

## **FINAL BILL ANALYSIS**

**BILL #:** CS/SB 504

**FINAL HOUSE FLOOR ACTION:**

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**SPONSOR:** Sen. Bogdanoff (Rep. Steube)

**GOVERNOR'S ACTION:** Approved

**COMPANION BILLS:** CS/HB 387

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### **SUMMARY ANALYSIS**

CS/SB 504 passed the House on May 4, 2011. The bill was approved by the Governor on June 21, 2011, chapter 2011-209, Laws of Florida, and becomes effective July 1, 2011.

In 2007, the Legislature created the Keeping Children Safe Act (Act) to keep children in the custody of the Department of Children and Family Services (DCF or department) or its contractors safe during visitation or other contact with an individual who is alleged to have committed sexual abuse or some related criminal conduct. The bill amends the Keeping Children Safe Act to provide that:

- A finding of probable cause of sexual abuse by a parent or caregiver is required to create a presumption of detriment to a child.
- Persons meeting specified criteria may not visit or have contact with a child without a hearing and order by the court, and in order to begin or resume contact with the child, there must be an evidentiary hearing to determine whether contact is appropriate.
- The court must conduct a hearing within seven business days of finding out that a person is attempting to influence the testimony of a child. The purpose of the hearing is to determine whether visitation with the person who is alleged to have influenced the testimony of the child is in the best interest of the child.

This bill also amends the legislative intent of the Act to provide that it is the intent of the Act to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to this chapter (proceedings related to children).

The bill does not appear to have a fiscal impact on state or local governments.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Keeping Children Safe Act

In 2007, the Legislature created the Keeping Children Safe Act (Act)<sup>1</sup> to keep children in the custody of the Department of Children and Family Services (DCF or department) or its contractors safe during visitation or other contact with an individual who is alleged to have committed sexual abuse or some related criminal conduct. The declared purpose of the act is:

To protect children and reduce the risk of further harm to children who have been sexually abused or exploited by a parent or other caregiver...<sup>2</sup>

The statute places additional requirements on judicial determinations related to visitation and other contact. One of the additional requirements is a "presumption of detriment." The presumption of detriment provides that a rebuttable presumption of detriment to a child is created when a parent or caregiver:

- Has been the subject of a report to the child abuse hotline<sup>3</sup> alleging sexual abuse of any child;<sup>4</sup>
- Has been found guilty of, regardless of adjudication, or has entered a plea of guilty or nolo contendere to certain specified crimes;<sup>5</sup> or
- Has been determined by the court to be a sexual predator.<sup>6</sup>

If a person meets any of these criteria then he or she may visit or have contact with the child only after a hearing and an order by the court that allows the visitation or other contact.<sup>7</sup> The presumption that is established in s. 39.0139(3)(a), F.S., may be rebutted if the court finds the person proved by clear and convincing evidence that the safety, well-being, and physical, mental and emotional health of the child is not endangered by such visitation or other contact.<sup>8</sup> The statute also provides that:

If a party or participant, based on communication with the child or other firsthand knowledge, informs the court that a person is attempting to influence the testimony of a child, the court shall immediately suspend visitation or other contact.<sup>9</sup>

The court must then hold a hearing to determine whether it is in the best interests of the child to prohibit or restrict visitation or other contact. The statute also provides that if a child is in therapy and the child's

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<sup>1</sup> Chapter 2007-109, s. 1, Laws of Fla.

<sup>2</sup> Section 39.0139(2)(b), F.S.

<sup>3</sup> The Florida Department of Children and Families maintains a child abuse hotline. The hotline allows a concerned party to submit a report of abuse via the telephone, fax or on-line. For more information see <http://www.dcf.state.fl.us/programs/abuse/> (last visited March 7, 2011).

<sup>4</sup> Section 39.0139(3)(a)1., F.S.

<sup>5</sup> Section 39.0139(3)(a)2., F.S.

<sup>6</sup> Section 39.0139(3)(a)3., F.S.

<sup>7</sup> Section 39.0139(4), F.S.

<sup>8</sup> Section 39.0139(4)(c), F.S.

<sup>9</sup> Section 39.0139(6)(a), F.S.

therapist reports that the visitation or other contact is impeding the child's therapeutic progress, the court must convene a hearing within seven days to review the terms of the visitation.<sup>10</sup>

### Applicability of the Keeping Children Safe Act

Since the passage of the Keeping Children Safe Act in 2007, there have been questions as to the applicability of s. 39.0139, F.S. In *Protecting Children from Sexual Abuse by Those Entrusted with Their Care*, the authors argue that the statute is applicable to situations other than dependency proceedings.<sup>11</sup> The authors argue that the statute should apply to other proceedings involving children including ch. 61, F.S. (Dissolution of Marriage), and ch. 742, F.S. (Determination of Parentage), proceedings since the statute itself does not specify that it only applies to ch. 39, F.S., proceedings.

In *In re: The Interest of Helen Potts*, the circuit court in Pasco County held that s. 39.0139(3)(a)1., F.S., the section of law finding a presumption of detriment if a parent or caregiver has been reported to the child abuse hotline, was unconstitutional.<sup>12</sup> The court explained that because the statute impinges a fundamental liberty interest – the right to parent<sup>13</sup> – the statute must serve a compelling state interest and use the least intrusive means possible to achieve its compelling interest. Although the court found that s. 39.0139(3)(a)1., F.S., serves a compelling state interest – to protect children from acts of sexual abuse and exploitation committed by a parent or caregiver – the statute did not do so in the least restrictive means possible. The statute does provide for an evidentiary hearing for those parents or caregivers who fall within the statute; however, those persons are deprived of visitation and contact with their child until the hearing is held.

Additionally, the court stated that “there is no other place in the Florida Statutes that permits interference with a fundamental right based solely on an anonymous tip.”<sup>14</sup> Accordingly, the court found s. 39.0139(3)(a)1., F.S., unconstitutional because:

The statute creates a rebuttable presumption that visitation of a dependent child by a parent or caregiver who has been reported to the child abuse hotline for sexual abuse, is detrimental to the child. The parent is not entitled to notice or entitled to be heard before his or her rights are eliminated. If a hearing is held at some future undetermined time, the onus is on the parent to rebut the presumption by clear and convincing evidence. Any and all evidence is permitted and the rules of evidence simply do not apply. . . . There is no other place in Chapter 39 that shifts the burden to the parent.<sup>15</sup>

The court held that s. 39.0139, F.S., did not apply to dissolution of marriage proceedings. The court reasoned that since the focus of s. 39.0139, F.S., is “to protect children ‘who are abused, abandoned, or neglected’” and those terms have specific meaning pursuant to ch. 39, F.S., the section should only

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<sup>10</sup> Section 39.0139(6)(b), F.S.

<sup>11</sup> Caballero and Anderson, *Protecting Children from Sexual Abuse by Those Entrusted with Their Care*, Fla. B.J. Vol. 83 No. 2 (March 2008).

<sup>12</sup> *In re: The Interest of Helen Potts*, case no. 07-00742DPAWS (Fla. 6th Jud. Cir. 2007).

<sup>13</sup> See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

<sup>14</sup> *In re, supra* note 16, at 7.

<sup>15</sup> *Id.*

apply to proceedings pursuant to ch. 39, F.S.<sup>16</sup> The court further reasoned that since "court," pursuant to s. 39.01(20), F.S., means "the circuit court assigned to exercise jurisdiction *under this chapter*,...unless otherwise expressly stated," a court assigned for a dissolution of marriage proceedings would not qualify to hear a s. 39.0139, F.S., complaint.<sup>17</sup> The court also ruled:

Given these broad powers to protect children under Chapter 61 and the Family Law Rules, section 39.0139 should not be read to supplant a due process oriented, comprehensive, balanced approach with provisions that change case dynamics based on a phone call to an abuse hotline.<sup>18</sup>

### Section 39.0139, F.S., and Sexual Abuse Hotlines

Since the passage of the Keeping Children Safe Act, several articles have been published expressing concerns regarding the creation of a presumption of detriment if a parent or caregiver is reported to a sexual abuse hotline.<sup>19</sup> In *Florida Statute §39.0139: Limiting the Risk of Serious Harm to Children*, Judge Robbins notes that:

All the KCSA requires is that the parent or caregiver have 'been the subject of a report to the child abuse hotline alleging sexual abuse of any child as defined in s. 39.01.' A report to the abuse hotline requires only that a person 'knows, or has reasonable cause to suspect, that a child is abused...' There are no limitations as to date, and there is no requirement that the parent or caregiver have been an adult when the report was made. There is no requirement that the report be found to have been true, or even that it be subject to a finding of probable cause before the rebuttable presumption arises. A report that was made in the distant past and closed following an investigation with no indicators of abuse nevertheless triggers the application of the KCSA.<sup>20</sup>

Thus, there is a possibility that a fraudulent or unfounded report, or a case that has been closed in the past, will trigger the presumption under s. 39.0139(3)(a), F.S., and the person reported to the hotline would then have to rebut the presumption by proving, by clear and convincing evidence, that he or she is not a danger to the well-being of the child.<sup>21</sup>

### **Effect of the Bill**

The bill amends s. 39.0139, F.S., the Keeping Children Safe Act, to provide that a rebuttable presumption of detriment is created when a court finds probable cause that a person sexually abused a child.<sup>22</sup> The bill provides that if a person meets certain criteria as set out in law, that person may not visit or have contact with a child without a hearing and order by the court. If visitation or contact is

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<sup>16</sup> *Id.* at 4. (The court refers to the definitions in s. 39.01, F.S.).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 5.

<sup>19</sup> See s. 39.0139(3)(a)1., F.S.

<sup>20</sup> Robbins, *Florida Statute §39.0139: Limiting the Risk of Serious Harm to Children*, Fla. B.J. Vol. 82 No. 5, pg 46 (May 2008).

<sup>21</sup> See s. 39.0139(4)(c), F.S.

<sup>22</sup> This replaces current law which provides that a rebuttable presumption of detriment is created as a result of a report to the child abuse hotline alleging sexual abuse. This was found unconstitutional in a Pasco county circuit court (case no. 07-00742DPAWS (Fla. 6<sup>th</sup> Jud. Cir.2007)).

denied and the person wishes to begin or resume contact with the child victim, there must be an evidentiary hearing to determine whether contact is appropriate. The bill provides that the court must appoint a guardian ad litem or attorney ad litem for the child prior to the hearing.

The bill also provides that at the hearing, the court may receive evidence, to the extent of its probative value, such as recommendations from the child protective team, the child's therapist, or the child's guardian ad litem or attorney ad litem, even if the evidence may not be admissible under the rules of evidence. Regardless of whether the court finds that the person did or did not rebut the presumption of detriment, the court must enter a written order setting forth findings of fact.

The bill provides that once a rebuttable presumption of detriment has arisen or if visitation has already been ordered and a party or participant informs the court that a person is attempting to influence the testimony of the child, the court must hold a hearing within seven business days to determine whether it is in the best interests of the child to prohibit or restrict visitation with the person who is alleged to have influenced the testimony of the child.

The bill also amends the legislative intent of the Act to provide that it is the intent of the Act to protect children who have been sexually abused or exploited by a parent or caregiver by placing additional requirements on judicial determinations related to contact between a parent or caregiver who meets certain criteria and a child victim in any proceeding pursuant to this chapter (Chapter 39, F.S.).

The bill provides an effective date of July 1, 2011

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.