

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 715 w/CS Court-Appointed Psychologists

SPONSOR(S): Rivera, Bullard and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 2050

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Health Standards (Sub)</u>	<u>6 Y, 0 N</u>	<u>Mitchell</u>	<u>Collins</u>
2) <u>Health Care</u>	<u>17 Y, 0 N w/CS</u>	<u>Mitchell</u>	<u>Collins</u>
3) <u>Judiciary</u>	<u>14 Y, 0 N w/CS</u>	<u>Havlicak</u>	<u>Havlicak</u>
4) <u>Judicial Appropriations (Sub)</u>	<u></u>	<u></u>	<u></u>
5) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Currently, a parent or legal guardian may file a complaint with the Department of Health against a court-appointed psychologist when they are in disagreement with the psychologist's evaluation. Complaints may be filed anonymously. A parent or legal guardian may also file a suit against a psychologist without first petitioning the court.

This bill provides that a psychologist, appointed by the court to conduct an evaluation in a child custody proceeding, is presumed to be acting in good faith if the evaluation is conducted using American Psychological Association, Guidelines for Child Custody Evaluation in Divorce Proceedings.

The bill requires a parent, before bringing a legal action against the court-appointed psychologist who conducted the child custody evaluation, to petition the judge to appoint another psychologist. The court must appoint a second psychologist upon the parent's showing of good cause. The bill provides for the court to determine which party will be responsible for attorney's fees and costs associated with the second appointment. Finally, the bill provides that administrative complaints cannot be filed with the department anonymously.

The effective date of the bill is July 1, 2003.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0715d.ju.doc

DATE: April 15, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION:

Currently, a parent or legal guardian may file a complaint with the department against a court-appointed psychologist when they are in disagreement with the psychologist's evaluation. Complaints may be filed anonymously. A parent or legal guardian may also file a suit against a psychologist without first petitioning the court.

The Florida Board of Psychology has been concerned with the number of administrative complaints filed against licensed psychologists who are appointed to evaluate minors in child custody cases. The non-custodial parent files a majority of complaints. The board has dismissed most of the complaints as not valid. Over the past seven years there have been 46 custody cases, relating to administrative complaints that have cost approximately \$58,000. The average costs for each complaint is approximately \$1300. Only 8 cases resulted in a finding of probable cause.

The board is also concerned that many qualified psychologists that perform the evaluations are requesting not to be appointed because they are fearful of being brought into a suit or having an administrative complaint filed against them.

The board is presently amending Rule 64B19-18.007, F.A.C., to provide licensed psychologists a minimum standard of performance in court ordered child custody evaluations.

Court-Ordered Social Investigations

Child custody, visitation and parenting issues may arise in child support, divorce, custody and visitation, termination of parental rights, dependency, and guardianship cases. In proceedings under chapter 61, F.S., a court may order a social investigation of the family if one hasn't been done or if the one that has been done is insufficient. The social investigation must include all pertinent details relating to the child and each parent. The court-appointed or selected staff conducting the social investigation must give to the court and all parties of record a copy of the written study including recommendations and statement of facts upon which the recommendations are based.

Although such investigations may contain hearsay and other inadmissible information under typical judicial proceedings, the rules of evidence do not preclude their consideration by the court. There are no statutory standards or uniform format for conducting such evaluations or investigations in child custody matters.

There are, however, some voluntary professional guidelines that have been developed that professionals in the field follow such as the Guidelines for Child Custody Evaluations in Divorce Proceedings, American Psychologist Association, Committee on Ethical Guidelines for Forensic Psychologists, Specialty Guidelines for Forensic Psychologists, and Association of Family and Conciliation Courts, Model Standards of Practice for Child Custody Evaluations.

With the exception of the indigent party, the adult parties involved in the child custody proceeding share financial responsibility for the expense of the social investigation which is taxed and ordered to be paid as costs in the proceedings.

Evaluators in Child Custody Matters

In a judicial proceeding involving child custody issues, an evaluator may be privately retained or court-appointed. It is not known what processes the various courts use to appoint or select evaluators. Under s. 61.20, F.S., the following persons or entities are the only ones that may conduct a social investigation and study relating to child custody or parental responsibility determinations:

- Qualified staff of the court
- A child-placing agency licensed pursuant to s. 409.175, F.S.
- A psychologist licensed under chapter 490, F.S.
- A licensed clinical social worker licensed under chapter 491, F.S.
- A licensed marriage and family therapist, licensed under chapter 491, F.S.
- A licensed mental health counselor licensed under chapter 491, F.S.
- Qualified staff of the Department of Children and Family Services if a party is indigent and no other qualified staff is available.

Each of the aforementioned professionals has varying degrees of training and expertise as required by their licensure. Each of these professionals with the possible exception of qualified court staff or staff of the Department of Children and Family Services is regulated by his or her respective governing board under which the professional may be disciplined or have a license suspended or denied.

Any person can file an administrative complaint against one of these professionals. A copy of the administrative complaint must be given to the health care professional. The complaint remains confidential until 10 days after the probable cause panel of the respective board determines whether a violation occurred. However, patient identity and patient records remain confidential at all times.

Current law allows a person to file an administrative complaint anonymously against any health professional as long as the complaint is in writing and the complaint contains an allegation of possible violation of the law. See s. 456.073(1), F.S. Such complaint must be investigated if it is determined that the alleged violation of law and/or rule is substantial and there is reason to believe, after a preliminary inquiry, that the alleged violation in the complaint is true. As of July 1, 2002, the Department of Health, Division of Medical Quality Assurance assumed responsibility for processing administrative complaints and reports involving potential misconduct of a licensee and initiating investigations when appropriate.

Statutory Presumptions

The Florida Evidence Code, ch. 90, F.S, defines presumptions and their effects. “[A] presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.”¹ Section 90.302, F.S., specifies that

[e]very rebuttable presumption is either:

¹ Section 90.301(1), F.S.

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

A presumption that serves “primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy,” shifts only the burden of producing evidence.² Such a presumption is called a “vanishing presumption” because any evidence to rebut the presumption eliminates the presumption from the proceeding altogether.³ Any other presumption (*i.e.*, a presumption that does serve primarily to implement public policy) shifts the burden of proof, and therefore does not “vanish” upon production of rebuttal evidence.⁴

PROPOSED CHANGES:

This bill provides procedures governing administrative, civil and criminal actions against court-appointed psychologists in proceedings involving child custody matters.

Provisions of the bill:

- Provide a presumption that a court-appointed psychologist in a custody matter is acting in good faith if the evaluation is done in accordance with standards consistent with the American Psychological Association’s guidelines for such evaluations in divorce proceedings;
- Prohibit a complainant from filing an anonymous administrative complaint against a court-appointed psychologist in a child custody evaluation;
- Require presuit filing of a petition for appointment of another psychologist prior to any legal action against a psychologist; and
- Authorize the court to determine who will pay court costs and attorney’s fees associated with the second appointment of a psychologist.

These provisions will take effect July 1, 2003.

C. SECTION DIRECTORY:

Section 1. Provides procedures governing administrative, civil and criminal actions against court-appointed psychologists in proceedings involving child custody matters.

Section 2. Establishes the bill shall take effect July 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

² Section 90.303, F.S.

³ *Insurance Co. of Pennsylvania v. Guzman’s Estate*, 421 So.2d 597, 601 (Fla. 4th DCA 1982).

⁴ See s. 90.304, F.S. See also *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1979).

2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may reduce the number of civil suits and administrative complaints filed against court-appointed psychologists and reduce the cost of their defense in such proceedings.

D. FISCAL COMMENTS:

Legislative staff has expressed concern that any reference to court related fees and costs risks conflict with changes currently being considered in Article V legislation, and may have to be corrected in a subsequent legislative session.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenues.

2. Other:

Access to Courts:

The Florida Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.⁵ Where citizens have enjoyed a historical right of access to the courts, the Legislature may only eliminate a judicial remedy under two circumstances: 1) a valid public purpose coupled with a reasonable alternative; or 2) overriding public necessity.⁶ This bill may raise the access to courts issue by circumscribing an individual's right of action or chilling a person's right to pursue an administrative or legal recourse against a court-appointed psychologist.

B. RULE-MAKING AUTHORITY:

No rule promulgation is required by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of Health recommends inserting the word "qualified" before the word psychologist. In the court arena, "qualified" means the court has previously deemed the psychologist acceptable as a

⁵ See Article 1, Section 21 of the State Constitution.

⁶ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

custody evaluator. The qualified psychologist conducts evaluations recommended by The American Psychological Association's Guidelines for Child Custody Evaluation in Divorce Proceedings.

The department is also concerned that the bill provides that administrative complaints cannot be filed with the department anonymously. This provision conflicts with s. 456.073(1), F.S., that states the department may investigate an anonymous complaint if the complaint is in writing and is legally sufficient.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 9, 2003, the Subcommittee on Health Standards recommended one amendment and reported the bill favorably to the Committee on Health Care.

Amendment 1 conforms the wording of the bill to the Senate version. It removes the section reference and removes the legal guardian as a referenced party to a legal action against a court-appointed psychologist.

On April 9, 2003, the Health Care Committee adopted the amendment recommended by the subcommittee and reported the bill favorably with a Committee Substitute.

On April 14, 2003, the Committee on Judiciary adopted two amendments which removed language that made the parent responsible for court costs and attorney's fees associated with the appointment of the second psychologist and gave the court the discretion in determining who will pay those fees and costs. The amendments made other technical changes. After adopting the amendments, the committee reported the bill favorably.