

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1241 Appointment of Attorney for Dependent Child with Disabilities

SPONSOR(S): Civil Justice Subcommittee; Combee

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1468

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Williams	Bond
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Where the parents or other caregiver of a child have abused, abandoned or neglected a child, the child may be found to be a "dependent child," that is, one dependent on the state for services. A small number of those dependent children in the state's care are especially vulnerable because they are disabled.

The bill requires appointment of an attorney for a disabled dependent child who resides in, or is to be placed in, a nursing facility.

The bill appears to have an unknown significant negative fiscal impact on state expenditures, payable from the General Revenue Fund. The bill does not appear to have a fiscal impact on local governments.

The bill has an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Dependency and Dependent Children in Florida

Chapter 39, F.S., establishes legislative intent to provide for the care, safety, and protection of dependent children in an environment that fosters healthy social, emotional, intellectual, and physical development; to recognize that most families desire to be competent caregivers and providers for their children; to ensure permanency for dependent children within one year, and to ensure that the health and safety of dependent children served shall be of paramount concern.¹ Chapter 39, F.S., provides the process and procedures for the following:

- Reporting child abuse and neglect;
- Protective investigations;
- Taking children into custody and shelter hearings;
- Petition, arraignment, and adjudication of dependency;
- Disposition of the dependent child;
- Postdisposition change of custody;
- Case plans;
- Permanency;
- Judicial reviews; and
- Termination of parental rights.

Many of the provisions and time-frames in chapter 39, F.S., are required by federal law in order to be eligible for federal funding.²

The dependency process in Florida begins with an investigation of an allegation of child abuse, abandonment, and/or neglect.³ A child protection investigator conducts an on-site investigation of the home where the abuse, abandonment, and/or neglect was alleged to have occurred.⁴ Following the investigation, the investigator recommends that no further action be taken (indicating that the allegations are unfounded), offers voluntary services to address identified issues in the home, or recommends judicial intervention and/or removal of the child from the home.⁵

If a child is removed from the home as a result of an investigation into child abuse, abandonment, and/or neglect allegations, a shelter hearing is held within 24 hours of removal.⁶ An Intervention Staffing is held to identify the service needs of the child and the family and a dependency petition is filed with the court.⁷ The dependency petition contains the allegations that led to the removal of the child from the home.⁸ The parent admits to, consents to, or denies the allegations contained in the dependency petition. In the meantime, the court determines the most appropriate placement for the child at the shelter hearing with an approved adult relative, with a licensed shelter or foster home, or with an approved non-relative.

¹ Section 39.001, F.S.

² Including, but not limited to, the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351); the Keeping Children and Families Safe Act (P.L. 108-36); the Adoption and Safe Families Act (P.L. 105-89); the Child Abuse Prevention and Treatment Act (P.L. 93-247); and the Adoption Assistance and Child Welfare Act (P.L. 96-242).

³ Section 39.301(1), F.S.

⁴ *Id.*

⁵ Section 39.301(14) and (15), F.S.

⁶ Section 39.402(8)(a) and (c), F.S.

⁷ Section 39.501, F.S.

⁸ Section 39.501(3)(c), F.S.

If the parent admits or consents to the allegations in the dependency petition, the court adjudicates the child dependent and a Guardian ad Litem is appointed to represent the child's best interests. A disposition hearing is held to determine appropriate services and placement setting for the child. A case plan determining permanency of the child, culminating in reunification of the family or another outcome, is also approved by the court.

In determining placement of the child following the disposition hearing, the court is faced with different standards depending on available placement options. If Department of Children and Families (DCF) prevention or reunification efforts allow the child to remain in or return to the home, the court allows such placement after making a specific finding that the reasons for removal from the home have been remedied to an extent that the child's safety, well-being, and physical, mental and emotional health will not be endangered.⁹ If the child is adjudicated dependent and the court determines the child can safely remain in the home with the parent with whom the child was residing at the time the circumstances arose which brought the child under the jurisdiction of the court, and that remaining in the home is in the best interest of the child, the court shall order such placement.¹⁰

If the parent denies the allegations contained in the dependency petition, the case will be set for an adjudicatory hearing. The court considers evidence and hears testimony at the hearing and if, by a preponderance of the evidence, the court finds that the child was abused, abandoned, or neglected, the child is adjudicated dependent. A disposition hearing is held to determine services and placement for the child and a case plan is approved.¹¹

The court also considers postdisposition changes in custody. The standard for changing custody of the child is whether the recommended or requested change is in the best interest of the child.¹² However, when the question before the court is reunification with a parent, the court must determine if the parent substantially completed the terms of the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by returning to the home.¹³

The court holds periodic judicial reviews, generally every six months until supervision is terminated, to determine the child's status, the parent's progress in following the case plan, and the goals and objectives of the case plan.¹⁴ After twelve months, if the case plan goals have not been met, the court holds a permanency hearing to determine the child's permanency goal.¹⁵

There are more than 8,000 dependent children in Florida's foster care system and more than 4,000 foster parents across the state.¹⁶

Recent Developments Regarding Dependent Children in Nursing Homes

In December 2011, the U.S. Department of Justice (DOJ) opened an investigation against the State of Florida regarding the services the state provides to children having disabilities. The DOJ visited a number of nursing homes that served severely disabled children throughout Florida. The DOJ found that the children housed at these facilities had little social activity, received little stimulation, and were often confined to their rooms or housed among the elderly. The DOJ found that the state failed to provide for these children as required by the Americans with Disability Act. In a letter from the DOJ, which was received by Attorney General Pam Bondi on September 1, 2012, the DOJ warned, "In the

⁹ Section 39.521(1)(e), F.S.

¹⁰ Section 39.521(3)(a), F.S.

¹¹ Section 39.603(1), F.S.

¹² Section 39.522(1), F.S.

¹³ Section 39.522(2), F.S.

¹⁴ Section 39.521(1)(c), F.S.

¹⁵ Section 39.621(1), F.S.

¹⁶ Florida Department of Children and Families, Fostering Florida's Future, Fact Sheet, available at www.fosteringflorida.com/docs/materials/fosterbusiness.pdf (last viewed Feb. 5, 2013).

event we determine that we cannot secure compliance voluntarily to correct the deficiencies described in this letter, the [U.S.] Attorney General may initiate a lawsuit pursuant to the ADA.”¹⁷

Representation in Dependency Cases

No law requires that an attorney be appointed for the child in a dependency case.

Florida’s Guardian ad Litem Program (Program) is a partnership of community advocates and professional staff, which provide a voice on behalf of Florida’s abused and neglected children.¹⁸ The Program advocates for the best interests of children alleged to be abused, abandoned, and neglected who are involved in judicial proceedings.¹⁹ Current law requires a guardian ad litem to be appointed to represent the best interests of children in dependency proceedings.²⁰

According to the Program, only 69% of the children with dependency cases are able to be represented with current resources.²¹ After a dependency proceeding is held a child may be placed in a nursing facility that may require further advocacy or litigation with other state or federal agencies to address legal needs outside of the dependency proceeding.²² However, since these types of litigation are not in the dependency court system, the Program is unable to meet all of the legal needs of these children.²³ In addition, the Program provides that attorney caseloads are currently strained at an average of 180+ children per attorney, whose time is spent in court on dependency issues.²⁴

Effect of the Bill

The bill creates s. 39.01305, F.S., to appoint an attorney for a dependent child with disabilities. The bill defines “dependent child with a disability” as a medically dependent or technologically dependent child who because of a medical condition requires continuous therapeutic interventions or supervision and resides in a skilled nursing facility or is being considered for placement in a skilled nursing facility.

The bill offers presumptions that dependent children with disabilities have important interests at stake, such as health, safety, and well-being and the need to obtain permanency; and that a dependent child with a disability, as defined by this law, has a particular need for an attorney to represent them in proceedings, fair hearings and appellate proceedings. The bill provides that such representation will allow the attorney to address the medical and related needs of the child, along with services and supports necessary for the child to live successfully in the community.

The bill provides the intent of the Legislature that an attorney be appointed by the court to represent each dependent child who has a disability and who has been placed, or is being considered for placement in a skilled nursing facility. The bill specifies that the order appointing such attorney must be in writing and remains in effect until the attorney is permitted to withdraw or is discharged by the court, or until the case is dismissed.

The bill requires the appointed attorney to provide a complete range of legal services from removal from the home or initial appointment through all available appellate proceedings. Upon the courts approval, the bill authorizes the attorney to arrange supplemental or separate counsel to handle proceedings at an appellate hearing.

¹⁷ Letter to Attorney General Pam Bondi from Thomas E. Perez, Assistant Attorney General, Department of Justice (September 4, 2012), available at http://www.ada.gov/olmstead/documents/florida_findings_letter.pdf (last visited March 16, 2013).

¹⁸ Florida Guardian ad Litem Program. (<http://www.guardianadlitem.org/index1.asp>)(last visited March 15, 2013).

¹⁹ Guardian ad Litem analysis for HB 1241. (On file with House Civil Justice Subcommittee).

²⁰ Section 39.822, F.S.

²¹ *Supra* note 19.

²² These agencies may include the Agency for Persons with Disabilities, Agency for Health Care Administration, Vocational Rehabilitation and the Social Security Administration.

²³ *Supra* note 19.

²⁴ *Id.*

The bill requires that the attorney to be adequately compensated and provided access to funding for expert witnesses, depositions, and for other litigation costs.

The bill does not negate the authority of the court to appoint an attorney for a proceeding under this law and provides that implementation of the law is subject to appropriations specified for the purposes of the law.

B. SECTION DIRECTORY:

Section 1 creates s. 39.01305, relating to appointment of an attorney for a dependent child with disabilities.

Section 2 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill appears to have a significant unknown negative fiscal impact on state expenditures. There is no apparent cap on attorney's fees that could be charged to the state under this bill. The source of funds for payment of the services required by the bill is not stated and thus is payable from the General Revenue Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The bill requires that an attorney representing a dependent child who has a disability must be adequately compensated (lines 54-56) without specifying any limit on the compensation, the source of funds, or what state agency, if any, has the authority to approve billings or to audit payments.

The bill provides that it is subject to funding, but it is possible that a court, finding a right to an attorney created by this bill, would order one appointed and paid from state funds regardless of whether the funding was actually appropriated.²⁵

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

²⁵ *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986); *Bd. of County Comm'rs of Hillsborough County v. Scruggs*, 545 So.2d 910, 912 (Fla. 2d DCA 1989)(expanding *Makemson* to court-appointed attorneys in civil dependency hearings).
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1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The definition of the term "dependent child with a disability" at lines 20-25 is unclear due to a lack of punctuation leading to different possible interpretations of the definition.

It appears that the main substantive idea of the bill is to appoint an attorney for certain children. However, that is merely expressed in an intent section of the bill (lines 37-43) and thus is not actually accomplished through positive statements in legislation.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 18, 2013, the Civil Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The first amendment changes a reference to "dependent children" to "dependent children with disabilities." The second amendment removes language which might be construed to place an unintended limit upon a dependent child's right to an attorney. The third amendment revises the definition of a "dependent child with a disability" to include a child who is being considered for placement in a skilled nursing facility.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.