

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 365 Representation by Counsel in Hearings on Petitions for Risk Protection Orders

SPONSOR(S): Criminal Justice Subcommittee, Sirois and others

TIED BILLS: IDEN./SIM. BILLS:

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	16 Y, 0 N, As CS	Padgett	Hall
2) Judiciary Committee		Padgett	Kramer

SUMMARY ANALYSIS

Section 790.401, F.S., authorizes a law enforcement officer or a law enforcement agency to file a petition for a risk protection order (RPO). An RPO is a temporary ex parte order or a final order which requires a respondent to surrender to the law enforcement agency all firearms and ammunition owned by the respondent that are in his or her custody, control, or possession and any license to carry a concealed weapon or concealed firearm issued to the respondent.

At the hearing on a petition for an RPO, if the court finds by clear and convincing evidence that the respondent poses a significant danger of causing personal injury to himself or herself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm or any ammunition, the court *must* issue an RPO for a period of time the court deems appropriate, up to 12 months. A person offering evidence or recommendations relating to the issuance of an RPO must present the evidence or recommendations in writing to the court with copies to each party and his or her attorney, *if one is retained*, or must present the evidence under oath at a hearing at which all parties are present. The rules of evidence apply in an RPO hearing to the same extent as in a domestic violence injunction proceeding under s. 741.30, F.S.

Section 27.40, F.S., requires counsel to be appointed to represent any person in a criminal or civil proceeding entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law. Generally, in the following order and manner, the court shall appoint:

- A public defender to represent indigent persons as authorized in s. 27.51, F.S.;
- The office of criminal conflict and civil regional counsel (RCC) in those cases in which the public defender is unable to provide representation due to a conflict of interest or is not authorized to provide representation; or
- Private counsel in cases in which RCC is unable to provide representation due to a conflict of interest.

Section 790.401, F.S., does not explicitly provide the right for a respondent to be represented by counsel and no other statute authorizing a court to appoint counsel to represent an indigent person authorizes the court to do so in an RPO action.

CS/HB 365 amends s. 790.401, F.S., to specify that a respondent in an RPO action has the right to be represented by an attorney. Additionally, the bill provides an indigent respondent with the right to have an attorney appointed to represent him or her in an RPO action. Under the bill, such counsel may include a public defender, RCC, or private attorney appointed off the conflict registry under s. 27.40, F.S. The bill limits compensation for a court-appointed private attorney in an RPO action to \$1,000.

To the extent that indigent RPO respondents request a court-appointed attorney as authorized by the bill, the bill will result in an increased workload to public defenders, RCCs, and court-appointed private attorneys and, as such, will have an indeterminate impact on state expenditures.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Risk Protection Orders

Section 790.401, F.S., authorizes a law enforcement officer or a law enforcement agency to file a petition for a risk protection order (RPO). An RPO is a temporary ex parte order or a final order which requires a respondent to surrender to the law enforcement agency all firearms and ammunition owned by the respondent that are in his or her custody, control, or possession and any license to carry a concealed weapon or concealed firearm issued to the respondent.¹

Petition

A petition for an RPO must be filed in the circuit court in the county where the petitioner's law enforcement agency is located or where the respondent resides² and must:

- Allege the respondent poses a significant danger of causing personal injury to himself or herself or others by having a firearm or any ammunition in his or her custody or control or by purchasing, possessing, or receiving a firearm or any ammunition, and such allegation must be accompanied by an affidavit made under oath which states the specific statements, actions, or facts that give rise to a reasonable fear of significant dangerous acts by the respondent;
- Identify the quantities, types, and locations of all firearms and ammunition the petitioner believes to be in the respondent's current ownership, possession, custody, or control; and
- Identify whether there is a known existing protection order governing the respondent under s. 741.30, F.S., (relating to domestic violence), s. 784.046, F.S., (relating to repeat violence, sexual violence, or dating violence), or s. 784.0485, F.S., (relating to stalking).³

The petitioner must make a good faith effort to provide notice to a family or household member of the respondent and to any third party who may be at risk of violence. Such notice must state that the petitioner intends to petition the court for an RPO or that he or she has already done so and must include referrals to appropriate resources, including mental health, domestic violence, and counseling resources. The petitioner must attest, in his or her petition for an RPO, that he or she has provided the required notice or must attest to the steps that he or she will take to provide such notice.⁴

Once the petition is filed, the court must order a hearing to be held within 14 days and must issue a notice of hearing to the respondent.

Temporary Ex Parte RPO

A petitioner may request that a temporary ex parte RPO be issued pending a final hearing, and without notice to the respondent, by including in the petition detailed allegations based on personal knowledge that the respondent poses a significant danger of causing personal injury to himself or herself or others in the near future by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm or ammunition.⁵

In considering whether to issue a temporary ex parte RPO, the court can consider all relevant evidence. A temporary ex parte RPO restrains the respondent from having any firearms or ammunition in his or her custody, control, or possession and from purchasing or receiving any firearm or ammunition while the order is in effect. If a court enters a temporary ex parte RPO, it must be served upon the

¹ S. 790.401(7)(a), F.S.

² See s. 790.401(2)(a) and (j), F.S.

³ S. 790.401(2)(e), F.S.

⁴ S. 790.401(2)(f), F.S.

⁵ S. 790.401(4)(a), F.S.

respondent at the same time as the notice of hearing and petition.⁶ A temporary ex parte RPO remains in effect until the final hearing.⁷

RPO Hearing

At the hearing on a petition for an RPO, if the court finds by clear and convincing evidence that the respondent poses a significant danger of causing personal injury to himself or herself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm or any ammunition, the court *must* issue an RPO for a period of time the court deems appropriate, up to 12 months. In making its determination, the court may consider any relevant evidence, including, but not limited to, any of the following:

- A recent act or threat of violence by the respondent against himself or herself or others, whether or not such violence or threat of violence involves a firearm;
- An act or threat of violence by the respondent within the past 12 months, including, but not limited to, acts or threats of violence by the respondent against himself or herself or others;
- Evidence of the respondent being seriously mentally ill or having recurring mental health issues;
- A violation of an RPO or a specified no contact order committed by the respondent;
- A previous or existing RPO issued against the respondent;
- A violation of a previous or existing RPO issued against the respondent;
- Whether the respondent has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime that constitutes domestic violence under s. 741.28, F.S.;
- Whether the respondent has used, or has threatened to use, any weapons against himself or herself or others;
- The unlawful or reckless use, display, or brandishing of a firearm by the respondent;
- The recurring use of, or threat to use, physical force by the respondent against another person or the respondent stalking another person;
- Whether the respondent has been arrested for, convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence;
- Corroborated evidence of controlled substance or alcohol abuse by the respondent;
- Evidence of the recent acquisition of firearms or ammunition by the respondent;
- Any relevant information from family and household members concerning the respondent; and
- Witness testimony, taken while the witness is under oath, relating to the matter before the court.⁸

A person offering evidence or recommendations relating to the issuance of an RPO must present the evidence or recommendations in writing to the court with copies to each party and his or her attorney, *if one is retained*, or must present the evidence under oath at a hearing at which all parties are present.⁹ The rules of evidence apply in an RPO hearing to the same extent as in a domestic violence injunction proceeding under s. 741.30, F.S.¹⁰

Order

Section 790.401(3)(g), F.S., requires an RPO to include all of the following:

- A statement of the grounds supporting the issuance of the order;
- The date the order was issued and the date the order ends;
- Whether the respondent is required to complete a mental health evaluation or chemical dependency evaluation;
- The address of the court in which any responsive pleadings should be filed;
- A description of the requirements for surrender of all firearms and ammunition owned by the respondent; and

⁶ S. 790.401(3)(a), F.S.

⁷ S. 790.401(4)(f), F.S.

⁸ S. 790.401(3)(c), F.S.

⁹ S. 790.401(3)(d), F.S.

¹⁰ S. 790.401(3)(e), F.S.

- A required notice advising the respondent, in part, of the right to request a hearing to vacate the order and that he or she may seek the advice of an attorney concerning any matter connected with the RPO.¹¹

Upon the issuance of an RPO, s. 790.401(10), F.S., specifies the following reporting requirements:

- The Clerk must enter any RPO into the uniform case reporting system and forward the respondent's identifying information to the Department of Agriculture and Consumer Services, who must immediately suspend any concealed weapons or concealed firearms license held by the respondent.
- The appropriate law enforcement agency must enter any RPO into the Florida Crime Information Center and National Crime Information Center making the order fully enforceable in any county in the state.

Section 790.401(6), F.S., provides the respondent the right to request a hearing to vacate an RPO, subject to specified time limitations and also grants a petitioner the right to request an extension of an RPO at any time within 30 days before the order expires.

A person who has in his or her custody or control a firearm or any ammunition or who purchases, possesses, or receives a firearm or any ammunition, knowing that he or she is prohibited from doing so by an RPO, commits a third degree felony.¹²

Court Appointed Counsel

Section 27.40, F.S., requires counsel to be appointed to represent any person in a criminal or civil proceeding entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law. Generally, in the following order and manner, the court shall appoint:

- A public defender to represent indigent persons¹³ as authorized in s. 27.51, F.S.;
- The office of criminal conflict and civil regional counsel (RCC) in those cases in which the public defender certifies in writing that he or she is unable to provide representation due to a conflict of interest or is not authorized to provide representation; or
- Private counsel in those cases in which RCC certifies in writing that the office is unable to provide representation due to a conflict of interest.

Section 27.51, F.S., requires a public defender to represent any person who is determined to be indigent and:

- Under arrest for, or charged with, a felony,
- Under arrest for, or charged with:
 - A misdemeanor authorized for prosecution by the state attorney;
 - A violation of chapter 316 punishable by imprisonment;
 - Criminal contempt; or
 - A violation of a special law or county or municipal ordinance ancillary to a state charge or if the public defender contracts with the county or municipality to provide representation pursuant to ss. 27.54 and 125.69;
- Alleged to be a delinquent child;
- The subject of a petition to be involuntarily placed as a mentally ill person under part I of chapter 394 (Baker Act), involuntarily placed as a sexually violent predator under part V of chapter 394 (Jimmy Ryce Act), or involuntarily admitted to residential services as a person with developmental disabilities under chapter 393;
- Convicted and sentenced to death, for the purposes of handling an appeal to the Supreme Court; or

¹¹ S. 790.401(3)(g), F.S.

¹² S. 790.401(11), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. S. 775.082, s. 775.083, or s. 775.084, F.S.

¹³ A person seeking appointment of a public defender under s. 27.51, F.S., based on inability to pay must apply to the clerk of the court for a determination of indigent status using an application form developed by the Florida Clerks of Court Operations Corporation with final approval by the Supreme Court. S. 27.52, F.S.

- Appealing any civil or criminal matter previously listed.

Section 27.51, F.S., does not require or authorize a public defender to represent a respondent in a petition for an RPO. Similarly, s. 27.511, F.S., does not require or authorize RCC to represent a respondent in a petition for an RPO if the public defender certifies he or she has a conflict of interest.

A private attorney appointed by the court to represent an indigent client is entitled to payment of a flat fee as authorized under s. 27.5304, F.S. Section 27.5304, F.S., does not currently contain a fee schedule for representation relating to an RPO.

Effect of Proposed Changes

CS/HB 365 amends s. 790.401, F.S., to specify that a respondent in an RPO action has the right to be represented by an attorney. Additionally, the bill provides an indigent respondent the right to have an attorney to be appointed to represent him or her in an RPO action. Under the bill, such attorney may include a public defender, RCC, or private attorney appointed off the conflict registry under s. 27.40, F.S. The bill requires the notice of hearing provided to an RPO respondent to inform the respondent of his or her right to be represented by an attorney and the right to have an attorney appointed if he or she is indigent and desires representation in the RPO action.

The bill amends ss. 27.51 and 27.511, F.S., to authorize the public defender and RCC, respectively, to represent a respondent in an RPO action.

The bill amends s. 27.5304, F.S., to limit the compensation for a private attorney who is appointed by a court to represent a respondent in an RPO action to \$1,000.

The bill amends s. 39.815, F.S., to conform a cross-reference to changes made by the bill.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 790.401, F.S., relating to risk protection orders.

Section 2: Amends s. 27.51, F.S., relating to duties of the public defender.

Section 3: Amends s. 27.511, F.S., relating to officer of criminal conflict and civil regional counsel; legislative intent; qualifications; appointment; duties.

Section 4: Amends s. 27.5304, F.S., relating to private court-appointed counsel; compensation; notice.

Section 5: Amends s. 39.815, F.S., relating to appeal.

Section 6: Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill will have an indeterminate impact on state expenditures. Public defenders, RCCs, and court-appointed private counsel do not currently represent respondents in RPO actions. To the extent that indigent RPO respondents will seek the assistance of court-appointed counsel as authorized by the bill, the bill will result in an increased workload to public defenders, RCCs, and court-appointed private counsel. Because the number of RPO respondents who are indigent is unknown, and because the number of those respondents who will request court-appointed counsel is unknown, the impact to their workload is indeterminate.

To the extent private attorneys are appointed from the conflict registry to represent indigent respondents, such attorneys may be compensated up to \$1,000 for providing such representation and may experience a positive fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 30, 2024, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment differed from the original bill in that it:

- Required the notice of RPO hearing to inform a respondent of his or her right to be represented by an attorney and inform the respondent that an attorney will be appointed if he or she is indigent and desires representation.
- Authorized the public defender and RCC to provide representation to an indigent respondent in an RPO action.
- Limited the compensation for a court-appointed private attorney in an RPO action to \$1,000.
- Made technical changes to conform current law with the changes made by the bill.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.