

**Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis**

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

Proposal #: P 40

Relating to: DECLARATION OF RIGHTS, creates new section

Introducer(s): Commissioners Keiser and Cox

Article/Section affected: Article I, New Section

Date: January 24, 2018

	REFERENCE	ACTION
1.	<u>DR</u>	<u>Pre-meeting</u>
2.	<u>JU</u>	<u></u>

I. SUMMARY:

Dependency proceedings are adversarial legal proceedings that are initiated by the state based upon probable cause to believe a child is, has been, or is at imminent risk of being abused, abandoned, or neglected. In dependency proceedings, the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the state's compelling interest to protect children from neglect or abuse.

All parents in dependency proceedings are constitutionally entitled to counsel, and indigent parents are entitled to appointed counsel. However, no provision in Florida law or rule requires appointment of counsel for dependent children unless the child has certain medical needs. Children in dependency proceedings are largely represented by Guardian ad Litem (GAL). GALs are trained volunteers who are supported by a GAL attorney and a child advocate; together the team represents the best interests of the child in the proceeding.

The proposal establishes a constitutional right to counsel for children in dependency proceedings.

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Chapter 39, Florida Statutes, governs dependency proceedings in the State of Florida. Dependency proceedings are usually initiated upon a child being sheltered (i.e., removed from the parents' custody) based on probable cause to believe the child is, has been, or is at imminent risk of being abused, abandoned, or neglected. These are adversarial legal proceedings where the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the state's compelling interest to protect children from neglect or abuse.¹ The child is also a party to these proceedings² and is vested with rights under ch. 39, F.S., including the right to a permanent home.³ Children, therefore, have a critical stake in the outcome of dependency proceedings.

Dependency Proceedings

The dependency process begins with an investigation into a report of child abuse, abandonment, or neglect.⁴ The report is referred to a child protection investigator in the Department of Children and Families (DCF) who conducts an on-site investigation of the alleged abuse, neglect, or abandonment.⁵ Based on the results of the investigation, a petition may be filed by DCF requesting the court place the child in shelter and seeking adjudication that the child is dependent and should be placed in the state's care⁶ When a child is placed in the state's care, the state "acts in the protective and provisional role of in loco parentis" for the child.⁷ Upon the filing of a petition for dependency, whether or not the child is taken into custody,⁸ the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.⁹

A child is dependent if the child:

- Has been abandoned, abused, or neglected by the child's parent(s) or legal custodian(s);
- Has been surrendered to DCF or a licensed child-placing agency for adoption;
- Has been voluntarily placed with a licensed child-caring agency, licensed child-placing agency, an adult relative, or DCF, pursuant to an action under ch. 39 and the parent(s) or legal custodian(s) have substantially failed to comply with the case plan at the time of its expiration;

¹ William A. Booth, *The Importance of Legal Representation of Children in Chapter 39 Proceedings*, THE FLORIDA BAR FAMILY LAW SECTION: COMMENTATOR (Fall 2010), p. 31, available at www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf.

² s. 39.01(52), F.S.

³ ss. 39.001(1)(h) and 39.0136(1), F.S.

⁴ s. 39.301(1), F.S.

⁵ *Id.*

⁶ s. 39.501, F.S.

⁷ *Buckner v. Family Services of Central Florida, Inc.*, 876 So. 2d 1285 (Fla. 5th DCA 2004).

⁸ s. 39.402, F.S.; A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care. If a child is taken into custody, a hearing is held within 24 hours.

⁹ s. 39.507(1)(a) and (b), F.S.

- Has been voluntarily placed with a licensed child-placing agency for subsequent adoption with the parent(s) consent;
- Has no parent or legal guardian capable of providing supervision and care;
- Is at substantial risk of imminent abuse, abandonment, or neglect by the parent(s) or legal custodian(s); or
- Has been sexually exploited and has no parent, legal custodian, or responsible adult relative currently known and capable of providing for the care, maintenance, training, and education of a child.

If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.¹⁰ At this hearing, the court also reviews and approves a case plan outlining services and desired goals, such as reunification with the family or another outcome, for the child.¹¹ The court holds periodic judicial reviews, generally every six months, until supervision is terminated, to determine the child's status, the progress in following the case plan, and the status of the goals and objectives of the case plan.¹² After twelve months, if the case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.¹³

Right to Counsel in Dependency Proceedings

In 1980, the Florida Supreme Court in *In Interest of D.B.*, 385 So. 2d 83 (Fla. 1980), held that there is no constitutional right to counsel for the child in a juvenile dependency proceeding. In general, the federal¹⁴ and state approach to represent the needs of children in the dependency system relies upon the appointment of Guardian ad Litem (GAL).¹⁵ There are approximately 25,600 children currently represented by the Statewide Guardian ad Litem Program.¹⁶ Section 39.822(1), F.S. requires the court to appoint a GAL at the earliest possible time to represent a child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal. A child represented by the Statewide Guardian Ad Litem Office is assigned a volunteer who is supported by an attorney and a child advocate; together this team represents the best interests of the child in dependency proceedings.

¹⁰ s. 39.521(1), F.S.

¹¹ s. 39.521(1)(a), F.S.

¹² s. 39.521(1)(c), F.S.

¹³ s. 39.621(1), F.S.

¹⁴ The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing guardian ad litem to represent the child's best interest in every case of child abuse or neglect which results in a judicial proceeding. 42 U.S.C. ss. 5101 *et seq*

¹⁵ "Guardian ad litem" as referred to in any civil or criminal proceeding includes the following: a certified guardian ad litem program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members 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 provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court. s. 39.820(1), F.S.

¹⁶ Statewide Guardian Ad Litem Program, Analysis of CRC Proposal 40, Dec. 5, 2017, pg. 4 (on file with the Declaration of Rights Committee).

Children with Special Needs

In 2014, the legislature established a right to counsel for a limited class of dependent¹⁷ children with special needs. Section 39.01305, F.S., requires a court to appoint an attorney for a dependent child who:¹⁸

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed a psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability;¹⁹
- Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- Is a victim of human trafficking.²⁰

An attorney who is appointed under s. 39.01305, F.S., must provide the dependent child with the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings.²¹ However, with the court's permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings. The appointment of the attorney continues in effect until the attorney is allowed to withdraw, is discharged by the court, or the case is dismissed.

Before making an appointment under s. 39.01305, F.S., the court must first consult the Statewide Guardian Ad Litem Office to determine if an attorney is available and willing to represent the child pro bono. If such an attorney is available within 15 days of the court's request, the court must appoint a pro bono attorney.²² If unavailable, the court must appoint and compensate an attorney or organization and provide the attorney or organization with access to funding for expert witnesses, depositions, and other costs of litigation. Appointments of compensated counsel must be made through a court registry.²³ Fees (does not include due process costs) for appointed attorneys may not exceed \$1,000 per child, per year.²⁴ Compensation is paid irrespective of the number of case numbers that may be assigned or the number of children involved.²⁵

B. EFFECT OF PROPOSED CHANGES:

The proposal establishes a constitutional right to counsel for every child who has been removed from the custody of his or her parents or a legal guardian by the state due to abuse or neglect, or is otherwise placed in the jurisdiction of the dependency court.

¹⁷ For purposes of s. 39.01305, F.S., "dependent child" means a child who is subject to any proceeding under ch. 39, F.S. The term does not require that a child be adjudicated dependent.

¹⁸ s. 39.01305, F.S.

¹⁹ "Developmental disability" means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. s. 393.063(9), F.S.

²⁰ "Human trafficking" means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. s. 787.06(2)(d), F.S.

²¹ s. 39.01305, F.S.

²² s. 39.01305(4)(a), F.S.

²³ s. 27.40, F.S.

²⁴ s. 39.01305(5), F.S.

²⁵ s. 27.5304(6)(a), F.S.

If approved by the voters, the proposal will take effect on January 8, 2019.²⁶

C. FISCAL IMPACT:

The bill has an indeterminate but perhaps significant recurring negative impact on state expenditures. The expansion of the right to counsel for dependent children may result in a significant increase in court-appointed attorneys and, correspondingly, costs for fees. The Department of Children and Families reports that in FY 2016-17, 53,661 children had active dependency court cases.²⁷ If counsel had been appointed for each of these children and the counsel had been compensated at the rate of \$1,000 per child per year established in s. 39.01305, F.S., the fiscal impact of the proposal for FY 2016-17 would have been \$53,661,000.²⁸

In Fiscal Years 2014-2017, approximately 3,084 attorneys were appointed to represent dependent children with special needs pursuant to s. 39.01305, F.S. During these years, approximately \$3,532,917 was paid in attorney fees and \$26,842 in due process costs for this case type.²⁹

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

Section 39.01305, F.S., which establishes a statutory right to counsel for children with special needs, contemplates that the counsel will represent the dependent child in proceedings under Chapter 39, F.S., fair hearings, and appellate proceedings. The proposed revision to the State Constitution does not contain a similar definition of the types of proceedings in which the appointed counsel will represent the child.

D. Related Issues:

None.

²⁶ See FLA. CONST. ART XI, S. 5(E) (1968) (“Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.”)

²⁷ Department of Children and Families, Analysis of CRC Proposal 40, Nov. 27, 2017 (on file with Declaration of Rights Committee).

²⁸ *Id.*

²⁹ Justice Administrative Commission, Analysis of CRC Proposal 40, Jan. 8, 2018, pg. 7 (on file with Declaration of Rights Committee).