



The Florida Senate

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Committee on Judiciary

Senator Locke Burt, Chairman

LEGAL NEEDS OF CHILDREN

SUMMARY

In attempting to protect the rights of children in the court system the court's have struggled to blend protections for the integrity of the family, the rights of the parent and the rights of the child. This has resulted in rules related to the status of a child in the court system and the type of representation to which that child is entitled that vary depending on the type of action in which the child appears.

In delinquency cases the child who is competent to stand trial is provided his or her own counsel. However, that same child in a dependency, family law, or civil case may not be represented by counsel, but is represented by a guardian ad litem or next friend who represents the best interest of the child not the expressed interests of the child.

In any revision to the methods of representing children in legal proceedings the focus should remain on the basic goals of preserving the integrity of the family, protecting the constitutional right of parents to raise their children free from government interference and, within the context of those two goals, protecting the right of children to be free from abuse and neglect.

Florida law and court rules must provide that every child has a right to representation in legal proceedings whether by the child's parents or guardian or by a court appointed advocate. A guardian ad litem should be appointed unless the court is shown that the child is capable of participating in his or her representation in a traditional attorney client relationship and the parents are funding the legal representation or there is a reason for the state to specifically fund independent legal representation for the child.

An Office of Public Advocacy should be established to provide representation for children from indigent families or children who would not otherwise be represented in court. The office should be independent of the oversight of the courts and should consolidate

representation of children in delinquency, dependency, and family law actions to coincide with the court's consolidation of those issues in the unified family court. This office should consolidate current resources located in the 21 guardian ad litem offices, resources in the public defender's offices performing delinquency representation and resources in the State Court Administrator's Office providing guardian ad litem program oversight. Once created the office should evaluate and report on the need for additional resources to provide representation for children.

BACKGROUND

In 1999-2000 there were over 48,000 children involved in Florida's child protection system and over 100,000 children were referred to the Department of Juvenile Justice. In addition to these direct actions, children's lives are impacted by our judicial system through actions related to custody, visitation, child support, civil commitment and domestic violence. Children are also found as parties in tort, contract, probate, and other civil actions. In each instance, the status of the child in the litigation and the manner of representation of the child's interests in the various types of actions has independently evolved through statutes, common law, and court rules.

During the 2001 interim, the President of the Senate directed staff of the Senate Judiciary Committee to investigate the issue of child representation, report to the Legislature on the status of representation and make recommendations for clarifying the roles of participants in the process.

METHODOLOGY

In preparing this report staff has extensively reviewed case law and academic and legal analyses of the representation of children covering the last thirty years. Additionally, staff attended CLE classes over three days to hear from nationally recognized professionals representing children and to hear from Florida lawyers

and guardians ad litem actively working in this area of law. Staff has attended court hearings and spent one day with a guardian ad litem visiting clients, a foster home and the Department of Children and Families. Staff has interviewed numerous individuals working in the area of child representation including the Secretary of the Department of Children and Families, judges and hearing officers handling family law and dependency cases, guardians ad litem, attorneys providing representation, directors of guardian ad litem programs, program attorneys, and legal aide attorneys.

FINDINGS

A Child's Legal Rights In Context of the Family

The United States provided in its constitution a right of privacy to the individual and the family that requires extraordinary circumstances for the state to abridge those rights. The constitutional right to have and raise children free from government interference includes certain responsibilities to protect the welfare of the children.¹ 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.²

Florida courts have recognized the right of parents to have the custody, fellowship and companionship of their children.³ The courts have also recognized that this right of the parents must be limited to protect the ultimate welfare or best interest of the child.⁴ The child's right to be free of physical and emotional violence "at the hands of his or her most trusted caretaker"⁵ will override the right of parents to their children.

In conjunction with the parental controls and responsibilities the courts have recognized that a minor also has individual constitutional rights. However, a government's authority over minors "reaches beyond the scope of its authority over adults."⁶

The Court in *Bellotti v. Baird*⁷, provided extensive analysis of the rights of children and the exercise and protection of those rights in the court system. The court recognized three reasons for concluding that the constitutional rights of children cannot be equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."⁸

The courts have struggled to blend protections for the integrity of the family, the rights of the parent and the rights of the child. This has resulted in rules related to the status of a child in the court system and the type of representation to which that child is entitled that vary depending on the type of action in which the child appears.

In Florida, the courts have held that minors do not generally have the capacity to sue. Thus, the child seeking access to the courts must overcome this issue of capacity to sue. This has been accomplished by allowing an adult to represent the child. When the child and his or her parents share an interest in the issue before the courts, the courts will allow the parents to represent the interest of the child.⁹ Only when the interests are determined to be adverse is there an issue of due process for the child.¹⁰ The particulars of how these issues are addressed are governed by the Florida Rules of Procedure adopted by the Florida Supreme Court, Florida Statutes, and case law.

Current Representation of A Child In Florida

In 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. 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.¹¹

¹ *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 2991 77 L.Ed. 2d 614, (1983).

² *Meyer v. Nebraska* 262 U.S. 390, 43 S.Ct. 625, 626 67 L.Ed. 1042 (U.S. Neb. 1923).

³ *Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957), *Padgett v. Department of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991).

⁴ *Id* at 570.

⁵ *Id* at 570.

⁶ *Cary v. Population Services, International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L.Ed. 2d 675 (1977), *Prince v.*

Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 443, 88 L.Ed. 645 (1944).

⁷ *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed. 2d 797 (1979).

⁸ *Id* at 3043.

⁹ *Mistretta v. Mistretta*, 566 So. 2d 836 (Fla. App. 5 Dist. 1990)

¹⁰ *Id.*

¹¹ *Kingsley* at 784.

Further, the courts have stated that these protections cannot be assured simply by providing the minor with his or her own counsel.¹²

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.¹³ 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.¹⁴

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 Actions Brought Under the Family Law Rules of Procedure

Actions related to family matters include most domestic violence actions, dissolution of marriage, paternity, child support, visitation, adoption, and all proceedings for modification, enforcement, and civil contempt of these actions.

Where a child is a party he or she must be represented by a guardian, guardian ad litem, or next friend.¹⁵ Though this is the general rule, the child is not a necessary party in a dissolution or custody case.¹⁶ However, in an action for dissolution of marriage, modification, parental responsibility, custody, or visitation the court may appoint a guardian ad litem or attorney where the court finds it is in the best interest of the child.¹⁷ The court may appoint the guardian ad litem to act as the next friend for the child, the evaluator, or the investigator. This person may not be appointed to act as an attorney or an advocate for the child but must act in the child's best interest. When the court appoints legal counsel for a child that individual is to act as an attorney or an advocate for the child.¹⁸ There is no guidance in the statutes for when a

guardian ad litem should be appointed versus when an attorney or when both should be appointed to represent different interests of the child.

Pursuant to Florida Rules of Juvenile Procedure

Actions related to delinquency, dependency, and children and families in need of services are governed by the Florida Rules of Juvenile Procedure.

Delinquency

In delinquency proceedings, the court has jurisdiction over the child and the child's parent(s) or guardian.¹⁹ If the child's parent(s) cannot be located, evades or fails to obey the summons, or are located in another state, the court must appoint a guardian ad litem, if appropriate.²⁰ There is no guidance in the statute or court rules regarding when it is appropriate to appoint a guardian ad litem or the duties or authority of the guardian ad litem when appointed.

The child is constitutionally entitled to legal representation when the action will involve relinquishing the child's liberty interest.²¹ Section 985.203, F.S., provides every child with a right to counsel at all stages of the delinquency proceeding. However, the child may waive counsel in writing except where it appears that the child is unable to make an intelligent and understanding choice because of mental conditions, age, education, experience, the nature or complexity of the case, or other factors.²²

Families and Children in Need of Services

Chapter 984, F.S., was enacted to assist families having serious problems with their children by providing them with an array of services designed to preserve the unity and integrity of the family and to emphasize parental responsibility for the behavior of their children.²³

Rule 8.617, Florida Rules of Juvenile Procedure, and s. 984.17, F.S., provide that at any stage of the proceeding any party may request, or the court may appoint, a guardian ad litem to represent any child alleged to be in need of services or from a family in need of services. The guardian ad litem must be an attorney or other responsible adult. He or she must

¹² *Id* at 784.

¹³ *Garner v. I.E. Schilling Co.*, 174 So. 837 (Fla. 1937).

¹⁴ *Brown v. Ripley*, 119 So.2d 712 (Fla. 1 Dist. 1960).

¹⁵ Rule 12.210, Family Law Rules of Procedure, and rule 1.210, Florida Rules of Civil Procedure.

¹⁶ Rule 12.210, Florida Family Law Rules.

¹⁷ Section 61.401, Florida Statutes.

¹⁸ Section 61.403, Florida Statutes.

¹⁹ Section 985.201, Florida Statutes.

²⁰ Section 985.218(7) F.S., Rule 8.170, Florida Rules of Juvenile Procedure.

²¹ *Gault*, Application of, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

²² See also s. 985.203 Florida Statutes.

²³ Section 984.04, Florida Statutes.

investigate the allegations of the petition and file a written report with the court stating the wishes of the child and the guardian's recommendations.

Dependency

Florida dependency proceedings are governed by federal requirements, ch. 39, F. S., and Florida Rules of Juvenile Procedure. In these actions "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.²⁴ The guardian ad litem must be a responsible adult and may or may not be an attorney, or a certified guardian ad litem program.²⁵

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.²⁶ There is not generally an ability to represent the child at the shelter hearing because the guardian ad litem is not appointed until that hearing. Further, generally there is no guardian ad litem available for appointment so the child moves through the process without representation.

Models Used by Florida or Other States to Provide Representation to a Child

Guardian Ad Litem Representation

Guardian ad litem representation can be provided by court appointment of a person as guardian ad litem outside of an organized guardian ad litem program or court appointment of a program. Generally, the court

²⁴ Rule 8.210, Florida Rules of Juvenile Procedure and section 39.0015(51), Florida Statutes.

²⁵ Fla. R.Juv.P. 8.215.

²⁶ *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).

appoints an independent guardian ad litem in civil cases and appoints a guardian ad litem program in family, delinquency, and dependency cases. The guardian ad litem then provides representation to the child in accordance with the court order and statutes governing the specific action. No statutory direction is provided to the guardian ad litem regarding representation in delinquency or civil actions and in family cases the guardian ad litem is simply an investigator for the court.

Where a private individual is appointed there are not specified qualifications beyond what may be required in the specific statute and there is generally no background check required. Some statutes require the guardian ad litem to be an attorney and others do not specify any qualifications.

Where a guardian ad litem program is appointed, the program appoints certified guardians ad litem who have received at least 30 hours of training. However, interviews with program administrators and staff of the Office of State Courts Administrator indicated that the pool of volunteers has not grown at a rate to allow the assignment of a guardian ad litem in every case assigned to the program. In calendar year 2000 the guardian ad litem programs provided representation to 7,024 cases. However, this has provided representation to only 58 percent of the cases to which the court appointed the guardian ad litem programs and only 36 percent of the petitions for dependency have a guardian ad litem assigned. The guardian ad litem model is used by the 21 guardian ad litem programs in Florida.

Attorney Ad Litem Representation

The Attorney ad litem model of representation usually involves legal representation with a best interest of the child standard. The attorney is appointed by the court to provide legal representation to the child but that legal representation must advocate for what is in the "best interest" of the child even if that is not what the child wants. For the attorney to represent the best interest of a child the attorney may be placed in a position of violating Florida Bar Rules requiring the lawyer to abide by the client's decisions concerning the objectives of representation.²⁷

The American Bar Association has not supported this model of representation because of the ethical conflicts and representation conflicts it presents for the attorney.

²⁷ Rule 4-1.2 Scope of Representation, Rules Regulating the Florida Bar.

Currently, thirteen other states do use this model of representation.²⁸

Traditional Client Directed Representation

The attorney representing a child who does not have a guardian ad litem or next friend to make decisions related to the case must provide representation under rule 4-1.14, Client Under a Disability.²⁹ That rule requires the lawyer to maintain a normal attorney client relationship to the extent possible where the client's ability to participate in the case is impaired. Only when the attorney determines the client cannot act in his or her own best interest may the lawyer seek the appointment of a guardian ad litem or take other protective action with respect to a client.

When assigned a child client the attorney must evaluate each client to determine to what extent he or she has the maturity and understanding to act in a normal attorney client relationship. The comment to the rule recognizes that where the attorney cannot under the rule seek appointment of a guardian ad litem the attorney may be forced to act as de facto guardian. Based on the ability of the child, this representation varies from full client representation to an attorney ad litem representation. The court may not know which type of representation the attorney is providing.

Attorney and Guardian Ad Litem Blended Models

Currently eighteen states are using some form of a blended model.³⁰ In most instances the child is represented by a guardian ad litem who is directed to represent the best interest of the child and by an attorney directed to represent the wishes of the child and provide traditional advocacy for the child. In some states the appointment of the guardian ad litem is dependent on a determination that the child is incompetent to work with the appointed attorney. This model requires the state to fund two advocates for the child who may be advocating different positions for the child.

The 9th Judicial Circuit Pilot Project

Section 39.4086, F.S., established the attorney ad litem pilot project in the 9th Judicial Circuit, which is composed of Orange and Osceola Counties. This is a blended model providing two advocates for the child.

Attorneys ad litem may be appointed for children at the court's discretion or upon motion of a party. Attorneys

ad litem in this project represent the child's wishes for purposes of proceedings under Chapter 39, so long as the child's wishes are consistent with the child's safety and well-being. The appointment of an attorney ad litem occurs in addition to the mandated appointment of a guardian ad litem, who is assigned to advocate for the best interest of the child.

The attorney ad litem program with Barry University School of Law is currently providing legal representation to 101 children. These children were selected by the judges based on each judge's assessment of the value of providing independent counsel. No criteria were established for appointment of an attorney ad litem. This was done to allow a case-by-case evaluation that could later be used to determine the effectiveness of representation and then develop criteria for appointment.

RECOMMENDATIONS

The focus of legal representation for children should remain on the basic goals of preserving the integrity of the family, protecting the constitutional right of parents to raise their children free from government interference and within the context of those two goals protecting the right of children to be free from abuse and neglect. Where the child's interests are not adverse to the interests of the parents, the parents should act as next friend to the child in litigation or assist the child in the legal process through retaining counsel or working with appointed counsel. Where the court determines that the child and the parents' interests are adverse or the parents refuse or are unable to protect the child's rights and interests, the court has a duty to protect the best interest of the child. In these circumstances statute and court rule should clearly state the process to protect the right of a child to representation in legal proceedings, the type of representation to be provided, the role and responsibilities of the representative, how the representative should be compensated, and the structure and responsibilities of a publicly funded system of representation.

Florida Statutes should clarify the child's right to representation in specific types of cases.

- In a family law case the court should not interfere with the parents' right to direct their child unless the court determines the child's interest are adverse to the interests of the parents. Where the interests are determined to be adverse, a guardian

²⁸ See Appendix A.

²⁹ Rules Regulating The Florida Bar.

³⁰ Appendix A.

ad litem represented by an attorney or an attorney should represent the child.

- In delinquency proceedings, the child should be provided representation through an attorney either retained by the child or the child's parents or provided by the state to continue to ensure compliance with constitutional requirements. No child should be allowed to waive counsel until after the child has had the opportunity to be advised by an attorney. Where the court finds the child competent to stand trial but not competent to participate in his or her defense the court may appoint a guardian ad litem or the child's parents to assist in representation.
- In dependency proceedings the court should be directed to appoint the Office of Public Advocacy or other guardian ad litem having legal representation, for each child having an issue before the dependency court, unless the court specifically ensures the child has other adequate representation. The appointment of the Office of Public Advocacy or other guardian ad litem having legal representation must be made at or before the shelter hearing and representation by a guardian who is represented by an attorney, or an attorney or other appropriate staff from the Office of Public Advocacy must be present during the shelter hearing.
- In a dependency proceeding, the court may find that the child has the maturity and intelligence to work within a traditional attorney client relationship and the court may find that counsel the child has retained privately is providing adequate representation and no guardian ad litem is necessary. Further, the court may determine that because of the complexity of the case or because of other significant legal issues, a child should be appointed independent counsel rather than or in addition to a guardian ad litem.
- Generally, in civil proceedings the court should appoint a guardian ad litem or next friend having legal counsel or legal counsel for the child. However, in probate proceedings the role of the guardian ad litem should remain as it currently is. The representation should be provided under the same criteria as for any other action with recovery for expenses of the guardian and any legal counsel paid from the estate where appropriate.

Florida Statutes should clearly specify the role and responsibilities of the Guardian ad litem in representing a child.

- The guardian ad litem and counsel representing children in any court action should be directed by statute to ensure that the court has sufficient information related to the child to rule on the "manifest best interest of the child." Representation should be focused on advocacy for the child and where appropriate the child should be involved and consulted in all decisions related to the action or actions impacting the child. Every child should be afforded the opportunity to attend all hearings, mediations or other proceedings related to the case except where the child is not of an age or capacity to understand the proceedings or to participate in decision making related to the proceeding. Every child should, however, have the right to refuse to attend any proceeding except delinquency proceedings and children and families in need of services proceedings unless the court determines the child's presence is necessary.

The trial courts should be provided additional flexibility in appointing representation to children.

- The court should have the ability to broaden those persons who can be appointed as a guardian ad litem. The court should have the authority to appoint family members or friends of a child as a guardian ad litem and to have the guardian ad litem or the legal representation for the guardian funded by the child, the child's parent or guardian or other person willing to pay for the representation. A guardian ad litem appointed pursuant to this provision should have a background check performed through the Circuit Office of Public Advocacy and that office should provide abbreviated training or informational materials on the roles and responsibilities of the guardian ad litem.
- The court should have the authority to appoint counsel to represent a child without a guardian ad litem or next friend where the court has determined that the child has the maturity to participate in his or her representation.

A statutory framework should be provided for oversight and coordination of representation for indigent children.

- A government funded Office of Public Advocacy should be established to provide representation to children who meet specified indigency criteria or the court determines cannot be otherwise represented. This office should provide guardian ad litem representation of the best interest of the child with both lay guardians ad litem and attorney representation for the guardian ad litem.
- At the statewide level the Office of Public Advocacy should consist of a small staff to develop policy and guidelines, to assist in developing training materials, and to consolidate assessment functions for the circuit offices. The Office of Public Advocacy should be located within the judicial branch and the Joint Administrative Commission should provide budget and administrative oversight of the office in the same manner they provide those services to the public defenders and state attorneys.
- The state office should provide oversight to the local programs to ensure consistent representation to children throughout the state and to facilitate budgeting for consistent levels of advocacy for children and consistent performance standards and measures throughout the state.
- The state office should also establish a not for profit direct support organization to assist the office with the solicitation of funds to provide independent legal services to children. This should include support for the costs of litigation and the provisions of special services to the local offices of public advocacy, to assist in recruiting and recognizing volunteers and to provide funding for the needs of children that are not currently funded through the foster care or family care funding systems.
- A Circuit Office of Public Advocacy should be established in each judicial circuit. Each circuit office should consist of an administrator, attorneys (either staff or pro bono or both), social workers, volunteer coordinators, volunteers and support staff based on the level of representation needed in that circuit. These staff positions currently exist in every circuit in the 21 guardian ad litem programs in the state which are currently staffed with 181 staff and over 4,500 volunteers and there are approximately 250 positions allocated in the public defenders offices for delinquency representation.
- The circuit offices should provide and coordinate the provision of representation to children in each aspect of court where private counsel is not available to the child. The offices should provide representation to every child not otherwise represented who is appearing in dependency or delinquency court. Representation should be provided as requested by the court and in accordance with statutory criteria where a domestic violence injunction has been filed related to violence against the child, and in disputed custody, visitation, and child support cases. Additionally, the court should continue to have the authority to appoint a guardian ad litem in accordance with law for a child who is a witness in specified criminal cases.
- For a child represented by the public advocacy office a process should be established for the appointment of independent counsel to represent the child in family law and dependency proceedings. Before appointing independent counsel the court should determine that, the child is competent to participate in representation and that because of the complexity of the case or other legal issues related to the child better representation of the child can be provided by independent counsel.