

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 2050

SPONSOR: Health, Aging, and Long-Term Care Committee, Judiciary Committee and Senator Aronberg

SUBJECT: Child Custody Evaluations

DATE: April 15, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates provisions governing administrative, civil and criminal actions against court-appointed psychologists in proceedings involving child custody matters as follows:

- Provides a presumption that a court-appointed psychologist in a custody matter is acting presumptively in good faith if the evaluation is done in accordance with standards consistent with the American Psychological Association's guidelines for such evaluations in divorce proceedings;
- Prohibits a complainant from filing an anonymous administrative complaint against a psychologist as an exception to s. 456.073(1), F.S.;
- Requires presuit filing of a petition for appointment of another psychologist prior to any legal action against a psychologist;
- Requires the court to determine who should bear the costs and reasonable attorneys fees associated in successful action for appointment of another psychologist; and
- Provides for recovery of attorneys fees and costs to the prevailing party in a legal action against a court-appointed psychologist.

This bill creates a yet undesignated section of the Florida Statutes.

II. Present Situation:

Social Investigations

Child custody, visitation and parenting issues may arise in child support, divorce, custody and visitation, termination of parental rights, dependency, and guardianship cases. In proceedings

under chapter 61, F.S., a court may order a social investigation of the family if one hasn't been done or if the one that has been done is insufficient. *See* s. 61.20, F.S. The social investigation must include all pertinent details relating to the child and each parent. The court-appointed or selected staff conducting the social investigation must give to the court and all parties of record a copy of the written study including recommendations and statement of facts upon which the recommendations are based. Although such investigations may contain hearsay and other inadmissible information under typical judicial proceedings, the rules of evidence do not preclude their consideration by the court. There are no statutory standards or uniform format for conducting such evaluations or investigations in child custody matters. There are, however, some voluntary professional guidelines that have been developed that professionals in the field follow. *See e.g., Guidelines for Child Custody Evaluations in Divorce Proceedings*, American Psychologist Association, Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, and Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*.

With the exception of the indigent party, the adult parties involved in the child custody proceeding share financial responsibility for the expense of the social investigation which is taxed and ordered to be paid as costs in the proceedings.

Evaluators in Child Custody Matters

In a judicial proceeding involving child custody issues, an evaluator may be privately retained or court-appointed. It is not known what processes the various courts use to appoint or select evaluators. Under s. 61.20, F.S., the following persons or entities are the only ones that may conduct social investigations and studies or home studies relating to child custody or parental responsibility determinations:

- Qualified staff of the court.
- A child-placing agency licensed pursuant to s. 409.175, F.S.
- A psychologist licensed under chapter 490, F.S.
- A licensed clinical social worker licensed under chapter 491, F.S.
- A licensed marriage and family therapist, licensed under chapter 491, F.S.
- A licensed mental health counselor licensed under chapter 491, F.S.
- Qualified staff of the Department of Children and Family Services if a party is indigent and no other qualified staff is available.

Each of the aforementioned professionals has varying degrees of training and expertise as required by their licensure. Each of these professionals, with the possible exception of qualified court staff or staff of the Department of Children and Family Services, is regulated by his or her respective governing board under which the professional may be disciplined or have a license suspended or denied. Any person can file an administrative complaint against one of these professionals. A copy of the administrative complaint must be given to the health care professional. The complaint remains confidential until 10 days after the probable cause panel of the respective board determines whether a violation occurred. However, patient identity and patient records remain confidential at all times.

Current law allows a person to file an administrative complaint anonymously against any health professional as long as the complaint is in writing and the complaint contains an allegation of possible violation of the law. *See* s. 456.073(1), F.S. Such complaint must be investigated if it is determined that the alleged violation of law and/or rule is substantial and there is reason to believe, after a preliminary inquiry, that the alleged violation in the complaint is true. The Department of Health, Division of Medical Quality Assurance has responsibility for processing administrative complaints and reports involving potential misconduct of a licensee and initiating investigations when appropriate. In addition to anonymous complaints the Department of Health may initiate an investigation against a health care practitioner under its jurisdiction if it has reasonable cause to believe that a licensee or group of licensees has violated a Florida statute, a rule of the department, or a rule of a board. *See* s. 456.073(1), F.S. In addition to any other discipline imposed through final order, or citation, entered against a licensed health care practitioner for a violation of any practice act, the board, or the Department of Health, if there is no board must assess costs related to the investigation and prosecution of the case. *See* s. 456.072(4), F.S. In any case where the board or department imposes a fine or assessment and the fine or assessment is not paid within a reasonable time, the Department of Health or the Department of Legal Affairs may contract for the collection of, or bring a civil action to recover, the fine or assessment. *See* s. 456.02(4), F.S.

Statutory Presumptions

None of the aforementioned professionals whether court-appointed or privately retained currently benefit from any statutory presumption in favor of their report or conduct. Florida Family Law Rules of Procedure 12.360 and 12.363 provide for evaluations of children and their parents by a mental health professional or other expert. Current court rules prohibit the court from giving a mental health professional or other expert appointed by the court to conduct a social or home study investigation any favorable presumption over the privately retained expert. *See* Fla. Fam. L. R. 12.363.

There is some precedence for limited liability for other persons appointed by the court to participate in judicial proceedings to assist the court. A guardian ad litem or guardian advocate appointed to participate in a judicial proceeding is “*presumed prima facie to be acting in good faith and in so doing shall be immune from liability, civil or criminal, that otherwise might be incurred or imposed.*” *See* ss. 39.822 (termination of parental rights), 61.405 (child custody), and 914.17 (child victim or child witness in criminal proceeding), F.S.

A presumption is an assumption of a fact without any direct evidence of that fact. Instead the presumption is derived from another fact or group of facts. There has to be a reasonable basis or rational relationship between the underlying fact or group of facts and the fact that is presumed. Courts require that there also be an opportunity to rebut the presumed fact. Only rebuttable presumptions are valid in Florida. There are two classes of rebuttable presumptions which serve different purposes:

- *Burden of producing evidence* for procedural or evidentiary purposes in the resolution of the civil action (*See* s. 90.303, F.S.):
 - When one party introduces underlying fact or groups of facts giving rise to a presumption, the burden shifts to the adverse part to *disprove* the presumed fact. If the

adverse party introduces evidence to disprove the presumed fact, the presumption goes away. That is why it is often referred to as the bursting bubble presumption. The jury is not told of the presumption and thus never has to decide what weight to give the contradictory evidence. Examples of this type of rebuttable presumption: a letter mailed is a letter presumed to be received by the person who was supposed to get it; a person is presumed to be dead after an absence of 7 years; or a will that is lost is presumed to have been revoked.

- *Burden of proof or persuasion* for purposes of implementing public policy (*See* s. 90.304, F.S.):
 - When one party introduces underlying fact or groups of facts giving rise to a presumption, the burden shifts to the adverse party to *persuade or disprove* the presumed fact. If the adverse party introduces evidence to disprove the presumed fact, the presumption does not go away. The jury is told of the presumption and it is the jury's decision to determine what weight to give the contradictory evidence. That is, the jury must decide whether the contrary evidence was sufficient to overcome the presumption. The burden is greater on the party trying to disprove the presumed fact. That burden increases depending on the underlying public policy. Examples of this type of rebuttable presumption: a marriage is presumed to be valid, a child born in wedlock is presumed to be legitimate, a judgment is presumed to be correct, a scientific test that shows a probability of paternity at 95 percent or greater creates the presumption that the person is the biological father.

III. **Effect of Proposed Changes:**

This bill provides that a psychologist appointed by the court to conduct a child custody evaluation is presumptively acting in good faith if the evaluation is done in accordance with standards that a reasonable psychologist would have used as recommended by the American Psychological Association's guidelines for such evaluations in divorce proceedings.

The bill requires the complainant to identify himself or herself when filing an administrative complaint against a court-appointed psychologist. The bill also requires the filing of a petition for appointment of another psychologist prior to the initiation of any legal action against a court-appointed psychologist. When a parent successfully petitions for appointment of another psychologist, the court shall make a determination as to who is responsible for court costs and attorneys fees associated with the subsequent appointment. In any legal action against a court-appointed psychologist, the non-prevailing party is liable for all court costs and attorneys fees.

The provisions of this bill could conceivably apply in any type of action other than under chapter 61, F.S., in which child custody and parenting issues arise.

The effective date of the bill is July 1, 2003.

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

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill may implicate a person's right of access to the courts under Article I, Section 21 of the Florida Constitution by circumscribing an individual's right of action or chilling a person's right to pursue administrative or legal recourse against a court-appointed psychologist. The Florida Constitution recognizes an individual's right to seek redress in court for any injury without denial or delay. However, that right of access to the courts may be circumscribed provided there is: 1) A valid public purpose coupled with a reasonable alternative; or 2) An overriding public necessity. *See Kluger v. White*, 281 So.2d 1 (Fla. 1973). It is a determination for the courts as to whether the limitations imposed by this bill affect a person's right to seek redress.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill may deter administrative and legal actions against court-appointed psychologists who conducted social investigations in child custody matters.

The bill may encourage more court-appointed psychologists to follow standards consistent with the American Psychological Association's recommended Guidelines for Child Custody Evaluations in Divorce Proceedings.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill may allow a social investigation report provided by a *court-appointed* psychologist to receive favorable or preferential consideration over a social investigation report provided by any other *court-appointed* person as authorized under current law or any *privately retained* psychologist regardless of whether they both acted in good faith in accordance with standards consistent with recommended professional guidelines.

Although the terms “child custody evaluation” and “family evaluation” are not currently used or defined in statute, they are the generally used vernacular terms for “social investigations and study” or “homestudy.”

Although the bill prohibits a complainant from filing an anonymous administrative complaint against a psychologist as an exception to s. 456.073(1), F.S., it does not prevent an individual from providing sufficient information to the Department of Health so that it may initiate an investigation independently from a formal complaint based on its “reasonable cause jurisdiction.” In addition to anonymous complaints the Department of Health may initiate an investigation against a health care practitioner under its jurisdiction if it has reasonable cause to believe that a licensee or group of licensees has violated a Florida statute, a rule of the department, or a rule of a board.

In addition, the bill’s prohibition on anonymous administrative complaints would have a chilling effect on reporting of practice violations by the peers of a court-appointed psychologist in a child custody case. Licensed health care practitioners are currently subject to grounds for discipline for failing to report to the Department of Health any person who the licensee knows is in violation of the general regulatory provisions or applicable practice standards of the practitioner’s regulations. *See* s. 456.072(1)(i), F.S.

The bill provides for the “claimant” to be responsible for all reasonable costs and attorney’s fees for any legal action filed against a court-appointed psychologist in a child custody case. For purposes of administrative actions involving the discipline of the psychologist it is unclear whether the Department of Health could assess fees through a final order by the department issued against a licensee who has been found to be in violation of applicable practice standards.

VIII. Amendments:

None.