202, F.S., to authorize the guardian ad litem and the child's counsel to obtain copies of confidential reports prepared by the department related to child abuse or neglect.

Section 11. Amends s. 39.302, F.S., to require the department to notify a child's guardian ad litem or attorney if there is a report of institutional child abuse, abandonment or neglect involving the child and requiring that a copy of the final report be furnished to the guardian ad litem or attorney.

Section 12. Section 39.305, F.S., is amended to substitute the Statewide Public Guardianship Office appointed by the Governor for the Guardian ad litem Program in the creation of a model plan for community intervention and treatment of intrafamily sexual abuse.

Section 13. Section 39.402, F.S., is amended to provide for representation of a child at the shelter hearing, including providing the child with the ability to request a postponement of up to 72 hours to obtain representation. This section requires the Circuit Office of Children's Representation to provide representation at the shelter hearing if no other representation is available and provides for notice of all proceedings to the child and, if known, the child's representative or the Circuit Office of Children's Representation.

Section 14. Section 39.407, F.S., is amended to authorize the court to appoint a legal representative for a child being placed in a residential treatment center by the department. Currently, the child must have a guardian ad litem but there is no provision for the appointment of legal counsel if the child is old enough and mature enough to assist in his or her representation. This provision may conflict with proposed amendments to the Florida Rules of Juvenile Procedure currently under review by the court. The proposed rule would require the child to be represented by counsel in all cases.

Section 15. The provisions in s. 39.4085, F.S., related to the development of a case plan for a dependent child, are amended to include greater involvement of the child's guardian ad litem or legal counsel.

Section 16. Repeals the pilot project establishing an attorney ad litem program created in s. 39.4086, F.S.

Section 17. The service of process provisions in s. 39.502, F.S., are amended to provide for service on a child through the child's legal counsel as well as the guardian ad litem.

Section 18. Section 39.504, F.S., is amended to specifically authorize the child's guardian ad litem or legal counsel to petition for an injunction against abuse or neglect on behalf of the child. Currently, the section specifically authorizes the department, law enforcement, or the state attorney to petition for an injunction and then generally allows any other responsible person to petition. This addition will make it clear the child's guardian ad litem or legal counsel may specifically petition avoiding any discussion as to whether they qualify as "other responsible persons."

Section 19. Section 39.505, F.S., is amended to provide that a guardian ad litem is not required to file an answer to a petition in a dependency action but may plead those matters orally at the hearing. This conforms treatment of the guardian ad litem to that of the child and the parents.

Section 20. Amends s. 39.510, F.S., to allow the guardian ad litem or the child's counsel to file an appeal in a dependency proceeding. Currently, only the department or a party affected by an order of the court may appeal and it is not clear that the person representing an affected party such as a guardian ad litem may appeal.

Section 21. Section 39.521, F.S., is amended to require the disposition plan in a dependency action to be served on the guardian ad litem representing the child. The section is also amended to prohibit the court from terminating representation of a child prior to termination of supervision of the child by the department. Currently, it is within the discretion of the court to terminate the guardian ad litem prior to final disposition of the dependency proceeding or prior to termination of the department supervision of the child. This effectively can leave a child unrepresented even though he or she is still in the dependency process.

Section 22. Section 39.701, F.S., is amended to include the right of the child to be present at judicial review hearings and to ensure that the child and the child's legal counsel receive notice of hearings. This section is also amended to allow the court to determine if the current placement of the child is appropriate to protect the child's safety; well-being; and physical, mental, and emotional health.

Section 23. Amends s. 39.801, F.S., to require that notice of the termination of parental rights hearing and copies of all orders must be given to the child and the child's guardian ad litem. Provides for waiver of service of process fees for a child's attorney.

Section 24. Section 39.802, F.S., is amended to allow a child through legal counsel to file for termination of parental rights. Currently, only the guardian ad litem can file this petition on behalf of the child. If the child has counsel without a guardian ad litem it is unclear whether a petition for termination of parental rights can be filed except by the department or some other person who has knowledge of the facts alleged.

Section 25. Amends s. 39.805, F.S., to provide that neither the child nor the child's guardian ad litem are required to file an answer to a petition for termination of parental rights but may plead the claims orally just as the parent and child can now do.

Section 26. Conforms s. 39.806, F.S., regarding the filing of a petition for termination of parental rights with section 24 of the bill to allow the child through legal counsel to file the petition.

Section 27. Section 39.807, F.S., is amended to provide that in a termination of parental rights proceeding a guardian ad litem appointed for a child must represent the best interest of the child. Where private counsel has been appointed that counsel will represent the child and must be appointed in accordance with the requirements of section 35 of the bill.

Section 28. Section 39.808, F.S., is amended to amend the requirement for the appointment of a guardian ad litem in a termination of parental rights proceeding to allow the appointment of an attorney for the child instead. This appointment would be made in accordance with the requirements in section 30 of the bill.

Section 29. Technical changes are made to s. 39.810, F.S., to conform to other changes made in the bill related to the "interest expressed" by the child rather than the "wishes of the child" being considered by the court in dependency proceedings. Further, the bill clarifies what is to be included in the guardian ad litem report to the court.



Section 30. Section 39.811, F.S., is amended to require the court to consider information from the child and the guardian ad litem when determining whether to terminate jurisdiction 6 months after the child is returned home. Currently, the statute directs the court to base a determination on whether the court should terminate jurisdiction on a report from the social service agency and any other relevant factors. There is no specific requirement that the court hear from the child or the guardian ad litem in making that determination and under current law the guardian ad litem could have been terminated and thus not available to appear on behalf of the child. Further, the section is amended to allow the court to review the appropriateness of the placement at the 6-month hearing.

Section 31. Section 39.820, F.S., is amended to remove references to the Guardian ad Litem Program and substitute the Circuit Office of Children's Representation in the definition of guardian ad litem.

Section 32. Section 39.821, F.S., is amended to require background checks on the staff in the Circuit Office of Children's Representation providing representation to children in dependency proceedings.

Section 33. Section 39.822, F.S., is amended to require all guardians ad litem to be either a member of the Florida Bar or reviewed by the Circuit Office of Children's Representation. An individual may be approved by the court as a guardian ad litem for a single case (requiring only a background check) or as a volunteer in a Circuit Office of Children's Representation (requiring a background check and training as provided by the office). The immunity from liability for a guardian ad litem is removed from the section. The section is also amended to require a written report from a guardian ad litem in hearings regarding declaring the child dependant and terminating parental rights.

Section 34. Section 39.8225, F.S., is created to provide the powers and duties for the guardian ad litem appointed to represent a child in dependency proceedings. These provisions apply whether the guardian ad litem is from the Circuit Office of Children's Representation or is appointed as a private guardian ad litem for a specific case.

The section provides:

- 1) The guardian ad litem is to represent the best interest of the child.
- 2) In a dependency action, the best interest to be represented is that interest appropriate to the civil action.
- 3) Counsel must represent the guardian ad litem, except where the Circuit Office of Children's Representation is appointed.
- 4) The Circuit Office of Children's Representation must represent the best interest of the child through a layperson and attorney team.
- 5) In a juvenile or family law proceeding the guardian ad litem is to represent the best interest of the child after:
  - a) investigating the allegations in the pleadings,
  - b) the needs of the child,
  - c) discussing the allegations with the child and legal counsel, and
  - d) after giving significant weight to the expressed interest of the child.

- 6) The guardian ad litem is to file any pleadings, motions, or petitions for relief that the guardian ad litem deems appropriate or necessary in furtherance of the guardian's representation of the child.
- 7) The guardian ad litem may file a written report with the court but must file the report at least 20 days before the hearing or for a report on a stipulation or settlement the report must be filed within 10 days of the stipulation or settlement. In dependency proceedings most reports may be filed 72 hours before the hearing.
- 8) The guardian ad litem may be given a general order to obtain information and may seek certain files, reports, or examinations through court order.

Section 35. Section 39.8226, F.S., is created to provide for appointment of legal counsel for a child and sets out when and how a counsel is appointed.

- The court is authorized to appoint legal counsel to represent a child, in addition to or in lieu of a guardian ad litem in any dependency case where the court determines that the child is of an age and maturity to participate in his or her representation and the child or the child's parents can pay for the representation.
- If the Circuit Office of Children's Representation has been appointed to represent a child in a dependency proceeding the court is authorized to appoint counsel to represent the child in addition to or rather than the office, only when the court finds that the child is of an age and maturity to participate in his or her representation and either the best-interest representation by the guardian ad litem and expressed interest of the child do not coincide or the complexity of the pending case or other legal actions suggest that representation for the child is appropriate.
- Further, the Circuit Office of Children's Representation may petition the court for independent representation for a child in collateral issues where the office does not have the expertise to provide appropriate representation.

Section 36. Section 39.84, F.S., is created to require the guardian ad litem to maintain confidentiality of information received.

Section 37. Section 39.86, F.S., is created to provide immunity for a guardian ad litem, staff or a volunteer representing the Circuit Office of Children's Representation, or court appointed psychologist.

Section 38. Section 40.24, F.S., is amended to allow jurors to donate their jury fee to the Statewide Public Guardianship Office for representation in dependency proceedings instead of the guardian ad litem program as currently authorized.

Section 39. Amends s. 215.5601, F.S., to substitute the director of the Statewide Public Guardianship Office appointed by the Governor for the Director of the Guardian ad litem program on the Lawton Chiles Endowment Fund Advisory Council.

Section 40. Section 985.308, F.S., is amended to remove the Guardian ad Litem program from the sexual abuse intervention network and to add the Statewide Public Guardianship Office.

Section 41. Effective date of October 1, 2002.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The United States Constitution provides a right of privacy to the individual and the family that requires extraordinary circumstances for the state to abridge. Under the 14<sup>th</sup> amendment, parents have a basic right to be free from governmental interference in the common occupations of life, including the right to marry, establish a home and to bring up children. These were found to include raising and instructing the children.<sup>12</sup> The family is also protected under the Due Process Clause, which provides protections to those liberty interests so rooted in the traditions and conscience of our people as to be ranked as fundamental.<sup>13</sup> Protection of the rights of the family has also been found in the ninth amendment. The rights of a family fall within those fundamental personal rights that are protected from abridgment by the Government though not specifically mentioned in the Constitution.<sup>14</sup>

The constitutional right to have and raise children free from government interference includes certain responsibilities to protect the welfare of the children.<sup>15</sup> Where a natural parent demonstrates a sufficient commitment to his or her child the parent is entitled to raise the child free from undue state interference.<sup>16</sup> Along with the right to control the education of their children parents are charged with the “high duty, to recognize and prepare [the child] for additional obligations.”<sup>17</sup>

Where the parent is meeting his or her obligations to the child, this right to have and raise children may not be interfered with by government action except where there is a reasonable relation to some purpose within the competency of the state to effect.<sup>18</sup> The Supreme Court has carefully examined any governmental intrusion on choices

<sup>12</sup> *Meyer v. Nebraska* 262 U.S. 390, 43 S.Ct. 625, 67 L. Ed. 1042 (U.S. 1923).

<sup>13</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L.Ed. 674 (1934), *Michael H. v. Gerald D.* 491 U.S. 110, 109 S. Ct. 2333 105 L.Ed. 2d 91 (1989).

<sup>14</sup> *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 1688, 14 L.Ed. 2d 510, (1965), *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 2943 111 L.Ed. 2d 344 (1990).

<sup>15</sup> *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 2991 77 L.Ed. 2d 614, (1983).

<sup>16</sup> *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 2943 111 L.Ed. 2d 344 (1990).

<sup>17</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 573, 69 L.Ed. 1070 (1925), *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645 (1944).

<sup>18</sup> *Meyer v. Nebraska* 262 U.S. 390, 43 S.Ct. 625, 626 67 L.Ed. 1042 (U.S. Neb. 1923).

concerning the family to determine the governmental interests advanced and the extent to which those governmental interests are served by the challenged regulation.<sup>19</sup>

Florida courts have also recognized the right of parents to have the custody, fellowship and companionship of their children.<sup>20</sup> However, this right of the parents must be limited to protect the ultimate welfare or best interest of the child.<sup>21</sup> The child's right to be free of physical and emotional violence "at the hands of his or her most trusted caretaker"<sup>22</sup> will override the right of parents to their children. However, this does not mean that when the child objects to the parent's decision or when the decision may entail some risk the state has the right to intercede.<sup>23</sup> In making its determination to appoint independent counsel or a guardian ad litem for a child the court must first determine that the appointment is appropriate to protect the child or that the interests of the child and of the parent are sufficiently diverse that the parent can no longer adequately represent the interest of the child.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill may require parents involved in dependency proceedings who can afford to pay for an attorney or guardian ad litem for their child or children to make those payments to a court appointed attorney or guardian ad litem rather than have a government subsidized guardian ad litem.

### C. Government Sector Impact:

The estimates of expenditures and costs below are based on the 12,824 dependency petitions filed during calendar year 2000. Additionally, the number of petitions is not reduced for any portion of the petitioners who may not be indigent. The number is based on the public defender representing every child for whom a dependency petition was filed without regard to indigency criteria.<sup>24</sup> Indigency is currently evaluated for representation of the parents so a determination as to the child will require additional paperwork.

<sup>19</sup> *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 2943, 111 L. Ed. 2d 344 (1990).

<sup>20</sup> *Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957), *Padgett v. Department of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991).

<sup>21</sup> *Id* at 570.

<sup>22</sup> *Id* at 570.

<sup>23</sup> *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

<sup>24</sup> The bill requires the application of indigency criteria but there is no data on which to base an estimated cost reduction. Anecdotally, representatives of the guardian ad litem programs have indicated most of the families will be considered indigent.

Estimated staffing needs to provide representation for 100 petitions are:

1 Program Attorney  
1.67 Case Coordinators<sup>25</sup>  
.75 of a Senior Secretary

To provide representation in 12,824 cases under the bill would take:

128 Attorneys  
214 Case Coordinators  
96 Senior Secretaries

The current state funded guardian ad litem staffing includes:

41 Attorneys  
96.5 Case Coordinators  
40 Senior Secretaries

Additional staff needed to provide representation to the 12,800 cases:

87 Attorneys  
117 Case Coordinators  
56 Senior Secretaries

The cost to provide the additional staff based on current salary and benefit levels is estimated for FY 2002-03 to be \$10,602,067 for 9 months. The cost for FY 2003-04 is estimated to be \$12,415,432. Because this cost is based on a representation model the cost for conflict counsel should be at least partially whether these amounts.

These cost figures do not include the \$3,100,000 counties are currently providing to fund these programs or other grants of \$350,000 the programs currently receive. If those funds continue to flow to the programs the cost of the programs would be reduced below the \$10.6 million and \$12.4 million listed above.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>25</sup> This ratio is based on the case coordinator supervising some volunteers handling cases and directly handling some cases.