

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 949 Attorneys for Dependent Children with Special Needs

**SPONSOR(S):** Civil Justice Subcommittee

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1212

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Robinson	Bond

### SUMMARY ANALYSIS

When the state removes a child from their parent's care and custody due to allegations of abuse, abandonment, or neglect, the child is under the jurisdiction of the state dependency system. Dependency proceedings are adversarial legal proceedings where the court must decide between the parents' constitutional rights to raise their children free from interference and the State's compelling interest to protect children from neglect or abuse.

All parents in dependency proceedings are constitutionally entitled to counsel, and indigent parents are entitled to appointed counsel. However, no provision in Florida law or rule requires appointment of counsel for dependent children unless the child has certain medical needs. The bill:

- Expands the right to appointed counsel in dependency proceedings to children under the age of 8 who have been prescribed psychotropic medication and to children who are ineligible for representation by the Statewide Guardian Ad Litem Program due to a conflict of interest;
- Requires the appointment of substitute counsel if an attorney appointed to represent a dependent child withdraws or is discharged by the court;
- Requires that all appointed attorneys and organizations, including pro bono attorneys, receive funding for litigation costs; and
- Requires that the Justice Administrative Commission contract with a non-profit entity to create the Quality Counsel Program. The Quality Counsel Program, using information submitted by appointed attorneys, provides a review and analysis of attorney advocacy and recommendations to enhance the quality of representation for dependent children.

The bill does not appear to have a fiscal impact on local government. The bill has an unknown negative recurring fiscal impact on state expenditures.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **BACKGROUND**

Chapter 39, Florida Statutes, governs dependency proceedings in the state of Florida. Dependency proceedings are usually initiated upon a child being sheltered (i.e., removed from the parents' custody) based on probable cause to believe the child is, has been, or is at imminent risk of being abused, abandoned, or neglected. These are adversarial legal proceedings where the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the State's compelling interest to protect children.<sup>1</sup> The child is also a party to these proceedings,<sup>2</sup> and is vested with rights under ch. 39, F.S., including the right to a permanent home.<sup>3</sup> Children, therefore, have a critical stake in the outcome of dependency proceedings.

#### **Dependency System-Overview**

The dependency process begins with an investigation into a report of child abuse, abandonment, or neglect.<sup>4</sup> The report is referred to a child protection investigator in the Department of Children and Families (DCF) who conducts an on-site investigation of the alleged abuse, neglect, or abandonment.<sup>5</sup> Based on the results of the investigation, a petition may be filed by DCF requesting the court place the child in shelter and seeking adjudication that the child is dependent and should be placed in the state's care.<sup>6</sup> When a child is placed in the state's care the state "acts in the protective and provisional role of in loco parentis" for the child.<sup>7</sup> Upon the filing of a petition for dependency, whether or not the child is taken into custody,<sup>8</sup> the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.<sup>9</sup> A child is dependent if the child:

- Has been abandoned, abused, or neglected by the child's parent(s) or legal custodian(s);
- Has been surrendered to DCF or a licensed child-placing agency for adoption;
- Has been voluntarily placed with a licensed child-caring agency, licensed child-placing agency, an adult relative, or DCF, pursuant to an action under ch. 39 and the parent(s) or legal custodian(s) had substantially failed to comply with the case plan at the time of its expiration;
- Has been voluntarily placed with a licensed child-placing agency for subsequent adoption with the parent(s)' consent;
- Has no parent or legal custodian capable of providing supervision and care;
- Is at substantial risk of imminent abuse, abandonment, or neglect by the parent(s) or legal custodian(s); or
- Has been sexually exploited and has no parent, legal custodian, or responsible adult relative currently known and capable of providing for the care, maintenance, training, and education of a child.

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<sup>1</sup>William A. Booth, *The Importance of Legal Representation of Children in Chapter 39 Proceedings*, THE FLORIDA BAR FAMILY LAW SECTION: COMMENTATOR (Fall 2010), p. 31, available at [www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf](http://www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf).

<sup>2</sup> s. 39.01(51), F.S.

<sup>3</sup> ss. 39.001(1)(h) and 39.0136(1), F.S.

<sup>4</sup> s. 39.301(1), F.S.

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

<sup>6</sup> s. 39.501(3)(c), F.S.

<sup>7</sup> *Buckner v. Family Services of Central Florida, Inc.*, 876 So. 2d 1285 (Fla. 5th DCA 2004)

<sup>8</sup> s. 39.402, F.S.; 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. If a child is taken into custody, a hearing is held within 24 hours.

<sup>9</sup> s. 39.507(1)(a) and (b), F.S.

If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.<sup>10</sup> At this hearing, the court also reviews and approves a case plan outlining services and desired goals, such as reunification with the family or another outcome, for the child.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

### **Right to Counsel for Certain Dependent Children**

In 2014, the legislature established a right to counsel for a limited class of dependent<sup>14</sup> children—children with special needs. Section 39.01305, F.S., requires a court to appoint an attorney for a dependent child who:<sup>15</sup>

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed a psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability;<sup>16</sup>
- 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.<sup>17</sup>

An attorney who is appointed under s. 39.01305, F.S., must provide the dependent child with the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings.<sup>18</sup> However, with the court's permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings. The appointment of the attorney continues in effect until the attorney is allowed to withdraw, is discharged by the court, or the case is dismissed.

Before making an appointment under s. 39.01305, F.S., the court must first consult the Statewide Guardian Ad Litem Office to determine if an attorney is available and willing to represent the child pro bono. If such an attorney is available within 15 days of the court's request, the court must appoint a pro bono attorney.<sup>19</sup> If unavailable, the court must appoint and compensate an attorney or organization and provide the attorney or organization with access to funding for expert witnesses, depositions, and other costs of litigation. Fees for appointed attorneys may not exceed \$1,000 per child per year.<sup>20</sup>

Appointments of compensated counsel must be made through a court registry.<sup>21</sup> In FY 2014-2015, the Statewide Guardian Ad Litem Office and the Justice Administrative Commission (JAC) collaborated to establish registries that meet appointment needs for dependent children. The Statewide Guardian Ad Litem Office reviewed each judicial circuit's local rules and practices to establish the minimum criteria for education, experience and training for an attorney's inclusion in the registry for dependent children. By the beginning of FY 2015-2016, all but one judicial circuit had included the s. 39.01305, F.S.,

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<sup>10</sup> s. 39.521(1), F.S.

<sup>11</sup> s. 39.521(1)(a), F.S.

<sup>12</sup> s. 39.521(1)(c), F.S.

<sup>13</sup> s. 39.621(1), F.S.

<sup>14</sup> For purposes of s. 39.01305, F.S., "dependent child" means a child who is subject to any proceeding under ch. 39, F.S. The term does not require that a child be adjudicated dependent.

<sup>15</sup> s. 39.01305, F.S.

<sup>16</sup> "Developmental disability" means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. s. 393.063(9), F.S.

<sup>17</sup> "Human trafficking" means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. s. 787.06(2)(d), F.S.

<sup>18</sup> s. 39.01305, F.S.

<sup>19</sup> s. 39.01305(4)(a), F.S.

<sup>20</sup> s. 39.01305(5), F.S.

<sup>21</sup> s. 27.40, F.S.

registry into their circuit registry.<sup>22</sup> There are currently 179 attorneys on s. 39.01305, F.S., registries statewide.<sup>23</sup>

## **EFFECT OF THE BILL**

### **Appointment of Attorneys for Dependent Children (Section 1)**

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.

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 and the child continues to meet the requirements for appointed counsel.

### **Quality Counsel Program (Section 2)**

The bill creates s. 27.406, F.S., which directs the JAC to establish a Quality Counsel Program to ensure dependent children receive quality representation from attorneys appointed under ch. 39, F.S. Attorneys appointed under s. 39.01305, which includes pro bono attorneys, 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 the report. The Quality Counsel Program must:

- Be established pursuant to a contract with a non-profit entity by June 30, 2018.
- Review and analyze the information submitted by appointed attorneys for quality improvement purposes.
- 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.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 39.01305, F.S., relating to appointment of an attorney for a dependent child with certain special needs.

Section 2 creates s. 27.406, F.S., relating to the Quality Counsel Program.

Section 3 provides an effective date of July 1, 2016.

## **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:**

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<sup>22</sup> *Supra* FN 21, at 3.

<sup>23</sup> *Supra* FN 21, at 4.

The bill has an indeterminate but perhaps significant recurring negative impact on state expenditures. The expansion of the right to counsel for dependent children may result in a significant increase in court-appointed attorneys and, correspondingly, costs for fees. Children under the age of 8 prescribed psychotropic medications would be entitled to legal counsel under the bill. It is also unknown how many of the 6,100 children currently unrepresented by the Statewide Guardian Ad Litem Office are unrepresented due to a conflict and thereby entitled to representation. The Statewide Guardian Ad Litem Office estimated that if all 6,100 unrepresented children were entitled to representation under the bill, the costs of fees alone could exceed \$6 million.<sup>24</sup>

Additionally, the expansion of funding to all appointed attorneys, including pro bono attorneys, for litigation costs will likely result in a significant increase in the expenditure of state funds. The number of pro bono attorneys currently providing representation who would be entitled to litigation costs under the bill is unknown.

The establishment of the Quality Counsel Program will result in an indeterminate increased expenditure of funds by the Judicial Administrative Commission.

#### 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:

None.

#### D. FISCAL COMMENTS:

Attorneys on a court registry for appointment under s. 39.01305, F.S., must contract with the Justice Administrative Commission for payment of fees and costs under ch. 27, F.S. In FY 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 dependent children pursuant to s. 39.01305, F.S. In the first 17 months of operation, attorneys have been appointed to represent 1,487 children under s. 39.01305, F.S.

JAC processed 681 billing submissions for attorney fees, costs, and related expenses amounting to a total of \$679,700 for representation of dependent children pursuant to s. 39.01305, F.S. in FY 2014-2015. To date in FY 2015-2016, the JAC has processed 503 billing submissions for a total of \$515,895. All but one payment has been for the flat fee, not exceeding \$1,000.<sup>25</sup>

Prior to providing payment under ch. 27, F.S., the Justice Administrative Commission (JAC) reviews billing submissions for completeness and compliance with contractual and statutory requirements. The commission may approve the intended bill for a flat fee per case for payment without approval by the court if the intended billing is correct.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

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<sup>24</sup> *Supra* FN 21, at 6.

<sup>25</sup> Since July 2014, the JAC has received three requests for extraordinary payment under ch. 27, F.S. Of such requests, one was paid, one was withdrawn, and one remains pending as of December 21, 2015. Justice Administrative Commission, Agency Analysis of 2016 House Bill 949, p. 4 (on file with the Civil Justice Subcommittee).

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 bill does not specify circumstances which would constitute “a conflict of interest” such that the Statewide Guardian Ad Litem Office would be precluded from providing representation to a dependent child and thereby entitling the child to appointed counsel.

The Quality Counsel Program appears to duplicate some functions of the JAC with regard to performance review of appointed counsel. Under current law, the JAC is required to review billing submissions for “completeness and compliance with contractual and statutory requirements.” To the extent that such contracts provide for particular outcomes or benchmarks, additional review and analysis by the Quality Counsel Program may be redundant.

An attorney representing a child is in a unique position. In general, an attorney is required to advocate a client's position, and while a child near maturity may be able to competently express his or her desires, young children may not. The professional responsibility rules of the Florida Bar give this guidance to attorneys:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.<sup>26</sup>

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a