

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

BILL: PCS/SB 1212 (723066)

INTRODUCER: Recommended by Appropriations Subcommittee on Criminal and Civil Justice and Senator Flores

SUBJECT: Appointed Counsel for Children

DATE: February 19, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|-----------------|------------|--------------------------|
| 1. | <u>Maida</u> | <u>Cibula</u> | <u>JU</u> | Favorable |
| 2. | <u>Harkness</u> | <u>Sadberry</u> | <u>ACJ</u> | Recommend: Fav/CS |
| 3. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/SB 1212 amends section 39.01305, Florida Statutes, to expand the right to appointed counsel to include dependent children under the age of 8 who have been prescribed psychotropic medication and to dependent children who cannot be represented by the Statewide Guardian ad Litem Office due to a conflict of interest. The bill also provides for appointment of substitute counsel in the event of an attorney's withdrawal or discharge.

Further, the bill requires the Justice Administrative Commission (JAC) to contract with a not-for-profit organization to create the Quality Counsel Program. The program must review and analyze, for quality improvement purposes, information submitted by appointed attorneys detailing the activities performed and results obtained on behalf of each child. In addition, the program must annually report collected data and recommendations to the President of the Florida Senate, Speaker of the Florida House of Representatives, Governor, Justice Administrative Commission, the Statewide Guardian ad Litem Office, and the Office of the State Courts Administrator.

The bill will increase the number of dependent children appointed an attorney; however, the number of additional children who will be appointed an attorney is unknown. As a result, the fiscal impact of the bill is unknown. *See* Section V.

The bill has an effective date of July 1, 2016.

II. Present Situation:

Dependent Children

A court-determined “dependent child” is considered dependent on the state for care and protection.¹ By statute, a “dependent” child is found:

- To have been abandoned, abused, or neglected by parents or legal custodians;
- To have been surrendered to the Department of Children & Family Services (DCF) or a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, an adult relative, or the DCF, and after being placed a case plan expired and the parents or legal custodian failed to substantially comply with the plan;
- To have been voluntarily placed with a licensed child-placing agency for adoption and a parent or parents have signed a consent;
- To have no parent or legal custodian capable of providing supervision and care;
- To be at substantial risk of imminent abuse, abandonment or neglect by the parents or legal custodians; or
- To have been sexually exploited and to have no parent, legal custodian, or responsible adult relative currently known and capable of providing necessary and appropriate supervision and care.²

The dependency process in Florida begins with a call to the Florida Abuse Hotline (hotline).³ If accepted by the hotline, the call is referred to a child protective investigator who conducts an on-site investigation of the allegations of abuse, neglect, or abandonment.⁴ If warranted, a dependency petition is filed with the court by DCF.⁵ A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care.⁶ In that instance, a judicial hearing must be held within 24 hours after removal of the child from the home.⁷ A Guardian ad Litem (GAL) must be appointed at the time of the shelter hearing.⁸ If needed, an Attorney ad Litem may be appointed at this time as well.⁹

If a petition for dependency is filed, whether or not the child is taken into custody, the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory

¹ See *In re M.F.*, 770 So. 2d 1189, 1193 (Fla. 2000) (stating that the “purpose of a dependency proceeding is not to punish the offending parent but to protect and care for a child who has been neglected, abandoned, or abused”).

² Section 39.01(15), F.S.

³ Section 39.201(2)(a), F.S.

⁴ Section 39.301(1), F.S.

⁵ Section 39.501(1) and (3)(c), F.S.

⁶ Section 39.402(1), F.S.

⁷ Section 39.402(8)(a), F.S.

⁸ Section 39.822(1), F.S.

⁹ The term “ad Litem” means literally “for the suit.” In practice, it means a representative, either lay (guardian) or lawyer (attorney) appointed for the limited purposes of a particular lawsuit.

hearing to determine whether the child is dependent, based on a preponderance of the evidence.¹⁰ If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.¹¹ At this hearing, the court also reviews and approves a case plan outlining services and desired goals for the child.¹²

The dependency court holds periodic judicial reviews to determine the child's status, progress in following the case plan, and the status of the goals and objectives of the case plan. These reviews will generally occur every 6 months.¹³ If after 12 months, case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.¹⁴

Lawyers for Children in the Dependency System

In general, the federal and state approach to safeguarding the legal needs of children in the dependency system relies upon the appointment of guardians ad litem (GAL) or attorneys ad litem (GAL attorney). The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing guardian ad litem to represent the child's best interest in every case of child abuse or neglect which results in a judicial proceeding.¹⁵ The funds of the Florida guardian ad litem program support both lay volunteers who assist children in dependency proceedings and attorneys ad litem. The guardian ad litem program has succeeded in recruiting attorneys who wish to satisfy their pro bono expectations by representing children with various legal needs in dependency court.¹⁶ When there are insufficient pro bono lawyers available and there are sufficient resources to do so, the guardian ad litem program may contract with legal aid, other programs, or private attorneys for the provision of these services.¹⁷

Florida law requires the appointment of a guardian ad litem for every child who is the subject of a dependency proceeding.¹⁸ While the guardian ad litem program has requested funds to allow it to meet this mandate, the Statewide Guardian ad Litem Office indicates it has not been fully funded. As of November 2015, there were 31,399 dependent children under court supervision, of whom 25,157 (80 percent) had been appointed a guardian ad litem.¹⁹ The GAL program also funds the current attorney ad litem program. The GAL attorney is required by program standards to request the appointment of an attorney ad litem in any case where doing so would further the best interests of the child. In addition, the court on its own motion or upon motion of any party, including the child, can appoint an attorney ad litem at any point in the dependency process.²⁰ Common reasons for seeking appointment of an attorney ad litem in dependency court include

¹⁰ Section 39.507(1)(a) and (b), F.S.

¹¹ Section 39.521(1), F.S.

¹² Section 39.521(1)(a), F.S.

¹³ Section 39.521(1)(d), F.S.

¹⁴ Section 39.621(1), F.S.

¹⁵ 42 U.S.C. ss. 5101 *et seq.*

¹⁶ The Florida Bar has an expectation that its members perform *pro bono* services. This term literally means "for good," and is applied to services performed without compensation by lawyers.

¹⁷ Office of the Florida Guardian ad Litem, email, (March 13, 2014).

¹⁸ Sections 39.402(8)(c)1, 39.807(2), and 39.822(1), F.S.

¹⁹ Florida Statewide Guardian ad Litem Office, Bill Analysis for Senate Bill 1212 (Dec. 30, 2015) (on file with the Senate Committee on Judiciary).

²⁰ Fla. R. Juv. P. 8.217(a).

cases in which a child needs legal guardianship or where special expertise is needed in areas such as immigration law, disability law, or administrative forums. No statewide tracking mechanism exists for the appointment of attorneys ad litem for dependent children, because attorneys are appointed at the court circuit level.

Unlike parents, children have been found to have no constitutional right to representation by counsel in dependency court.²¹ By statute,²² however, an attorney is appointed for a dependent child who:

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability as defined in s. 393.063, F.S.;²³
- Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- Is a victim of human trafficking as defined in s. 787.06(2)(d), F.S.²⁴

In Fiscal Year 2014-2015, the legislature provided \$1,500,000, from recurring general revenue funds and \$2,700,000, from nonrecurring general revenue funds for the JAC to contract with lawyers to represent the children pursuant to the provisions of s. 27.40 and 27.5304, F.S.²⁵ Pursuant to the statute, the lawyers' compensation must include both fees and costs.²⁶ Attorney fees may not exceed \$1,000 per child per year.²⁷ The legislature directed the JAC to consult with the GAL to develop a registry of attorneys as compensated counsel for children with the identified special needs and to provide the registry to each judicial circuit's chief judge for inclusion that judicial circuit's registry.²⁸ The GAL was also required to develop the minimum criteria for education, experience and training for attorney's inclusion in the registry.²⁹ Lastly, the DCF was given the responsibility to develop procedures to identify the children with the special needs who require appointment of an attorney.³⁰

In addition to the services of the attorneys ad litem through the guardian ad litem program, other options exist for legal services for children. The Florida Bar Foundation provides grants to legal service providers, several law schools have clinics which serve children, and several Children's Councils³¹ fund lawyers for children.

²¹ *In the Interest of D.B. and D.S.*, 385 So. 2d. 83, 90-91 (Fla. 1980), *In the Interest of C.T.*, 503 So. 2d 972, 973 (Fla. 4th DCA 1987).

²² Section 39.01305(3)(a)-(e), F.S.

²³ Under Section 393.063, F.S., a "developmental disability" means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome, that: 1) manifests before the age of 18, and 2) the constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

²⁴ Under Section 787.06(2)(d), F.S., "human trafficking" means transporting soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining other person for the purpose of exploitation of that person.

²⁵ Section 794, conference report on HB5001 (2014 Reg. Session).

²⁶ Section 39.01305(5), F.S.

²⁷ *Id.*

²⁸ Section 794, conference report on HB5001 (2014 Reg. Session).

²⁹ *Id.*

³⁰ Section 39.01305(6), F.S.

³¹ Florida Children's Councils, or Children's Services Councils, are locally established special taxing districts designed to provide services to children and families. Chapter 125, F.S., governs their creation and operation. The first Council was

Dependent Children in Nursing Homes

The state is currently party to a lawsuit related to the placement of medically complex children in more restrictive settings such as nursing homes. The United States Department of Justice joined the lawsuit which alleges the state violated the Americans with Disabilities Act (ADA).³² The Agency for Health Care Administration (AHCA) has worked with the families of over 200 children in nursing homes under the Medicaid program to ensure they are aware of and are provided in home health services. In addition, the DCF and the Agency for Persons with Disabilities (APD) have worked with medically complex children and their families to ensure the least restrictive placement.

Dependent Children and Psychotropic Drugs

Florida law requires the DCF to obtain consent from parents or a court order before administering psychotropic drugs to a child, barring an emergency.³³ The statute directs, unless parental rights have been terminated, parents should be involved in decision-making regarding administration of these drugs. By rule, when a child of sufficient age, understanding, and maturity refuses psychotropic medication, the dependency case manager or child protective investigator must request Children's Legal Services to request an attorney for the child.³⁴

Dependent Children and Residential Treatment Facilities

No information is available about the number of children being considered for placement in a residential treatment facility. Placement of a dependent child in a residential treatment facility is governed by the provisions of s. 39.407(6), F.S. This section provides placement must be the least restrictive alternative for the child and requires an immediate appointment of a guardian ad litem for the child if a guardian ad litem is not already provided. In addition, the Florida Rules of Juvenile Procedure requires if a child does not agree with placement in a residential treatment facility, the court must appoint an attorney for the child, if one has not already been appointed.³⁵

III. Effect of Proposed Changes:

The bill amends s. 39.01305, F.S., to expand the right to appointed counsel to:

- Dependent children under the age of 8 who have been prescribed psychotropic medication. Under current law, children prescribed a psychotropic medication are entitled to appointed counsel only if they decline the medication. This revision provides for appointed counsel for children under 8 years of age regardless of the child's assent to the medication.
- Dependent children who cannot be represented by the Statewide Guardian ad Litem Office due to a conflict of interest.

approved in 1946 in Pinellas County. There are currently Councils (with slight variances in names) in Broward, Duval, Martin, Miami-Dade, Palm Beach, and St. Lucie counties. <http://flchildrenscouncil.org/about-the-council/overview/> and <http://flchildrenscouncil.org/about-cscs/member-cscs/> (last visited January 24, 2016).

³² *A.R. et al. v. Dudek et al, United States V. Florida*, Consolidated Case No. 0:12-cv-60460-RSR, U.S. District Court for the Southern District of Florida.

³³ Section 39.407(3)(a)1., F.S.

³⁴ Rule 65C-35.005(3)(b), F.A.C.

³⁵ Fla. R. Juv. P. 8.350(6).

The bill further requires a court to appoint substitute counsel if an attorney appointed to represent any dependent child withdraws or is discharged from the representation. This requirement does not grant the court any discretion regarding this appointment even if the basis for the initial appointment no longer applies or if pro bono counsel is available.

Attorneys appointed under s. 39.01305, F.S., must submit a quarterly report to the Quality Counsel Program detailing the activities performed and results obtained on behalf of each dependent child. The JAC is directed to prescribe the form of this report.

Finally, the bill creates s. 27.406, F.S., which requires the JAC to contract with a non-profit entity establish a Quality Counsel Program to ensure dependent children receive quality representation from attorneys appointed under ch. 39, F.S. The Quality Counsel Program must:

- Be established and operational by June 30, 2018.
- Review and analyze the information submitted by appointed attorneys for quality improvement purposes.
- Annually report the data collected from appointed counsel pursuant to s. 39.01305, F.S., and recommendations to enhance the program to the President of the Florida Senate, Speaker of the Florida House of Representatives, Governor, Justice Administrative Commission, the Statewide Guardian ad Litem Office, and the Office of the State Courts Administrator.

The bill has an effective date of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

PCS/SB 1212 requires appointed attorneys to report activities performed and results obtained on behalf of each dependent child, which potentially increases attorneys' workload but would not have a private sector fiscal impact.

C. Government Sector Impact:

Pursuant to s. 39.01305, F.S., the attorneys fees for each additional child may not exceed \$1,000 per year; “all appointed attorneys... must be provided with access to funding for expert witnesses, depositions and other costs of litigation.” The bill will increase the number of dependent children appointed an attorney; however, the number of additional new appointments are unknown. As a result, the fiscal impact of the bill is unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 39.01305, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Recommended CS by Appropriations Criminal and Civil Justice Subcommittee on February 17, 2017:

- Expands the right to appointed counsel to dependent children under the age of 8 who have been prescribed psychotropic medication and dependent children who cannot be represented by the Statewide Guardian ad Litem Office due to a conflict of interest.
- Requires a court to appoint substitute counsel if an attorney appointed to represent any dependent child withdraws or is discharged from the representation.
- Establishes a Quality Counsel Program to ensure dependent children receive quality representation from appointed attorneys. The program must create a quality improvement program as well as annually report on the results obtained on behalf of each dependent child and provide recommendations to enhance the quality of dependent children’s representation.

B. Amendments:

None.