

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: SB 1212

INTRODUCER: Senator Flores

SUBJECT: Appointed Counsel for Children

DATE: February 16, 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>	Pre-meeting
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 1212 expands the authority of a court to appoint an attorney for a dependent child. It operates by creating a “catch-all” provision in section 39.01305(3), F.S., whereby a court-appointed attorney is provided if the dependent child “[h]as been identified by the court as having need for legal representation.” 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. This program must 1) require all compensated counsel to keep contemporaneous time records for billing purposes, 2) incentivize legal service providers to use teams that include individuals who are not attorneys to provide broader representation, and 3) establish a performance evaluation system.

The bill will increase the number of dependent children appointed an attorney, but the fiscal impact of the bill is unknown.

The bill takes effect upon becoming law.

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;

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”).

- 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 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

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.

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.

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 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.

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).

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 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).

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:

SB 1212 primarily accomplishes three things. By creating the broad catch-all subsection (f) in s. 39.01305, F.S., it grants a court greater autonomy in assigning an attorney to a dependent child. As current law provides for mandatory attorney assignment in five specific situations, the bill dramatically expands that scope. As s. 39.01305, F.S., does not limit the authority of the court to appoint an attorney, this expansion may correspondingly result in a significant increase in court-appointed attorneys, thereby increasing costs.³⁶ The bill further requires a court to appoint a substitute counsel if a dependent child's attorney withdraws or is discharged from the representation. In addition, all compensated attorneys must keep contemporaneous time records

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).

³⁶ Under s. 39.01305(3)(a)-(e), F.S., a court *shall* appoint an attorney for a dependent child under certain circumstances, while already granting courts autonomy to appoint attorneys in the absence of such circumstances (s. 39.01305(8), F.S). This bill would require—not allow—a court to appoint an attorney under a new “catch-all” provision.

and submit an itemized hourly statement that complies with the JAC's policies and provisions with each billing submission.

Finally, the bill establishes a quality-control mechanism by requiring the JAC to contract with a not-for-profit organization to establish the Quality Counsel Program. The program will:

- Require all compensated counsel appointed after June 30, 2016, to keep contemporaneous time records and submit an itemized hourly statement with each billing submission;
- Issue payment for legal services;
- Incentivize organizational legal service providers to use teams that utilize non-attorneys; and
- Create an improvement program to include attorney performance evaluations.

The bill takes effect upon becoming a law.

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:

SB 1212 requires registry attorneys to submit contemporaneous time records and submit hourly itemized statements that comply with the Quality Counsel Program's requirements, which potentially increases attorneys' workload but would not have a private sector fiscal impact. The bill also requires the Quality Counsel Program to process time records and issue payments to attorneys in a manner duplicative to the JAC. Since the bill does not contemplate funding for the Quality Counsel Program expressly, these administrative billing costs will presumably be performed by the selected non-profit organization without compensation.

C. Government Sector Impact:

The bill will increase the number of dependent children appointed an attorney; however, the number of additional new appointments and the bill's potential fiscal impact are 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 Changes:

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

None.

B. Amendments:

None.