

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 561 Attorneys for Dependent Children with Disabilities

SPONSOR(S): Civil Justice Subcommittee; Fresen

TIED BILLS: None **IDEN./SIM. BILLS:** SB 972

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 0 N, As CS	Ward	Bond
2) Justice Appropriations Subcommittee	12 Y, 0 N	deNagy	Lloyd
3) Judiciary Committee			

SUMMARY ANALYSIS

"Dependency" is a legal determination that an abandoned, neglected, or abused child requires intervention by the state. The term "dependent child" means that the child has been determined by a court to be dependent on the state for support or services. Some dependent children are disabled.

The bill provides legislative findings that though there are other organizations which provide representation to children with proven effect, a disabled child in the dependency system has a particular need for legal services. The bill requires that the court appoint an attorney to represent the following children who have been adjudicated dependent:

- 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;
- A dependent child who has been prescribed a psychotropic medication;
- A dependent child with a suspected diagnosis of developmental disability;
- A dependent child being placed in a residential treatment center or being considered for placements in a residential treatment center; and
- A dependent child who has been a victim of sexual abuse or human trafficking and who is suspected to be in need of mental health treatment.

The bill directs that the appointed attorney be adequately compensated and be provided with funds for appellate counsel and litigation costs. The implementation of the law is subject to appropriations expressly made for that purpose.

The bill's impact is indeterminate but significant. The bill specifies the implementation of this section is subject to appropriations expressly made for that purpose. The House of Representatives proposed FY 2014-15 GAA appropriates \$200,000 be used by the Justice Administrative Commission to contract with attorneys selected by the Guardian ad Litem Program to represent dependent children as specified in this bill or similar legislation within the 11th Judicial Circuit, contingent upon this bill or similar legislation becoming law. See FISCAL SECTION.

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Dependent Children

Proceedings related to children are governed by ch. 39, F.S. The stated purpose of the chapter is to "provide for the care, safety, and protection of dependent children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; to promote the health and well-being of all children under the state's care; and to prevent the occurrence of child abuse, neglect, and abandonment."¹

"Dependency," "dependent child" and "adjudication of dependency" are terms used throughout ch. 39, F.S., to describe the legal process whereby parental rights and responsibilities are partially or fully surrendered to the state. The statutes do not define "dependency" but define "dependent child."² "Dependent child," is defined by the adjudication of the condition, after notice and hearing,³ based upon one or more of the findings set out in the statute.⁴

The dependency process in Florida begins with an investigation into an allegation of child abuse, abandonment, or neglect.⁵ A child protection investigator conducts an on-site investigation of the alleged abuse or neglect.⁶ If warranted, a dependency petition is filed with the court by the Department of Children and Families.⁷

A child may be taken into custody and placed in a shelter without a hearing if there is probable cause of imminent danger or injury to the child.⁸ If a child is taken into custody, a hearing is held within 24 hours.⁹ A guardian ad litem¹⁰ will be, and an attorney ad litem¹¹ may be, appointed to represent the child's best interests in the proceeding. An adjudicatory hearing is held to determine whether the child is dependent based upon a preponderance of the evidence.¹² A disposition hearing is held to determine appropriate services and placement setting for the child.¹³ A case plan¹⁴ determining permanency of the child placement, with goals such as reunification of the family or another outcome, is also approved by the court.¹⁵

The court holds periodic judicial reviews, generally every six months, until supervision is terminated, to determine the child's status, the progress in following the case plan, and the status of the goals and objectives of the case plan.¹⁶ After twelve months, if the case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.¹⁷

¹ Section 39.001(1)(a), F.S.

² Section 39.01(15), F.S.

³ Section 39.502(1), F.S.

⁴ Section 39.01(15), F.S.

⁵ Section 39.301(1), F.S.

⁶ *Id.*

⁷ Section 39.501(3)(c), F.S.

⁸ Section 39.402(1), F.S.

⁹ Sections 39.01(69) and 39.402(8)(a), F.S.

¹⁰ Section 39.822(1), F.S.

¹¹ Section 39.4085(20), F.S.

¹² Section 39.507, F.S.

¹³ Sections 39.01(25) and 39.521, F.S.

¹⁴ Section 39.01(11), F.S.

¹⁵ Section 39.521(1), F.S. *See also*, s. 39.6011, F.S., *et seq.*

¹⁶ Section 39.521(1)(c), F.S.

¹⁷ Section 39.621(1), F.S.

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 with 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 (ADA). In a letter from the DOJ, which was received by Attorney General Pam Bondi on September 1, 2012, the DOJ warned: "In the 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."¹⁸

The Fiscal Year 2013-14 General Appropriations Act, Ch. 2013-40, L.O.F., currently appropriates \$323,000 in recurring general revenue funds to be used by the Justice Administrative Commission to contract with attorneys selected by the Guardian ad Litem Program to represent dependent children with disabilities in, or being considered for placement in, skilled nursing facilities. Attorney fees shall not exceed \$4,500 per child per year and due process costs shall not exceed \$5,000 per year per child.

Representation in Dependency Cases

The court may appoint an attorney to represent a child in a dependency proceeding, but it is not mandatory. A guardian ad litem is appointed to represent the best interests of the child in a dependency proceeding.¹⁹

Effect of the Bill

The bill creates the classifications of children to be served by the bill in the definition of "dependent child with a suspected or known 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;
- A dependent child who has been prescribed a psychotropic medication and refuses to take the psychotropic medication;
- A dependent child with a suspected diagnosis of developmental disability as defined in s. 393.063, F.S.;
- A dependent child being placed in a residential treatment center or being considered for placements in a residential treatment center; or
- A dependent child who has been a victim of sexual abuse or human trafficking and who is suspected to be in need of mental health treatment.

The bill provides legislative findings that:

- All children in ch. 39, F.S., proceedings have important interests at stake;
- A dependent child with a suspected or known disability has a particular need for an attorney in dependency through appellate proceedings;
- A dependent child with a suspected or known disability has a particular need for an attorney to address medical and related needs of the child;
- It is the intent of the Legislature that the court appoint an attorney to represent each dependent child with a suspected or known disability;
- There already exist organizations that provide effective representation to children;

¹⁸ 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 February 13, 2014).

¹⁹ Section 39.822, F.S.

- Funding under this bill is not intended to supplant funding to organizations providing effective representation to disabled children; and
- There is no intent to limit the ability of a pro bono attorney to appear on behalf of a child.

The bill provides that:

- The court must appoint an attorney for a dependent child with a suspected or known disability (see definition above). The order must be in writing;
- The appointment of the attorney continues in effect until the case is closed or the attorney is discharged by the court;
- With permission of the court, the attorney may arrange for counsel to handle an appellate proceeding;
- The appointed attorney must be adequately compensated; and
- The appointed attorney must be provided with costs of litigation.

The bill does not limit the authority of the court to appoint an attorney for a proceeding under ch. 39, F.S.

The bill provides that implementation of the law is subject to appropriations expressly made for the purposes of the law.

The bill has an effective date of July 1, 2014.

B. SECTION DIRECTORY:

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

Section 2 provides an effective date of July 1, 2014.

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:

If the bill were implemented statewide, it would have an indeterminate, but significant fiscal impact. The Department of Children and Families (DCF) estimated as of January 27, 2014, the number of children who meet the definition of a "dependent child with disabilities" is 3,915.²⁰ The cost of an attorney for each child is unknown. There is no standard for determination of fees and costs, nor is there a limit, creating a significant fiscal impact.

The bill specifies the implementation of this section is subject to appropriations expressly made for that purpose (lines 94-95). The House of Representatives proposed FY 2014-15 GAA appropriates \$200,000 in nonrecurring general revenue funds to be used by the Justice Administrative Commission to contract with attorneys selected by the Guardian ad Litem Program to represent dependent children as specified in this bill or similar legislation within the 11th Judicial Circuit, contingent upon this bill or similar legislation becoming law.

The bill requires that an attorney representing a dependent child with a disability must be "adequately" compensated and provided with funds for costs of litigation (lines 82-90). There is no standard for determination of fees and costs, nor is there a limit. Other statutes providing for attorneys' fees pre-determine those fees in some fashion, and have a "reasonable" standard for

²⁰ Department of Children and Families, 2014 Agency Legislative Bill Analysis on HB 561
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costs and fees.²¹ However, the Florida Supreme Court has found that attorneys' fees and costs for court appointed counsel can exceed statutory minimums in certain circumstances.²² Therefore, it is unknown how quickly the \$200,000 in nonrecurring general revenue will be spent within the 11th Judicial Circuit.

The House of Representatives proposed FY 2014-15 GAA also appropriates \$323,000 in recurring general revenue funds to be used by the Justice Administrative Commission to contract with attorneys selected by the Guardian ad Litem Program to represent dependent children with disabilities in, or being considered for placement in, skilled nursing facilities. Attorney fees shall not exceed \$4,500 per child per year and due process costs shall not exceed \$5,000 per year per child. Funds anticipated to be in excess of those necessary to represent these children may be used for attorney training on legal issues involving children with disabilities. This appropriation will cover the costs of attorneys for any dependent child who resides in a skilled nursing facility statewide. This appropriation is not contingent upon this bill or similar legislation becoming law.

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 will have a positive fiscal impact on attorneys who represent the dependent children who meet the definitions of this bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

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:

None.

²¹ See, e.g., ss. 16.0155(5), and 27.5304, F.S.

²² *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).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 19, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides legislative findings recognizing that there already exist organizations that provide attorney representation to children in many jurisdictions in the state with some proven effect, and that it is not the intent that the funding under the bill to supplant those organizations which are effective and proven. The amendment provides that an attorney shall be appointed to represent the children described in the bill. The bill amendment also removed a reference to perpetrators of sexual abuse or human trafficking. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.