Constitution Proposal Analysis

PROPOSAL: 0040

SPONSOR: Belinda Keiser

SUBJECT: Establishes a right to counsel for children in dependency proceedings.

REFERENCES: Declaration of Rights, Judicial

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I. SUMMARY

Commissioner Keiser proposes to add a new section to Article I of the Florida Constitution that will provide children in Chapter 39 dependency proceedings with the right to counsel. The proposal states:

> Right to counsel for children in dependency proceedings.
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> 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, has a right to counsel.

Currently these children have party status in the legal proceedings that address their fundamental constitutional interests. Section 39.01(52), Florida Statutes. Children are permitted to have counsel appear for them, but they are not guaranteed the right to court-appointed counsel. The other parties to the proceeding, including indigent parents, have state-funded counsel. Given the fundamental liberty interests at stake when children are removed from their home, this proposal, if enacted, will promote their due process rights by giving them counsel.

This proposal has a net positive fiscal impact. It will require approximately $20 million in additional expenditures to provide counsel to the 90% of children who are currently without counsel. The state will save approximately $39 million in reduced payments for licensed out-of-home care. Moreover, the state can anticipate additional long-term savings to the state in areas such as child welfare, social services, health care, education and criminal justice.

II. CURRENT SITUATION

Overview of Florida Dependency Law

Chapter 39 of Florida Statutes directs the care and protection of minor children who may be victims of abuse or neglect.[1] It requires the dependency court to decide several issues that affect a child's life. The dependency judge first determines whether there is sufficient evidence of abuse or neglect to remove children from their parents. The judge then may decide to adjudicate the children "dependent" on the state and approve a case plan with services designed to remedy the causes for removal so that children may be safely reunified within a 12-month statutory timeframe. However, the judge may also decide that grounds for termination of parental rights exist, that the children cannot be safely returned and that adoption is in the best interests of the children.

Florida's dependency courts have an ongoing responsibility to ensure that the myriad of Florida's laws protect children's safety, ensure their well-being and speed them to permanency. The role of the court has been described as "judicial oversight by a judge who is not merely an unbiased judicial fact finder, but instead actively oversees the proceedings. . . ." *J.B. v. DCF*, SC 14-1990 (Fla. July 9, 2015) pg. 31 concurring opinion of J. Pariente quoting brief of the Guardian ad Litem Program.

There are four parties to a dependency case: the state, the parents, the children and the guardian ad litem.

- The state is represented by Department of Children and Families – Children's Legal Services or contracted providers. Fla. Stat. 39.013(12). Before 1990, the state was often represented by social workers, but that was deemed the unlicensed practice of law. *The Florida Bar Re: Advisory Opinion, HRS Non-lawyer Counselor*, 14 F.L.W. 253 (Fla. May 25, 1989).

- Indigent parents have a Florida constitutional right to counsel when facing termination of parental rights. That right was solidified in the 1980 Florida Supreme Court opinion in *In re D.B. and D.S.* 385 So. 2d 83 (Fla. 1980). In 1998 the Florida Legislature expanded parents' right to counsel by providing indigent parents with the right to counsel in all dependency proceedings. Section 39.013, Florida Statutes. (Laws of Florida Ch. 98-403).

- The statutes are silent on whether a guardian ad litem is required to be represented by counsel. The Guardian ad Litem Program is funded to employ attorneys and its guardians ad litem most often appear in court with an attorney employed by the Guardian ad Litem Program. Guardians ad litem

[1] The term "abuse, abandonment, and neglect" is often used in the child welfare arena. However, as abandonment is a form of neglect, and the term "abuse and neglect" is the language in the proposal, the shorter term is used herein.

are statutorily charged with representing the child in dependency proceedings. Section 39.822, Florida Statutes. The term "guardian ad litem" is defined as a program, volunteer, attorney "or a responsible adult who is appointed by the court to represent the best interests of the child in a proceeding as provided by law. . . who is a party to any judicial proceeding as a representative of the child. Section 39.820, Florida Statutes.

- Before 2014, Florida law did not require the court to appoint counsel to dependent children. That changed with the passage of Section 39.01305 Florida Statutes, and now children with statutorily defined special needs are entitled to be appointed counsel. Sources other than the state also fund counsel for children. Approximately 10% of children in out-of-home care are represented by counsel. [2]

Florida's History on the Provision of Representation to Dependent Children

Florida's representation history must be viewed in context of federal law. The importance of representation to children in child welfare cases was recognized in 1974 when Congress enacted the Child Abuse Prevention and Treatment Act, CAPTA. Pub. L. No. 93-247, § 1, 88 Stat. 4, 4(1974). CAPTA required states to create a plan that, among other things, described how the state would provide each child with a guardian ad litem to represent the child in court. At the time of enactment, CAPTA did not discuss how that requirement could be met. The law was subsequently amended to clarify that it can be met through the use of a trained layperson or by a lawyer. Child Abuse Prevention Treatment Act 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000) (amended by Keeping Children and Families Safe Act of 2003).

Florida chose to fulfill the CAPTA mandate through the use of its Guardian ad Litem Program.

Florida's Guardian ad Litem Program

In 1979 Florida began pilot projects designating non-lawyer volunteers to advocate on behalf of abused and neglected children following the model of the national Court Appointed Special Advocate (CASA) program. Florida called its non-lawyer volunteers "guardians ad litem" rather than using the term "CASA." In 1980, the Legislature provided funding to the Office of State Court Administrator to develop a pilot project using volunteers as guardians ad litem.

That pilot was then developed into Florida's Guardian ad Litem Program, making Florida the first state in the nation to undertake a comprehensive statewide program of volunteer guardians ad litem. See, The Florida Guardian ad Litem Program, 25

[2] The analysis that arrives at the 10% figure and other data provided herein is stated in "Cost of Providing Counsel to Unrepresented Children in Florida," attached to this analysis.

years of Child Advocacy, pg. 6 (herein "GAL at 25 Report.")[3] The 1985 Program Manual for the Guardian ad Litem Program stated, "Guardians...are officers of the court, who receive powers from the order of appointment to represent the best interests of the child."[4] The Guardian ad Litem had 5 major roles: "(1) investigator on behalf of the child; (2) monitor of the agencies and persons who provide services to the child to ensure that court orders are carried out and that services are provided to the family; (3) protector of the child from the harmful effects of court proceedings; (4) spokesperson for the best interests of the child; and (5) reporter to the court presenting information and helping the court to determine the child's best interests.[5]

In 1985, the Florida Supreme Court issued Standards of Operation to administer the Program. Those standards placed the Guardian ad Litem Program under the administration of the local circuit court, though the volunteer guardian ad litem was viewed as independent of the Guardian ad Litem Program. A 1994 law review article noted, "The guardian program itself does not participate in any dependency or termination proceedings and does not make decisions for appointed guardians. Nor does the program appear in court to exercise any power or to represent any person." H. Lila Hubert*, In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings,* 49 U. Miami L. Rev. 531, 553 (1994) (internal citations omitted).

In the 1990s the Guardian ad Litem Program added program attorneys as well as staff advocates to supplement their volunteer ranks. GAL at 25 Report, pg. 13. In 2004 the Guardian ad Litem Program was transferred from the judicial branch to the executive branch, where it was housed in the Justice Administrative Commission and renamed the Statewide Office of Guardian ad Litem. GAL at 25 Report, pg. 15.

The role of the volunteer guardian as an independent voice changed with the shift to a statewide office that employed substantially more staff and attorneys. The current Florida Guardian ad Litem Program Standards, issued in July 2015[6], describe the approach:

> **The Team Model.** Each GAL works within a team model of advocacy that is child centered and driven by the best interest of the child. It is a collaborative effort of the GAL, the assigned CAM, and the CBI Attorney with the child's voice considered to be an integral part of the team's decision making and advocacy. The GAL, CAM and CBI Attorney are equal partners, with each providing a unique perspective and knowledge gained through life experiences that complements the

[3] Available on the Guardian ad Litem website.
[4] H. Lila Hubert*, In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings,* 49 U. Miami L. Rev. 531, 553 (1994) (citing Ellen I. Hoffenberg et al. State of Florida Guardian ad Litem Program Manual, 20-21 (1985).
[5] *Id.* pg. 552.
[6] Available on the Guardian ad Litem website.

others and enhances the quality of the advocacy, leading to better outcomes for the child.

The 2015 Guardian ad Litem Standards define:

> **Guardian ad Litem (GAL)** refers to the representative of the Program who is advocating for the best interests of the child. This term refers to a volunteer Guardian ad Litem, or in cases where a volunteer GAL is not available, a paid staff member. A GAL is a member of a team that includes a Child's Best Interest (CBI) Attorney and a Child Advocate Manager (CAM).
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> **Child's Best Interest (CBI) Attorney** refers to the attorney employed by the Program to protect a child's best interest either in the circuit dependency courts or the appellate courts. There is no attorney-client relationship between the CBI Attorney and the child; however, representing the best interest of the child is the sole purpose of their advocacy.

In 2003, when the Guardian ad Litem Program was transferred out of the Office of State Court Administrator, it had a budget of $16 million and provided a guardian ad litem in 63% cases to which it was appointed.[7]

The Guardian ad Litem Program's 2017-2018 budget is $50 million with a staff of 726[8], 158 of whom are attorneys.[9] Currently 10,600 volunteers work with staff to provide a guardian ad litem to approximately 80% of all children in the dependency system.[10]

Provision of Counsel to Children

Before the advent of the Guardian ad Litem Program some abused and neglected children were appointed attorneys serving as guardian ad litem. Responsibility for paying those attorneys was not clear, so litigation ensued.

In 1980, the Florida Supreme Court issued an opinion in *In the Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980). In addition to establishing the constitutional right to counsel for parents who face termination of parental rights, it is also widely viewed as the case that establishes that children do not have a constitutional right to counsel in dependency proceedings. The *D.B. and D.S.* court reviewed the

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[7] *See* Staff Analysis for HB 439, issued March 20, 2003.

[8] The budget information is available at: http://www.floridafirstbudget.com/web%20forms/Budget/BudgetServiceIssueList.aspx?rid1=313902&rid2=&si=21310000&title=STATEWIDE%20GUARDIAN%20AD%20LITEM%20OFFICE%20(Program)&sf=1.

[9] *See* GAL budget narrative at http://guardianadlitem.org/wp-content/uploads/2017/07/Narrative-Salary-Adjustment-for-Guardian-ad-Litem-Staff.pdf.

[10] Statewide Guardian ad Litem Office Long Range Program Plan, August 15, 2017.

circumstances of two children who had been appointed counsel – attorneys serving as a guardian ad litem. It found counsel appropriately appointed for one child, and with regard to the second held:

> Finally, we find there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding. By statute, counsel as guardian ad litem must be appointed in any child abuse judicial proceeding under section 827.07(16), Florida Statutes (1979). In all other instances, the appointment of counsel as guardian ad litem for the child is left to the traditional discretion of the trial court, and should be made only where warranted under Florida Rule of Juvenile Procedure 8.300.
> *In the Interest of D.B. and D.S,* 385 So. 2d 83, 91 (Fla. 1980).

Courts continued to appoint attorneys, sometimes at the request of the volunteer Guardian Ad Litem. These attorneys were sometimes appointed as guardian ad litem and then more often as "attorney ad litem," a term used more often after the term GAL became increasingly associated with laypeople. In the '80s and '90s several cases concerning payment of fees to those attorneys were litigated in Florida courts. The cases were resolved in three different ways, in some the county was required to pay; in others the Department of Health and Rehabilitative Services was required to pay; and in the third category, the attorney was denied compensation altogether.[11]

The Guardian ad Litem Program was eventually provided with funding to pay for some attorneys for children.[12] Some counties also funded court-appointed counsel, often called "special public defenders." The counties' ability to fund counsel ended in the early 2000s when Florida eliminated county funding for court functions and required the state pay for those functions.[13]

In the early 1990s The Florida Bar Foundation created the Children's Legal Services grant program, which funded local legal aid programs to represent children in a variety of settings, including dependency court. At its height, in fiscal year 2009 - 2010, The Florida Bar Foundation funded 10 grantees to represent children in

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[11] *See, for example, M.P. v. Lake County*, 453 So.2d 85 (Fla. 5th DCA 1984) (requiring H.R.S. to pay a fee and requiring the lawyer to accept a reduced fee); *H.R.S. v. Coskey*, 599 So.2d 153 (Fla. 5th DCA. 1992) (reversing trial court order requiring H.R.S. to pay the child's attorney fee, though appointment was requested by the volunteer guardian ad litem); *H.R.S. v. Rich*, 687 So.2d 923 (Fla. 4th DCA 1997) (neither the county nor H.R.S. was liable for the fee, so the attorney's work was performed pro bono).

[12] The Guardian ad Litem 2005 Annual Report notes that $309,338 was available for attorneys ad litem. The terms "attorney ad litem" and "child's attorney" are interchangable.

[13] *See e.g. Justification Review: Justice Administrative Commission, State Attorneys, Public Defenders.* Report no. 01-64, December 2001.

dependency proceedings with a total of $1 million.[14] In subsequent years, The Florida Bar Foundation made major cuts to its children's grants following a significant drop in its income due to the country's financial crisis. In fiscal year 2017-2018, three grantees were funded to represent children in dependency proceedings, with grant awards totaling $152,000.[15]

In 2001, the Palm Beach Children's Services Council became the first special taxing district to fund attorneys to represent dependent children. That children's services council has continued to fund the Foster Children Project at the Legal Aid Society of Palm Beach County in the intervening years and currently awards over $1 million for the representation of dependent children.[16] The children's services councils in Broward and Hillsborough Counties also fund legal aid programs to represent dependent children, and the one in Miami-Dade funds a pro bono project that provides attorneys for children in dependency proceedings.[17]

Efforts to Provide Florida's Children with Statutory Right to Counsel

In 1999 the Florida Legislature passed Section 39.4085, which established several goals for dependent children, including Subsection (20) "To have a guardian ad litem appointed to represent, within reason, their best interests and, where appropriate, an attorney ad litem appointed to represent their legal interests…."

In 2000, the Legislature created a three-year pilot program in the 9th Judicial Circuit, which came under the Office of State Court Administrator. Section 39.4086, Florida Statutes (2000). The Legal Aid Society of the Orange County Bar Association oversaw guardians ad litem who were attorneys. Barry University School of Law oversaw attorneys who directly represented children. The Osceola County Guardian ad Litem Program used a blended model of representation.[18] The pilot concluded at the end of its funding. The Legal Aid Society of the Orange County Bar continues to operate the Guardian ad Litem program in Orange County by having volunteer and staff attorneys, rather than laypeople, serve as guardians ad litem.

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[14] The Florida Bar Foundation 2009-10 Annual Report. That year the Legal Aid Society of the Orange County Bar was also awarded $138,000 for its Guardian ad Litem Program.
[15] The Florida Bar Foundation Children's Legal Services Grantee list can be viewed at https://thefloridabarfoundation.org/project/childrens-legal-services/.
[16] Palm Beach Children's Services Council funding information can be found on their website at http://www.cscpbc.org/funded-programs.
[17] *See* Broward: https://cscbrowardpublic.webauthor.com/pub/file.cfm?uuid=A9431460-7ACF-4ABB-86CD-8EEF69384C82&actionxm=Download&item_type=xm_file; Hillsborough: http://www.childrensboard.org/download/061917/CBHC-FY-2018-Budget-Packet.pdf; Miami-Dade: https://www.thechildrenstrust.org/content/financial-information.
[18] *See Staff Analysis of HB 439 creating Statewide Office of Guardian ad Litem.* March 20, 2004.

In March 2001, the Florida Supreme Court approved a new rule of Juvenile Procedure, 8.217 which specified the right of the court to appoint an attorney ad litem for a child alleged to be dependent.[19]

In 2002, The Florida Bar's Commission on the Legal Needs of Children issued a Final Report[20] stating: "After three years of extensive debate, a recommendation was unanimously approved by the full Commission for a comprehensive model of representation for children." (pg. 9.). Specifically with regard to children in dependency proceedings, the Commission recommended the creation of a Statewide Office of Children's Advocate, which would have a division of Legal Counsel and a Division of Guardian ad Litem. (pgs.11-12)

The Florida Bar ultimately created a Standing Committee on the Legal Needs of Children (LNOC) and charged it with implementing the Commission's recommendations. In 2009, the LNOC drafted legislation with input from a variety of stakeholders, including substantial input from the Guardian ad Litem Program. The draft bill provided counsel for several categories of children, most of which were specifically identified in the 2002 Commission Report. The Florida Bar took a legislative position in favor of the bill, and Senate Bill 1860 was filed in the 2010 Session of the Legislature. The bill died in committee.

The next legislative endeavor came in 2013, when a narrower bill, Senate Bill 1468 / House Bill 1241, was filed. That bill provided counsel for dependent children who were in, or at risk of placement in, nursing homes. While that bill also failed, the Legislature appropriated funds for the Guardian ad Litem Program to contract with attorneys to represent those children.

In 2014, proponents of children's right to counsel were successful in securing passage of House Bill 561 / Senate Bill 972, which created Section 39.01305, Florida Statutes - Appointment of Counsel for Dependent Children with Certain Special Needs. That law provides for five categories of children to be appointed counsel: those who reside in or are considered for placement in nursing homes; those who are prescribed psychotropic medications and do not assent to taking them; those who have developmental disabilities; those who are in or face placement in locked residential treatment facilities; and those who are victims of human trafficking.

The 2014 legislation specified that children had a right to counsel who were adequately compensated, though it recognized the importance of and promoted the continued use of pro bono attorneys and existing legal aid programs. One unfortunate consequence of the legislation was the interpretation by the Guardian ad

[19] *In re Amendments to Rules of Juvenile Procedure,* Case no. SC00-1699 (Fla. 2001).
[20] The Final Report is available at http://www4.floridabar.org/TFB/TFBResources.nsf/Attachments/0718346282810A0985256BEA00684438/%24FILE/finalLNCversionfromJan%20website%20file.pdf.

Litem Program that it could no longer fund the appointment of other counsel as it had done in previous years.

Although the Department of Children and Families cannot readily ascertain how many children currently have counsel, an analysis of available data leads to the conclusion that no more than 10% of children who are in out-of-home care are currently represented by counsel. See, "Cost of Providing Counsel to Unrepresented Children in Florida," attached to this analysis.

Evolving National Consensus on Dependent Children's Right to Counsel

Thirty-seven years ago, when it declined to find that all dependent children had a constitutional right to counsel, the Florida Supreme Court acknowledged that the right to counsel "is an evolving constitutional concern." *In re D.B.* at 89. Proponents of this proposal assert that circumstances have changed sufficiently to warrant a declaration that dependent children have a constitutional right to counsel.

Back in the early 1980s, when states began trying different mechanisms to fulfill CAPTA's representation requirements, Florida embraced the promising model of using specially trained lay volunteers. The Florida Guardian ad Litem Program and its proponents continue to believe that its model, as it has evolved over time, is sufficient to represent the best interest of most children in Florida.

In 2011, the American Bar Association capped three years of discussion and debate by adopting Model Legislation on Child Representation in Abuse and Neglect Cases, which features the provision of attorneys to children. Subsequent law review articles describe the shifting landscape as a majority of states move toward attorney representation.[21] In August 2017 the Conference of State Court Administrators issued its policy position supportive of appointment of counsel for children.

In 2017, the Children's Bureau, the federal agency that oversees child welfare, recommended that states provide counsel for children: "While CAPTA allows for the appointment of an attorney and/or a court appointed special advocate (CASA), there is widespread agreement in the field that children require legal representation in child welfare proceedings."[22] The report explains:

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[21] *See The Right to Counsel Landscape after Passage of the ABA Model Act – Implications for Reform*, Harfeld, 36 Nova LR 325, 326 (2012) and *Wanted: Forever Home, Achieving Permanent Outcomes for Nevada's Foster Children*. Meyer-Thompson, 14 Nevada LJ 268, 291 (Fall 2013).

[22] Memorandum on High Quality Legal Representation for All Parties in Child Welfare Proceedings issued by the Administration for Children and Families on January 17, 2017 pg. 3. Herein "High Quality Representation Memo." Available at: https://www.floridabar.org/wp-content/uploads/2017/09/High-Quality-Legal-Representation.pdf.

> This view is rooted in the reality that judicial proceedings are complex and that all parties, especially children, need an attorney to protect and advance their interests in court, provide legal counsel and help children understand the process and feel empowered. The confidential attorney-client privilege allows children to feel safe sharing information with attorneys that otherwise may go unvoiced.
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> In addition to attorneys, children and youth also benefit from a lay guardian ad litem, such as a CASA. CASAs can make important contributions to child welfare proceedings through time spent getting to know the child's needs and reports to the court.
> High Quality Representation Memo, pgs. 3-4.

The report further asserts:

> There is evidence to support that legal representation for children, parents and youth contributes to or is associated with:
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> - increases in party perceptions of fairness;
> - increases in party engagement in case planning, services and court hearings;
> - more personally tailored and specific case plans and services;
> - increases in visitation and parenting time;
> - expedited permanency; and
> - cost savings to state government due to reductions of time children and youth spend in care.
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> High Quality Representation Memo, pg. 2.

III. EFFECT OF PROPOSED CHANGES

The proposal will require the state to provide counsel to all children in out-of-home care with open dependency cases. This includes both children who have been removed from a parent or guardian due to allegations of abuse and neglect and children who were "otherwise placed in the jurisdiction of the dependency court." The "otherwise placed" clause is needed to include children who are placed in out of home care for reasons other than parental abuse or neglect – for example because the parents are deceased or were unable to obtain services for their children without placing them in state care.

It is possible to interpret the "otherwise placed" clause to include children who are still at home with their parents and are receiving services under the supervision of the dependency court. Those children fall under the jurisdiction of the dependency court, though they have not been "placed." When children are home, parents retain

the capacity and responsibility to ensure their children's needs are met, therefore the liberty and due process rights that arise from placement in out-of-home care are not implicated. Those children are, however, at a far greater risk of removal than their peers.

Given the disparity between the number of children currently represented by counsel and those who would become eligible if the proposed amendment is enacted, Florida will need to undertake a major effort to recruit qualified attorneys needed to provide competent representation to newly eligible children.

IV. FISCAL IMPACT

A. Tax/Fee Issues

None.

B. Private Sector Impact

None

C. Government Sector Impact

The exact fiscal impact of this proposal cannot be ascertained because the Department of Children and Families cannot readily quantify the number of children who have counsel.[23] Informal research reveals that of the 30,000 children who are in out-of-home care in a year between 3,000 and 4,000 children are currently represented each year.[24] The lower number is used to provide a conservative calculation.

Two-thirds of the 27,000 unrepresented children are part of sibling groups, some of whom can be represented by the same attorney. It is estimated that 17,020 appointments need to be made to provide counsel to 27,000 unrepresented children. [25] At an average cost of $1,200 per child, the total cost to represent children is $20,240,000. The cost of providing counsel children who are living at home, but are under the jurisdiction of the dependency court is an additional $733,200.[26]

Savings to the state are estimated to be twice the cost of providing counsel.[27] The estimate of $40 million in savings is based on the reduction on payments for

[23] DCF-Children's Legal Services has requested that the agency revise its software in order to be able to capture that information.
[24] See "Cost of Providing Counsel to Unrepresented Children in Florida," Appendix A attached to this Analysis
[25] Id. Appendix B.
[26] Id. Appendix C.
[27] Id.

placement of children in licensed care.[28] Additional savings will be realized in the cost of providing care to children in unlicensed placements. Long-term savings will also result from the provision of counsel to dependent children by increasing the likelihood that they leave care with a family. Children who age out of care without a family are substantially more likely than their peers to become involved in the criminal justice system, be homeless, unemployed, and become young parents. The estimated cost to tax payers of youth aging out of care without a family is $300,000 per young adult.[29] In fiscal year 2016 – 2017 Florida had 957 youth age out of state care,[30] if lawyers facilitate permanency for only one-tenth of the population, tax payers will save an additional $28 million in future expenses for each co-hort of youth who exit state care.

[28] Id.

[29] Cost Avoidance: Bolstering the Economic Case for Investing in Youth Aging Out of Foster Care. Cutler Consulting, 2009. Available at: https://www.issuelab.org/resource/cost-avoidance-bolstering-the-economic-case-for-investing-in-youth-aging-out-of-foster-care.html

[30] Data from DCF's Child Welfare Dashboard on MyFloridaFamilies.com.