

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 175 Drug Court Programs
SPONSOR(S): Adams and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 114, SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee		Cunningham	Kramer
2) Juvenile Justice Committee			
3) Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

Dependency court is for children who are dependent upon the state to protect them from abuse or neglect by their adult caretaker(s). This bill authorizes a dependency court to order individuals involved in a dependency court case to be evaluated for drug or alcohol problems, and allows the court to refer an individual to dependency drug court for monitoring of treatment after a finding of dependency. Individuals may voluntarily enter drug court prior to a finding of dependency. This bill also allows appropriate sanctions (including incarceration) of persons referred to dependency drug court who fail to comply with the conditions of the referral.

The term “drug court” refers to a process by which substance abusers entering the court system are placed into treatment and proactively monitored by the judge and a team of justice-system and treatment professionals.

This bill modifies laws regarding drug court programs for adult and juvenile criminal offenders. Currently, those programs are primarily structured as pre-trial diversion programs. This bill provides that convicted offenders, post-adjudication offenders, and individuals involved in dependency proceedings may be referred to drug court programs. Drug courts have traditionally used sanctions, including short terms of incarceration, as punishment for participants who violate terms of their treatment plan; however, recent case law has held that such incarceration for persons in a pre-adjudicatory drug court program is not authorized by law. This bill addresses this issue by providing for incarceration of a person violating his or her treatment plan ordered by a drug court, which incarceration is in addition to any term of incarceration that may be ordered should the person leave drug court and then be convicted of the offense. Participation in a drug court prior to adjudication or a pretrial intervention program is voluntary. This bill further requires that participants acknowledge in writing that they wish to enter the program and understand the program requirements and sanctions for noncompliance.

The fiscal impact to state and local governments of this bill is unknown. The language of the bill is permissive (i.e. participation in drug court programs is at the counties’ discretion). However, should a county elect to participate in such programs, the bill requires that the protocol of sanctions for treatment-based programs other than those authorized by Chapter 39 include jail-based treatment and incarceration. This would require counties to expend funds and would therefore fall under the mandates provisions of Article VII, Section 18 of the Florida Constitution. However, since the bill deals with criminal laws, it would appear to be exempt from this section. See Fiscal Analysis & Economic Impact Statement and Applicability of Municipal/County Mandates Provision.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill authorizes the court to order a substance abuse assessment and evaluation after a shelter petition or dependency petition has been filed for individuals involved in the case. This bill expands the scope of drug court program beyond pretrial intervention programs to include dependency drug court, post-adjudicatory programs, and the monitoring of sentenced offenders. This bill provides for incarceration of individuals subject to drug court who violate drug court terms and conditions.

Promote Personal Responsibility → This bill provides for court-ordered substance abuse evaluation and treatment and court-monitored compliance with such orders. Sanctions are authorized for individuals who do not comply with the court orders.

Empower Families → This bill provides increased court responsibilities in dependency court matters.

B. EFFECT OF PROPOSED CHANGES:

Proceedings Relating to Children

There are two main court systems specifically tailored for minors. Dependency court is for children who are dependent upon the state to protect them from abuse or neglect by their adult caretaker(s). Delinquency court is for minors who commit crimes that do not warrant transfer to the adult criminal justice system.

In January 1999, the National Center on Addiction and Substance Abuse at Columbia University (CASA) published a report detailing its two-year analysis of the connection between substance abuse and child maltreatment.¹ CASA estimates that substance abuse causes or contributes to 7 out of 10 cases of child maltreatment and accounts for nearly \$10 billion in federal, state, and local spending, exclusive of costs relating to healthcare, operating judicial systems, law enforcement, special education, lost productivity, and privately incurred costs.

The CASA report documented a doubling in the number of child abuse or neglect cases, from 1.4 million cases nationwide in 1986 to nearly 3 million cases in 1997. In connection with the report, CASA conducted a national survey of family court and welfare professionals to ascertain their perceptions of the extent to which substance abuse issues exist in child welfare cases. The survey revealed the following:

- 71.6 percent of respondents cited substance abuse as one of the top three causes for the rise in the number of child abuse and neglect cases.
- Almost 80 percent of respondents stated that substance abuse causes or contributes to at least half of all child abuse and neglect cases while nearly 40 percent stated that substance abuse was a factor in over 75 percent of cases.
- 75.7 percent of respondents believed that children of substance abusing parents were more likely to enter foster care than other children, and more likely to experience longer stays in foster care.
- 42 percent of all caseworkers reported that they were either not required or uncertain if they were required to report substance abuse when investigating child abuse or neglect cases.

In April 1999, the Department of Health and Human Services issued a report to Congress which highlighted the necessity of prioritizing the identification and treatment of parental substance abuse and its relationship to children in foster care. It stated that children in substance abuse households were more likely than others to be served in foster care, spent longer periods of time in foster care than other children, and were less likely to have left foster care within a year.

¹ "No Safe Haven: Children of Substance-Abusing Parent," January 1999.

Drug Court System

The original drug court concept was developed in Dade County as a response to a federal mandate to reduce the inmate population or lose federal funding.² The Florida Supreme Court reported that a majority of the offenders being incarcerated due to drug-related crimes were “revolving back through the criminal justice system because of underlying problems of drug addiction.”³ The Court felt that the delivery of treatment services needed to be coupled with the criminal justice system, strong judicial leadership, and partnerships to bring treatment and the criminal justice system together.⁴

As of July 2004, 88 drug courts operated in 43 counties.⁵ There are 1,183 drug courts nationwide, either operational or in the planning stages, and drug courts are operational in all fifty states.⁶

In Florida, in 2002, approximately 10,200 offenders were referred to drug court. Studies show that drug court graduates experience a significantly reduced rate of recidivism, and that drug courts are a cost-effective alternative to incarceration of drug offenders.⁷

Drug courts operate on a reward and punishment system. The reward for successful completion of the program is not only a better life, but also lowering of a criminal charge to a lesser offense, or even dismissal of the criminal charge. Punishments for failing to comply with the program typically include work assignment, increased treatment modalities, increased court appearances, increased urinalysis testing, community service, house arrest, and incarceration. Failure to comply with the program can also result in the continuation of the criminal process and possible additional jail time upon conviction. Recently, a district court ruled that because there is no statutory authorization for the imposition of a jail sentence upon violation of a drug court program, a drug court participant cannot be incarcerated for violating the terms of the drug court program.⁸

Effect of the Bill

Dependency Proceedings

This bill expands existing legislative intent to encourage courts to use the drug court program model and to authorize courts to assess parents and children for substance abuse problems in every stage of the dependency process. This bill establishes the following goals for substance abuse treatment services in the dependency process:

- ensure the safety of children
- prevent and remediate the consequence of substance abuse
- expedite permanent placement
- support families in recovery

This bill authorizes a dependency court, upon a showing of good cause, to order a child, or person who has custody or is requesting custody of the child, to submit to substance abuse assessment and evaluation. The assessment and evaluation must be made by a qualified professional, as defined by s. 397.311, F.S.⁹

² Publication by the Florida Supreme Court, *The Florida Drug Court System*, revised January 2004, p.1

³ *Id.*

⁴ *Id.*

⁵ *Report on Florida's Drug Courts*, by the Supreme Court Task Force on Treatment-Based Drug Courts, July 2004, p.5

⁶ *Id.*

⁷ *Id.*

⁸ *Diaz v. State*, 884 So.2d 299 (Fla. 2nd DCA 2004).

⁹ Section 397.311(24), F.S., defines “qualified professional” to mean “a physician licensed under chapter 458 or chapter 459; a professional licensed under chapter 490 or chapter 491; or a person who is certified through a department-recognized certification process for substance abuse treatment services and who holds, at a minimum, a bachelor's degree. A person who is certified in substance abuse treatment services by a state-recognized certification process in another state at the time of employment with a licensed substance abuse provider in this state may perform the functions of a qualified professional as defined in this chapter but must meet certification requirements contained in this subsection no later than 1 year after his or her date of employment.”

After an adjudication of dependency, the court may require the individual to participate in and comply with treatment and services identified as necessary, including, when appropriate and available, participation in and compliance with a treatment-based drug court program. Prior to a finding of dependency, participation in treatment, including a treatment-based drug court program, is voluntary. The court, in conjunction with other public agencies, may oversee progress and compliance with treatment and may impose appropriate available sanctions (including incarceration) for noncompliance. The court may also make a finding of noncompliance for consideration in determining whether an alternate placement of the child is in the child's best interests.

Drug Court Programs

Drug court programs typically provide services and monitoring in the pretrial stage of a criminal case. A defendant who successfully completes the drug court program receives the benefit of dismissal of the criminal charge, thereby sparing the defendant from jail and from a permanent criminal record of a conviction. Pretrial drug court programs suspend the setting of a trial date and use the threat of resetting the trial date, and possible conviction, as a means to encourage compliance with the program.

This bill specifies that entry into any pretrial treatment-based drug court program is voluntary and that participating individuals state in writing that they understand the program requirements and potential sanctions for noncompliance. A recent court ruling indicates that a participating individual may be allowed to "opt out" of the program if there is an administrative order stating that *participation* in the program is voluntary.¹⁰ Sanctions for noncompliance may include incarceration separate from the term of incarceration that may be imposed should the person leave drug court and then be convicted of the crime.¹¹ The term of incarceration is limited to the term available for contempt of court (six months). For juveniles, the term of incarceration in a secure detention facility is 5 days for a first violation and 15 days for a subsequent violation.

This bill provides that, in addition to pretrial intervention programs, treatment-based drug court programs may include individuals involved in dependency proceedings, sentenced offenders, and offenders who are involved in postadjudicatory programs.

This bill provides that an individual who successfully completes a treatment-based drug court program, if otherwise eligible, may have his/her arrest record and nolo contendere plea expunged.

This bill requires that, contingent upon an annual appropriation, each judicial circuit must establish at least one coordinator position for the treatment-based drug court program.¹²

Current law provides that any person eligible for participation in a drug court treatment program may be eligible to have his/her case transferred to a county other than that in which the charge arose if the drug court program agrees and of specific conditions are met. The bill specifies that if approval for transfer is received from all parties, the trial court must accept a plea of nolo contendere. The bill further specifies that the jurisdiction to which a case has been transferred is responsible for disposition of the case.

In regards to criminal court pretrial intervention programs and misdemeanor pretrial intervention programs, as they relate to drug offenses and referral of drug court, this bill provides that entry into such programs is voluntary, the defendant agreeing to drug court is subject to a coordinated strategy for treatment,

¹⁰ Section 948.08, F.S. requires that pretrial substance abuse education and treatment intervention programs be approved by the chief judge of the circuit. The court in *Mullin v. Jenne*, 890 So.2d 543 (Fla. 4th DCA 2005), referenced this statute and held that where a chief's judge's administrative order defining the parameters of the program stated that *participation* in the program was voluntary (rather than *entry*), a court could not require a defendant to remain in a drug court treatment program. The court noted that had the administrative order stated that "entry" into the program was voluntary, a different result would have occurred. Although this bill provides that entry, rather than participation, is voluntary, pretrial substance abuse intervention program are still, by statute, subject to approval by the chief judge of the circuit. Thus, should a chief judge issue an administrative order stating that participation in a program is voluntary, participating individuals may opt out of the program.

¹¹ This would have the effect of overruling the effect of the decision in *Diaz v. State*, 884 So.2d 299 (Fla. 2nd DCA 2004). Note that the court in that case suggested that the Legislature make this change.

¹² These positions were established in prior budgets and are currently staffed and funded.

noncompliance can lead to confinement, and the possible sanctions must be provided to the defendant in writing before the defendant agrees to participate in the drug court.

This bill adds tampering with evidence, solicitation to purchase a controlled substance, and obtaining a prescription by fraud to the list of offenses that make a child eligible for admission into a delinquency pretrial substance abuse education and treatment intervention program. Entry into the program is voluntary, the juvenile agreeing to drug court is subject to a coordinated strategy for treatment, noncompliance can lead to confinement, and the possible sanctions must be provided to the defendant in writing before the defendant agrees to participate in the drug court.

C. SECTION DIRECTORY:

Section 1. This act is cited as the “Robert J. Koch Drug Court Intervention Act.”

Section 2. Amends s. 39.001(4), F.S., adding legislative intent language regarding substance abuse treatment services in proceedings relating to children.

Section 3. Amends s. 39.407, F.S., providing that at any time after a shelter or dependency petition is filed, a court may order a child or a person who has or is requesting custody of a child to submit to substance abuse assessment and evaluation.

Section 4. Amends s. 39.507, F.S., providing that after an adjudication of dependency or finding of dependency where adjudication is withheld, the court may order a child or person who has or is requesting custody of a child to submit to substance abuse assessment or evaluation; providing that the court may require participation and compliance with treatment; providing that the court may oversee progress and compliance with treatment; providing that the court may impose sanctions for noncompliance or make a finding of noncompliance for consideration in determining a child’s placement.

Section 5. Amends s. 39.521(1)(b)1., F.S., providing that when a child is adjudicated dependent, the court may order a child or person who has or is requesting custody of a child to submit to substance abuse assessment or evaluation; providing that the court may require participation and compliance with treatment; providing that the court may oversee progress and compliance with treatment; providing that the court may impose sanctions for noncompliance or make a finding of noncompliance for consideration in determining a child’s placement.

Section 6. Amends s. 39.701(9)(d), F.S., providing that the court may modify a dependency case plan to require parental/custodian participation in a treatment-based drug court program.

Section 7. Amends s. 397.334, F.S., providing that entry into a pretrial treatment-based drug court program is voluntary; expanding the types of treatment-based drug court programs; providing a treatment-based drug court program coordinator within each judicial circuit; providing that a circuit’s chief judge may appoint an advisory committee for the drug program.

Section 8. Amends s. 910.035(5), F.S., relating to transfers from county for pleas and sentencing.

Section 9. Amends, s. 948.08, F.S., providing that while in a felony pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team; providing that the coordinated strategy must include a protocol of sanctions for noncompliance with the program.

Section 10. Amends s. 948.16, F.S., providing that while in a misdemeanor pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team; providing that the coordinated strategy must include a protocol of sanctions for noncompliance with the program.

Section 11. Amends s. 985.306, F.S., expanding the list of crimes for which an offender is eligible for participation in a delinquency pretrial substance abuse education and treatment intervention program; providing that while in a delinquency pretrial substance abuse education and treatment intervention program, participants are subject to a coordinated strategy developed by a drug court team; providing that the coordinated strategy must include a protocol of sanctions for noncompliance with the program.

Section 12. This act takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None – this bill does not affect a state revenue source.

2. Expenditures:

Indeterminate – see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None – this bill does not affect a local government revenue source.

2. Expenditures:

Indeterminate – the language in this bill is permissive and participation in a drug court program will be left to the counties' discretion. However, the bill requires the court to include a protocol of sanctions for individuals in pretrial intervention programs, which are authorized for all counties. The protocol of sanctions for treatment-based programs other than those established in Chapter 39 (dependency proceedings) must include jail-based treatment programs and incarceration for noncompliance. These sanctions would result in a cost to the counties. There are no data available to estimate the number of individuals that would be incarcerated under the provisions of this bill. It should be noted that pretrial intervention programs are already authorized in law and are designed to reduce jail populations and associated costs. Thus, pretrial intervention programs are generally perceived as providing a financial benefit to counties.

Additionally, the Department of Juvenile Justice states that the bill would increase the number of youth eligible for secure detention due to sanctions provided for in the bill. The Department estimates that of the 1,798 youths placed in drug court programs, 17 percent would violate, resulting in 306 youths eligible for placement in secure detention for 5 days. Of those 306 first-time violators, 5 percent would violate a second time, resulting in 15 youths eligible for placement in secure detention for 15 days. At current per diem rates for secure detention, this represents expenditures of approximately \$204,800 per year.¹³ Although pre-adjudication costs for secure detention became a county responsibility on July 1, 2005, the Department of Juvenile Justice states that the majority of those placed in secure detention will be placed there post-adjudication. Thus, the state would be responsible for the majority of the cost.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may increase the use of private drug assessment and treatment programs. Individuals are often required to pay for services ordered through drug courts.

D. FISCAL COMMENTS:

Department of Children and Family Services

¹³ 306 youths multiplied by 5 days multiplied by \$115 per day results in a total of \$175,950. 15 youth multiplied by 15 days multiplied by \$115 per day results in a total of \$28,875. \$175,950 plus \$28,874 results in a combined total of \$204,825.

In its analysis of this bill, the Department of Children and Family Services (DCF) states that they currently fund substance abuse treatment services for approximately 8,602 adults and 2,200 children involved in the drug court system. DCF notes that because the language of the bill is permissive (i.e. the bill does not *require* courts to order assessment and evaluations), it is difficult to anticipate a fiscal impact.

Office of State Courts Administrator

The Office of State Courts Administrator reports that all judicial circuits already have a drug court coordinator, so there will not be a fiscal impact related to the provision that each judicial circuit, contingent upon appropriation, establish the position of drug court coordinator.

Under the implementation of Revision 7 to Article V of Florida's Constitution, the state is obligated to pay from state revenues certain case management costs which include "service referral, coordination, monitoring, and tracking for treatment-based drug court programs under s. 397.334."¹⁴ However, "costs associated with the application of therapeutic jurisprudence principles by the courts" are excluded from the mandated portion of these costs to be borne by the state.¹⁵ Therefore, while costs associated with case management will be paid by the state, to the extent the assessments and treatment described by the provisions of the bill are "therapeutic," they do not appear to have a significant fiscal impact on the state.

Committee on Criminal Justice Fiscal Comments

The State Courts Administrator asserts that the costs of evaluation of individuals ordered by a dependency court would be "therapeutic", and therefore not paid by the state under s. 29.004(10), F.S. However, that section is only applicable to "case management services". Section 29.004(6), F.S., provides that the state will be responsible for "expert witnesses not requested by any party which are appointed by the court pursuant to an express grant of statutory authority." If a finding is made that an assessment is not therapeutic, but only explores whether therapeutic services are necessary, then s. 29.004(10), F.S., will not apply and the state may be obligated to pay for the evaluation for indigent persons.

Currently, these assessments are already being ordered and paid for through a variety of sources, including payment by individuals who can afford it. The number of annual assessments is unknown. Also unknown is whether this bill will increase the number of substance abuse assessments ordered. In FY 2002-2003, there were 16,215 dependency cases filed.¹⁶ If 70% of cases involve substance abuse, and courts were to order a substance abuse evaluation in each case, this would result in a potential of 11,351 cases with substance abuse evaluations. Note, however, that some cases may involve multiple individuals, but that evaluations may not be ordered where the individual admits to his or her addiction. The estimated cost for an assessment is \$50.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Although counties are given the option of whether to fund drug courts, the bill allows the courts to impose sanctions on pre-trial intervention participants which involve incarceration in county jail, jail-based treatment programs and secure juvenile detention. Thus, the bill would appear to require counties to expend funds. While the Department of Juvenile Justice estimates a \$1.2 million impact, data to estimate the amount of any jail bed impact are unavailable. In addition, pre-trial intervention programs are already authorized under current law and are designed to reduce jail populations and associated costs. So these programs are generally perceived as providing financial benefit to counties that outweigh the costs.

Article VII, Section 18 of the state constitution reads as follows: "No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action

¹⁴ Section 29.004(10)(d), F.S.

¹⁵ Section 29.004(10), F.S.

¹⁶ Trial Court Statistical Reference Guide, published by the Office of State Courts Administrator.

requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.”

Subsection (d) provides for several exemptions to Section 18. Among them are criminal laws and laws having insignificant fiscal impact. Even if the potential costs of incarceration authorized by this bill exceeded an amount considered by the Legislature to constitute an insignificant fiscal impact, these provisions relate to the criminal law, specifically to sentencing and the implementation of criminal sanctions, and therefore are exempt from any requirements of Section 18 of Article VII of the Florida Constitution.

2. Other:

The amendments to s. 397.334, F.S. provide that the protocol of sanctions for treatment-based programs authorized in chapter 39 (dependency proceedings) may include incarceration for noncompliance with the program rules within the time limits established for contempt of court. Thus, an individual participating in a treatment-based drug court program as part of a dependency proceeding may be incarcerated for failing to comply with the program’s terms and conditions. As written, this bill authorizes a court to impose a criminal punishment (incarceration) in a civil proceeding (dependency proceedings are civil proceedings). Although incarceration can be used in civil proceedings as a sanction for criminal and civil contempt, this bill does not specify that incarceration would be the result of contempt proceedings (only that the incarceration may not exceed the time limits established for contempt of court). This could result in a constitutional challenge.

It is uncertain whether the statements that parents or other caregivers make during the substance abuse assessment can be used against them in a criminal proceeding. Although some of the persons who administer assessments may qualify as a psychotherapist for purposes of the psychotherapist and patient privilege¹⁷, the privilege does not apply to statements made in the course of a court-ordered evaluation of the mental or emotional condition of a patient.¹⁸

Section 7 of this bill provides that offenders who are “postadjudicatory” may be referred to drug court for assessment and treatment of addictions. The ex post facto and double jeopardy clauses may prohibit a court from compelling such a referral for an offender whose offense was committed prior to the effective date of this bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

¹⁷ Section 90.503, F.S. The constitutional privilege against self-incrimination relates to protecting the accused from giving an admission of guilt against his or her will; Psychiatric examinations generally require testimonial communications of the person examined and any statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth contained therein, *Parkin v. State*, 238 So.2d 817 (Fla. 1970); A person’s prior substance abuse treatment as part of a plea agreement did not constitute a court-ordered examination under the statute providing that there is no psychotherapist-patient privilege for communications made during a court-ordered examination of the mental conduct of the patient, *Viveiros v. Cooper*, 832 So.2d 868 (Fla. 4th DCA 2002).

¹⁸ Section 90.503(4)(c), F.S.

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES