

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: CS/SB 1022

INTRODUCER: Senator Steube

SUBJECT: Determination of Parentage

DATE: January 23, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	<b>Favorable</b>
2.	Preston	Hendon	CF	<b>Fav/CS</b>
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1022 authorizes a court to recognize a third legal parent and add that parent to the child's birth certificate. Under the bill, when an "alleged parent" reasonably believes that he or she is the biological parent of a child already deemed the legal child of another, the alleged parent may file a petition in circuit court to establish that he or she is the "actual" legal parent of the child. The child or the child's mother may also file a petition to establish actual legal parentage.

The bill sets forth the procedures both the court and the petitioner must follow. To prevail, the petitioner must ultimately rebut one of the presumptions of legal parentage in another person during a trial and establish that the alleged parent: (a) is the biological parent, (b) has demonstrated a substantial concern and interest in the child's welfare, and (c) that it is in the best interests of the child to establish the biological parent as a legal parent.

If the petitioner is successful, the bill authorizes the court to enter an order recognizing the alleged or biological parent as a legal parent of the child in one of two ways: (1) by terminating the rights of the current legal parent (not the mother) and adding the new legal parent/biological parent to the birth certificate; *or* (2) by adding the biological legal parent as a third legal parent to the birth certificate. However, if the petitioner is unsuccessful at any stage of the proceeding or the court determines that establishing the alleged parent's legal parentage is not in the best interests of the child, the court must dismiss the petition and seal the record.

The bill may have a fiscal impact on the state court system and has an effective date of July 1, 2018.

## II. Present Situation:

### Overview

In Florida, the biological father of a child conceived as the result of an extramarital affair with a married woman will not be deemed the child's legal parent. Rather, by operation of a common law rule safeguarding the legitimacy of children, the mother's husband is deemed the legal parent of the child because the child was born into an intact marriage.<sup>1</sup>

### Legal Parentage

Well before DNA and extensive keeping of birth records and birth certificates, issues of legal parentage—both maternity and paternity—arose.

In modern times, the status of being a “legal parent” is coveted for a variety of reasons. “The status of legal parent . . . has tremendous legal significance, as it comes with near complete independence in decision-making [for the child] and significant constitutional protection.”<sup>2</sup> “Parental rights constitute a fundamental liberty interest . . . protected by the Due Process Clause of the Fourteenth Amendment[.]”<sup>3</sup> Additionally, “[l]egal parents enjoy considerable protection from state and third-party interference”<sup>4</sup> and are not subjected to the scrutiny that those seeking to become adoptive parents must undergo.<sup>5</sup> “While legal parents bear the obligations of parentage, such as food, shelter, clothing, medical care, and the like, legal parents also enjoy all of the benefits of parentage, such as custody and influencing the child's educational, moral, and religious development.”<sup>6</sup>

But the paramount consideration in the parent-child relationship is not the right of the parents but the best interests of the child. Parents who are “fit parents” will be free from state interference because “fit parents” are presumed “to act in the best interests of their children.”<sup>7</sup> As the United States Supreme Court has explained:

“[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the

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<sup>1</sup> *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993); *C.G. v. J.R.*, 13 So. 3d 776 (Fla. 2d DCA 2014) (defining the “legal father” as “the man to whom the mother was married when the child was born and whose name appears on the birth certificate”).

<sup>2</sup> Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 213–14 (2012).

<sup>3</sup> *In re K.M.*, 946 So. 2d 1214, 1219 (Fla. 2d DCA 2006) (quoting *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So.2d 565, 571 (Fla.1991)(internal quotation marks omitted); citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion)).

<sup>4</sup> Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 311 (2007).

<sup>5</sup> See note 2, *supra*.

<sup>6</sup> *Id.*

<sup>7</sup> *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (“[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”).

right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."<sup>8</sup>

### ***Third Party Intervention in the Legal Parent-Child Relationship***

Generally, the only third party permitted to interfere with the legal parent-child relationship is the state, when intervention is necessary to protect the health or safety of the child.<sup>9</sup> However, when the state must intervene for the health and safety of the child, the state must also presume that parents want to be “fit” and competent parents, and must make every effort to keep families stable and intact.<sup>10</sup> Stability is one of the key statutory factors in determining the best interests of the child and is deemed paramount in determining custody or timesharing between parents<sup>11</sup> as well as dependency issues.<sup>12</sup>

On the other hand, “a parent’s desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference . . . absent a powerful countervailing interest, protection.”<sup>13</sup> Where the child’s mother is not married when the child is born, the right of both unmarried biological fathers and mothers to establish a legal parent-child relationship with the child has been recognized in Florida.<sup>14</sup> The constitutional right of the unwed biological parent is described as “inchoate” and may “develop into a fundamental right to be a parent” when the biological parent “demonstrates a full commitment to

<sup>8</sup> *Id.* (quoting *Parham v. J. R.*, 442 U.S. 584, 602 (1979)).

<sup>9</sup> See Ch. 39, F.S.

<sup>10</sup> Section 39.001(1), F.S. (“The purposes of this chapter are: (a) To provide for the care, safety, and protection of children . . . (b) To recognize that most families desire to be competent caregivers and providers for their children and that children achieve their greatest potential when families are able to support and nurture the growth and development of their children. Therefore, the Legislature finds that policies and procedures that provide for prevention and intervention through the department's child protection system should be based on the following principles: 1. The health and safety of the children served shall be of paramount concern. . . . 3. The prevention and intervention *should intrude as little as possible* into the life of the family, . . . [and] ensure[] the health and safety of children *and the integrity of families*. (f) *To preserve and strengthen the child's family ties whenever possible*, removing the child from parental custody only when his or her welfare cannot be adequately safeguarded without such removal.”).

<sup>11</sup> Section 61.13(3), F.S. (requiring court to consider factors including the maintaining the stability of the child’s current environment, as well as each parent’s capacity to honor timesharing schedule, put the child’s needs above his or her own, communicate with the other parent, create a stable home life establishing routines for the child, etc.). See also *Neville v. McKibben*, 227 So. 3d 1270, 1273 (Fla. 1st DCA 2017) (“the trial court must find, at a minimum, that its custody determination is in the best interests of the child”).

<sup>12</sup> Section 39.001(1)(h), F.S. (“To ensure that permanent placement with the biological or adoptive family is achieved as soon as possible for every child in foster care and that no child remains in foster care longer than 1 year.”).

<sup>13</sup> *T.M.H. v. D.M.T.*, 79 So. 3d 787, 796–97 (Fla. 5th DCA 2011), *aff’d in part, disapproved in part*, 129 So. 3d 320 (Fla. 2013) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), accord *Stanley*, 405 U.S. at 651, 92 S.Ct. 1208); see also *Lehr v. Robertson*, 463 U.S. 248, 256, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983)).

<sup>14</sup> *D.M.T. v. T.M.H.*, 129 So. 3d 320, 335 (Fla. 2013) (“a biological father’s constitutional rights are inchoate and develop into a fundamental right to be a parent when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child” (citations, quotation marks, and alterations in original text omitted) (extending to unmarried biological mother who contributed an egg to her same-sex partner with the intention of conceiving and parent a child together) . . . [because] his interest in personal contact with his child acquires substantial protection under the due process clause.”

the responsibilities of parenthood by coming forward to participate in the rearing of [the] child.”<sup>15</sup> However, when the mother is already married, the unwed biological parent is not the legal parent. Rather, for purposes of legitimacy, the mother’s spouse is the legal parent under the common law presumption applicable to children born into an intact marriage.<sup>16</sup>

### ***The Common Law Presumption of Parentage for Legitimacy***

Though not identical, historically, parentage and legitimacy have been closely related concepts.<sup>17</sup> Parentage determines who bears the duty to care for and support a child (the parent in fact), whereas legitimacy concerns the legal relationships between the parent and the child and its consequences.<sup>18</sup> Many of the laws establishing presumptions concerning legal parentage at common law were developed to shield a child from the severe consequences of illegitimacy. Illegitimacy carried not only a stigma of disrepute for the unwed mother and her innocent child,<sup>19</sup> it carried criminal penalties for the mother and father engaged in adultery<sup>20</sup> as well as severe legal consequences for the child:

Under the English common law, a bastard could not be the heir of anyone, and neither could he have heirs except the heirs of his own body; being nullius filius, he was considered to be kin to nobody and to have no ancestor from whom any inheritable blood could be derived, and in this country, . . . it is generally recognized that in the absence of any statute conferring rights of inheritance upon them, illegitimate children are without capacity to inherit from or through either parent. Common law disabilities of the illegitimate are relaxed or removed only to the extent that the legislature has seen fit to remove them, and no rights of inheritance can exist in any case which is not within the statute.<sup>21</sup>

Under Florida’s common law, “any action challenging a child’s legitimacy” as a byproduct of challenging the child’s parentage was viewed “with great disfavor.”<sup>22</sup> The Florida Supreme Court in *Department of Health & Rehabilitative Services v. Privette* expressed concern over disturbing the common law presumption of legitimacy where the Department of Health & Rehabilitative Services sued the biological father for support of a child born into the mother’s intact marriage, even though the mother’s spouse had been listed as the legal father on the birth certificate:

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<sup>15</sup> *Id.* (internal quotations and citation omitted).

<sup>16</sup> *Daniel v. Daniel*, 681 So. 2d 849, 851 (Fla. 2d DCA 1996), *approved*, 695 So. 2d 1253 (Fla. 1997) (quoting *In Matter of Adoption of Baby James Doe*, 572 So.2d 986, 988 (Fla. 1st DCA 1990) (“A child born or conceived during a lawful marriage is a legitimate child.”)).

<sup>17</sup> *Id.* at 851–52 (“The American Heritage College Dictionary 1001 (3d ed. 1993), defines paternity as ‘the state of being a father; fatherhood. . . . a woman attempting to establish that a particular man is the father of her child. . . .’ Only one person can be the biological father of a child. The American Heritage College Dictionary 775 (3d ed. 1993), defines legitimate as ‘being in compliance with the law; lawful. . . . Born to legally married parents.’ Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts.”).

<sup>18</sup> *Id.*

<sup>19</sup> *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384–85 (Fla. 5th DCA 1997) (noting that adultery was historically a crime; and “[s]ociety was so scornful of bringing children into the world as a result of adulterous conduct that ‘bastardy’ was also a crime.”).

<sup>20</sup> *Id.* (noting that the biological father often did not come forward for fear of criminal prosecution).

<sup>21</sup> *In re Caldwell's Estate*, 247 So. 2d 1, 5 (Fla. 1971) (citing 10 Am.Jur.2d Sec. 146, Pg. 948).

<sup>22</sup> *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384–85 (Fla. 5th DCA 1997).

Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their own best interest. Art. I, § 9, Fla. Const. The child's legally recognized father likewise has an unmistakable interest in maintaining the relationship with his child unimpugned, . . . such that his opposition to the blood test and reasons for so objecting would be relevant evidence in determining the child's best interests.<sup>23</sup>

Thus, legitimacy laws came into being to protect children. While a child would not necessarily suffer the same legal consequences if legal parentage were challenged today, the child would still suffer the consequences of potential alienation from a loved legal parent.<sup>24</sup>

### **Establishing Legal Parentage of a Child in Florida**

Currently, a child's legal parentage is established in several ways in Florida. Unless abandoned following a home birth, the child's mother is usually identified by virtue of the fact that she has given birth at a hospital or elsewhere with the assistance of a midwife or other emergency or medical professionals.<sup>25</sup> If she is the only known parent of the child at the time of birth, she will be the only parent listed on the birth certificate.<sup>26</sup>

The identity of the legal father of the child may be established as follows:

- In the case of a child born to a legally married couple, legal parentage is established by operation of the common law rule that presumes the husband of the child's mother is the legal father, particularly where the husband's name is listed as the father on the birth certificate and he acknowledges the child as his own.<sup>27</sup>
- For a child born to a couple that is not married to one another, legal parentage may be established by:

<sup>23</sup> 617 So.2d 305 (Fla.1993).

<sup>24</sup> It appears the only legislative body in the United States to permit more than two legal parents is California. Section 7612 (c) of the California Family Code focuses more on the potential harm to the child:

(c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

<sup>25</sup> Section 382.013(1), F.S.

<sup>26</sup> Section 382.013(2) (c), F.S. ("If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father.").

<sup>27</sup> *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384 (Fla. 5th DCA 1997) ("There existed an almost irrebuttable presumption that the husband was the father of his wife's children, a presumption which could be overcome only upon a showing that the husband either was impotent or lacked access to his wife at the time of conception.") (citing 41 Am.Jur.2d *Presumption From Birth In Wedlock*, § 10 (1995)). See also s. 382.013(2) (a), F.S. ("If the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.").

- A voluntary acknowledgment of paternity entered by the parties during proceedings to determine inheritance, dependency under worker's compensation or a similar compensation program, or by the Department of Revenue to determine child support;<sup>28</sup>
- Voluntary acknowledgment of paternity signed by both parents within five days after the child's birth as reflected on the child's birth certificate issued by the Department of Health's Office of Vital Statistics;<sup>29</sup>
- Marrying after the birth of the child, in which case the child is treated as if born into an intact marriage (common law rule above);<sup>30</sup> or
- DNA testing to establish paternity when the "putative" or unmarried biological father does not acknowledge paternity within five days after the birth of the child, provided certain procedures set out in chapter 742, F.S., are followed.<sup>31</sup>
- In adoption cases, the legal parentage of a child is established by judicial decree after the rights of the legal or biological parent(s) are terminated.<sup>32</sup>
- In donor cases, where a child is conceived within wedlock by means of donated biological contributions (sperm, eggs or preembryos), the husband and wife are deemed the legal parents and the donor relinquishes all rights and obligations, provided the written consent requirements set out in chapter 742, F.S., are followed.<sup>33</sup>
- For children born in another state within the U.S., a certified copy of a final order concerning legal parentage from that state is conclusive evidence of paternity.<sup>34</sup>
- If the legal father who was married to the mother at the child's birth voluntarily disestablishes paternity, the biological father may be able to establish paternity and become the legal parent.<sup>35</sup>

"If a father's name is listed on the birth certificate, the birth certificate may only be amended to remove the father's name or to add a different father's name upon court order."<sup>36</sup>

<sup>28</sup> Section 409.256, F.S. If the affidavit or stipulation is filed in conjunction with an adjudicatory hearing, it establishes parentage. When no adjudicatory hearing is held, however, the affidavit or stipulation creates a rebuttable presumption of parentage and may be rescinded within 60 days. *Id.*

<sup>29</sup> Section 382.013(2) (c), F.S. ("If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father. . . . Upon request of the mother and the person to be named as the father, the facility shall assist in the execution of the affidavit, a notarized voluntary acknowledgment of paternity, or a voluntary acknowledgment of paternity that is witnessed by two individuals and signed under penalty of perjury as specified by s. 92.525(2).").

<sup>30</sup> Section 742.091, F.S. *See also* s. 382.013(f), F.S.

<sup>31</sup> Section 742.10, F.S. *See also* s. 63.032, F.S. ("'Unmarried biological father' means the child's biological father who is not married to the child's mother at the time of conception or on the date of the birth of the child and who, before the filing of a petition to terminate parental rights, has not been adjudicated by a court of competent jurisdiction to be the legal father of the child or has not filed an affidavit pursuant to s. 382.013(2)(c).").

<sup>32</sup> Section 63.032, F.S. ("'Adoption' means the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock."); ss. 63.087-.089, F.S. (governing procedures for termination of parental rights pending adoption).

<sup>33</sup> Sections 742.11 & 742.14, F.S.

<sup>34</sup> Section 742.105, F.S.

<sup>35</sup> Section 742.18, F.S.

<sup>36</sup> Section 382.016(1)(c), F.S.

**Legal Father versus Biological Father in *C.G. v. J.R.***<sup>37</sup>

As recognized in *C.G. v. J.R.*, there is no basis under Florida law to recognize dual paternity where the child was conceived as the result of an extramarital affair between the biological father and the child's mother. Rather, because a child is born into a legally intact marriage, the child's legal father is the mother's spouse.<sup>38</sup>

***Facts of C.G. v. J.R.***

The biological father and the legal father were business partners. The biological father began having an affair with the legal father's wife (the mother) in 2005 and they conceived a child. Because the child was born while the mother was married, the mother's spouse was named as the legal father on the birth certificate. As soon as the child was born, the mother permitted the biological father to frequently visit the child. Although the biological father was aware that the child was his, the legal father was not made aware of the affair for approximately seven months after the child's birth. Until that point, the legal father believed he was the biological father.<sup>39</sup>

However, in May 2007, after learning of the affair, the mother and the legal father no longer allowed the biological father to visit the child. The biological father filed a paternity action. However, he was not permitted to visit the child until January 2009 when the mother and legal father separated.

At that point, the mother and biological father entered into an agreement acknowledging him as the biological and "legal" father, granting him visitation with the child and providing that he would provide support for the child. The agreement also contained a stipulation that the legal father's rights were not affected or removed. The legal father signed the agreement, and a trial court entered a final order acknowledging the agreement in February 2009.<sup>40</sup>

Things began to fall apart, however, after the mother was arrested for drug possession. As a result of her arrest, the biological father refused to return the child to the legal father following a visitation with the child, citing concerns that the legal father was also using drugs. The child was eventually returned to the mother pursuant to an emergency pick-up order, and the legal father filed a motion to set aside both the January 2009 agreement and the February 2009 court order.<sup>41</sup>

Between February 2009 and June 2009, things had apparently been smoothed over between the mother and the biological father. The mother and her new boyfriend moved in with the biological father and his family, and they subsequently entered into another agreement acknowledging the biological father as the legal father and granting him visitation. The new agreement also purported to release the legal father of any financial obligation for the child. The legal father's parental rights were not mentioned in this agreement, nor did he sign it.<sup>42</sup>

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<sup>37</sup> 13 So. 3d 776 (Fla. 2d DCA 2014).

<sup>38</sup> See note 37, *supra*.

<sup>39</sup> *Id.* at 777.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 777-78.

In June 2009, the mother filed for divorce, although the petition was dismissed in October 2010 for lack of prosecution. In the meantime, the trial court adopted the new agreement of the biological father and the mother on a temporary basis while the legal father pursued his motion to vacate the earlier agreement and order.<sup>43</sup>

Finally, in October 2009, the trial court vacated the final judgment approving the first agreement between the mother and biological father on the basis that “dual paternity” is contrary to Florida law and public policy. Thus, the trial court concluded the agreement was unenforceable.<sup>44</sup>

Although the biological father had not seen the child since 2009, in July 2011, he filed an emergency motion for timesharing and sole or shared custody on the basis that: (1) his DNA test reveals he is the child’s biological father, and (2) he has been involved in the child’s life. He also cited concerns over the mother’s instability and drug use.<sup>45</sup>

Although the biological father’s motion was denied, the matter was set for trial and a guardian ad litem was appointed to the child in February 2012 to evaluate the best interests of the child. In March 2012, the guardian ad litem filed her report noting that the only suitable parents were either the legal father or the biological father because the mother had not had any contact with the child for longer than two years. The report noted that the mother was a drug user and unstable.<sup>46</sup>

As between the fathers, the guardian ad litem reported that it was in the best interests of the child to be placed with the legal father. The report noted the faults of the biological father:

- He permitted the mother to reside with her boyfriend in his home while she abused drugs and used “the media and street signs to publicize the custody issue.”<sup>47</sup>
- He tried “to gain an advantage in the custody battle” by entering the agreements with the mother.<sup>48</sup>
- His moral fitness was in question because,
  - He used public forums to convey information about how he interfered with the attempts of the legal father and mother to reconcile their marriage;
  - He may have made false allegations of medical neglect of the child; and
  - He may have made false allegations concerning drug use by the legal father.<sup>49</sup>

The guardian ad litem reported that the legal father was “better equipped to facilitate timesharing based on [the biological father’s] unilateral decision to modify the timesharing agreement (i.e., when he refused to return [the child] after visitation).”<sup>50</sup> The legal father, however, had been more cooperative with timesharing. The guardian ad litem also reported that the child was doing well in her placement with her legal father and considered him to be her father, and that the child was so closely bonded to her half-siblings that it would be detrimental to the child to separate them. Additionally, the guardian ad litem noted that the child’s home, school, and community records

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<sup>43</sup> *Id.* at 778.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



avored placement with the legal father. The guardian ad litem “ultimately concluded that it was in [the child’s] best interest to preserve the ‘presumption of legitimacy’ that arose when she was born during an intact marriage.”<sup>51</sup>

The trial court agreed and entered an order against the biological father in his paternity action. In its order, the trial court considered the statutory child custody factors<sup>52</sup> and found that the biological father had no “significant relationship with the child” and that none of the factors favored him. Rather, the factors favored the legal father. Thus, the trial court ruled that it was in the child’s best interest that the legal father “remain as her legitimate and legal father.”<sup>53</sup> The trial court ordered that the birth certificate reflect that the legal father is the father.<sup>54</sup>

The trial court’s order was affirmed by the Second District Court of Appeal. Initially, the Second District rejected the biological father’s argument that the trial court erroneously ruled against his emergency motion for timesharing. The Second District held that, contrary to the biological father’s argument, the child custody factors were supported by competent, substantial evidence.<sup>55</sup>

The Second District also issued a written opinion to explain why it was affirming the trial court’s order vacating the February 2009 agreement between the mother and the biological father which purported to recognize both the biological and the legal fathers’ rights to parent the child. The Second District noted that the issue is “whether a child can have two legally recognized fathers in addition to a mother.”<sup>56</sup> After examining current Florida law,<sup>57</sup> the Second District held that there was no support under the law to legally recognize two fathers when the child was born into an intact marriage:

This is not a case where either the biological father or the legal father has abandoned the child. Nor is this a case where either father failed to demonstrate a strong desire to be a part of the child’s life or even the ability to care for the child. Rather, this is one of those cases presenting the unfortunate circumstance of a child who was born into a legally intact marriage but who was conceived as the result of an extramarital affair. The consequence of that circumstance is that the third party, here C.G., has an interest in that child which is adverse to the legal father, here J.R. We are cognizant of the gravity of our decision and the legal ramification that it has on C.G.’s and H.G.-R.’s relationship. However, under the facts of this case, there is

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<sup>51</sup> *Id.* at 779.

<sup>52</sup> Section 61.13(3), F.S.

<sup>53</sup> *C.G. v. J.R.* at 779.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> The court examined but ultimately distinguished the cases of *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. 5th DCA 2011), *approved in part, disapproved in part*, 129 So. 3d 320 (Fla. 2013) (holding that unmarried biological mother who gave egg to same sex partner with the intent and demonstrated commitment to parent the resulting child was not a donor but more akin to a unmarried biological father who has an inchoate constitutional right that develops into a fundamental right upon coming forward to participate in rearing of child), and *Greenfield v. Daniels*, 51 So. 3d 421, 427 (Fla. 2010) (holding that child born into a legally intact marriage could claim survivor damages in a wrongful death action involving the biological father “so long as it is established that the decedent is the biological parent and that he acknowledged responsibility for support.”). The court noted that these cases were distinguishable because *C.G. v. J.R.* did not involve an unmarried parent, nor did it involve a wrongful death claim.

simply no support in Florida law for the proposition that H.G.-R. is entitled to have two legally recognized fathers. *Because similar circumstances could arise in other cases, the legislature may choose to readdress the issue of a biological father's right to establish paternity where the child is conceived and born during an intact marriage to another man.* But under the current state of the law, we are constrained to affirm the trial court's order vacating the February 2009 order approving the original paternity and support agreement.<sup>58</sup>

### **The Florida Bar Family Law Section's Concern with *C.G. v. J.R.***

In response to the Second District's opinion and calls to "to fill the gap" in chapter 742 and address the interests of a biological father who desires a parental relationship with a biological child born out of an extramarital affair into an intact marriage, the Family Law Section of The Florida Bar established the following standing positions that were adopted by The Florida Bar:

96. Supports the right of a biological parent to pursue and, when appropriate, establish his or her parental rights when the biological parent has demonstrated or evinced a settled purpose to assume parental responsibilities and when doing so would be in the best interest of the child.

97. Supports the concept that a child may legally have more than two mothers, two fathers or, when appropriate, more than two parents. The best interests of the child must be the foremost concern in determining such matters.<sup>59</sup>

Thus, the Family Law Section drafted the proposed bill, designated as section 742.19, F.S., to address the issues of "quasi-marital children and parental rights in a manner that will further the best interests of the children" while also helping the law "catch up with science."<sup>60</sup>

### **III. Effect of Proposed Changes:**

The bill provides that an "alleged parent" is one who reasonably believes that he or she is the biological parent of a child. The bill permits the alleged parent, the child, or the child's mother to rebut the presumption of legal parentage in one person and establish "actual legal parentage" in another person either to the exclusion of *or* in addition to the legal parent(s). In other words, the bill permits the court to decree that a child has more than two legal parents.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> The Family Law Section of The Florida Bar, *White Paper: BASIS FOR PROPOSED SECTION 742.19, FLORIDA STATUTES* (2017) (on file with the Senate Committee on Judiciary).

<sup>60</sup> *Id.* See also Roberts, P. *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*. Center for Law and Social Policy (2003), available at <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/0111.pdf> (last visited January 8, 2018) (noting the ease of conducting DNA testing and the dilemma created for states, courts, parents and children: "At what point should the truth about genetic parentage outweigh the consequences of leaving a child fatherless? Is a child better off knowing his/her genetic heritage or maintaining a relationship with his/her father and his family that provides both emotional and financial support? Should it matter who brings the action or should the rules be the same for men trying to disestablish paternity, women seeking to oust a father from the child's life, and third parties trying to assert their paternity of a child who already has a legal father?")

Specifically, the alleged parent, the child, or the child's mother may file a petition in circuit court to rebut the presumption that:

- A child born to an intact marriage is the child of the mother's spouse;
- A child born to an unmarried couple who later marries is the child of the mother's spouse;<sup>61</sup>
- A voluntary acknowledgment of paternity entered by the parties during proceedings to determine inheritance, dependency under worker's compensation or a similar compensation program, or by the Department of Revenue to determine child support, establishes the child's parentage;<sup>62</sup> or
- A foreign judgment of another state resulting from a voluntary acknowledgment or affidavit of paternity establishes the child's parentage.<sup>63</sup>

The bill provides the procedures the courts and a petitioner must follow to establish parentage in an alleged parent.

***Step 1—The Petition:*** A petitioner initiates an action to establish “actual legal parentage” and rebut the enumerated legal presumptions by filing a petition in circuit court. The petition must meet the following requirements:

- Be signed by the petitioner under oath.
- Identify all parties, including the mother, the mother's spouse, the alleged parent, and any other person who may be a parent.
- Provide specific facts to support a claim that the alleged parent: (1) is the biological parent; (2) has demonstrated a substantial interest in or concern for the welfare of the child; *and* (3) should be deemed a legal parent based on the best interests of the child.

***Step 2—Protect the Child's Best Interests:*** Unless deemed unnecessary, the court must appoint a guardian ad litem or attorney ad litem for the child depending on the child's age and level of understanding.

***Step 3—Evidentiary Hearing on Petition:*** The court now acts as a gatekeeper and must conduct an evidentiary hearing to essentially test whether the petition is filed in good faith or whether it must be dismissed. In deciding whether to dismiss the petition and seal the record, or permit the petition to move forward, the court must determine two things, giving particular weight to the mother's circumstances (if she is deceased, incapacitated, or seeking a divorce from her spouse):

- (1) Whether the alleged parent has demonstrated a substantial concern or interest for the welfare of the child. If this is not demonstrated, the court must dismiss the petition and seal the record.
- (2) Whether it would be in the best interests of the child to permit the petition to proceed. If the court determines that the best interests of the child will not be served by permitting the petition to go forward, the court must dismiss the petition and seal the record.

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<sup>61</sup> Section 742.091, F.S.

<sup>62</sup> Section 742.10(1), F.S.

<sup>63</sup> Section 742.105, F.S.

**Step 4—Order Genetic Testing:** If the court determines that the petition may proceed, the court must next order the alleged parent and the child to submit to genetic testing to determine the probability of parentage. The court must also advise all parties of the testing requirements, how to object to the results, and of the consequences for failing to object. However, it is the responsibility of the alleged parent to file the test results by the date specified in the court's order.

Once the test results are filed, the next steps vary depending on whether an objection is filed:

- If no written objection to the test results is filed within 10 days, the results must be admitted into evidence by the court without the need for an evidentiary foundation or predicate, and weighed by the court along with all other evidence of parentage.
- If a party timely files a written objection to the test results, the court must hold an evidentiary hearing and permit the party to refute the test results (usually by calling expert witnesses). If a party places the test results in dispute, the court may order retesting at the requesting party's expense.
- If the test results show the alleged parent is not the biological parent, the court must dismiss the petition and seal the court file.
- However, if the test results show there is a statistical probability of parentage of 95 percent or more, a rebuttable presumption that the alleged parent is the biological parent is created.
- When there is no objection to the test results or a party fails to rebut the 95 percent parentage presumption, the court may enter summary judgment on the parentage issue but must conduct a trial.
- If the court otherwise rules that genetic testing establishes the alleged parent is the biological parent, the court must conduct a trial.

**Step 5—Trial:** During the trial, the court must decide between three options:

- (1) Whether the mother's spouse remains the legal parent based on the best interests of the child.
  - In determining the best interests of the child, the court is required to evaluate a long list of factors affecting the welfare and interests of the child and the circumstances of the family.
  - If the court determines that the mother's spouse should remain the legal parent to the exclusion of the biological parent, the court must dismiss the petition and seal the court file.
- (2) Whether the parental rights of the mother's spouse should be terminated and granted to the biological parent if doing so is in the best interests of the child.
  - If the court decides to terminate the parental rights of the mother's spouses and recognize the biological parent as the legal parent, the court must enter an order reflecting the same and order that the birth certificate be amended.
- (3) Whether the all three – the mother, the mother's spouse, and the biological parent – should have shared parental rights and responsibilities.
  - The court may decide the child should have three legal parents when both the mother's spouse (legal parent) and the biological parent have established a substantial relationship with the child and the petitioner shows that adding the biological parent as a legal parent is in the best interests of the child.
  - The court will enter an order that:

- Preserves the rights of the mother's spouse;
- Establishes the biological parent's rights and responsibilities as a third legal parent;
- Requires that the birth certificate be amended to add a third legal parent; and
- Declares that each legal parent is recognized as an equal parent with equal standing to secure shared parenting rights, including time-sharing, responsibility, and child support.

**Step 6—Continuing Jurisdiction After Trial:** When the court rules that the biological parent must replace the mother's spouse as the legal parent or declares there are three legal parents, the court has continuing jurisdiction to:

- Approve, grant, or modify parenting plans as defined in s. 64.046, F.S. (which is amended by the bill to include a cross-reference to the newly created provision).
- Order the payment of child support calculated under the child support guidelines<sup>64</sup> when the biological parent replaces the mother's spouse as the legal parent.
- Order the payment of child support when there are three legal parents to ensure the child receives the same full benefit of the total child support amount that would be received under the child support guidelines.<sup>65</sup>

The bill states the legitimacy of a child is not affected by the proceedings to establish a biological parent as a legal parent.

The effective date of the bill is July 1, 2018.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

*Equal Protection:* The bill's use of the word "parent" rather than "father" may avoid some equal protection issues. However, the bill may also apply to situations beyond the scenario presented in *C.G. v. J.R.* (involving a contest between the legal father and biological father), that could give rise to other equal protection issues.

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<sup>64</sup> Section 61.30, F.S.

<sup>65</sup> *Id.*

Under the bill, a “legal parent” includes the legal spouse of the *child’s mother* at the time of the child’s birth. Although not contemplated at common law, the presumption would appear to now apply to the same-sex spouse of the birth mother when they are legally married for purposes of establishing legal parentage. Additionally, an unmarried biological mother who has contributed biological material to a legally married same-sex male couple appears to fall within the bill’s definition of an “alleged parent.”

However, in the case of a legally married, same-sex male couple, the spouse of the biological father does not meet the definition of a “legal parent” under the common law presumption (legal parent is the *mother’s* spouse at the time of birth).

*Due Process:* The bill provides that, if it is in the “best interests of the child,” the court can enter an order terminating the legal parent’s parental rights and establishing the biological parent’s legal rights. However, a legal parent’s parental rights are constitutionally protected and generally cannot be terminated without their consent (as in the case of adoption<sup>66</sup>) or without following “the strict procedures set forth in chapter 39, Florida Statutes,” for involuntary termination of parental rights.<sup>67</sup> Under chapter 39 proceedings,

Termination of parental rights by the state requires clear and convincing evidence of: (1) a statutory ground for termination set forth in section 39.806, Florida Statutes [such as abandonment, abuse, neglect, incarceration]; (2) that termination is in the manifest best interest of the child pursuant to section 39.810; and (3) that termination is the least restrictive means of protecting the child from harm. *See Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So.2d 565, 570–71 (Fla. 1991). A finding of least restrictive means is required because “parental rights constitute a fundamental liberty interest.” *Id.* at 571.<sup>68</sup>

Accordingly, it appears likely that a legal parent’s parental rights cannot be terminated in the manner described by the bill without running afoul of the legal parent’s due process rights.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

With the exception of the child, any party to a petition to establish an alleged parent’s legal parentage of a child will likely incur financial costs.

<sup>66</sup> See Chapter 63, F.S. (the Florida Adoption Act).

<sup>67</sup> *Fahey v. Fahey*, 213 So. 3d 999, 1001 (Fla. 1st DCA 2016) (“Under Florida law, parental rights may only be terminated through adoption or the strict procedures set forth in chapter 39, Florida Statutes”).

<sup>68</sup> *D.S. v. Dep’t of Children & Families*, 164 So. 3d 29, 33 (Fla. 4th DCA 2015).

*Attorney's Fees and Court Costs:* The bill makes no provision for attorney's fees or court costs (including the guardian ad litem's fees) to any party. While there is a discretionary attorney's fee and costs provision applicable to all proceedings under chapter 742,<sup>69</sup> any award is within the court's discretion and based in part on the financial resources of the parties to pay. Thus, the mother's spouse/legal parent who is forced to defend his or her legal status against termination (which may violate his or her due process rights) may still be liable to pay his or her own attorney's fees or court costs. The difficulty, however, in requiring that the "petitioner" pay attorney's fees and court costs under the bill is that the "petitioner" may be the child.

*Genetic Testing Costs:* The bill does not specify whether the alleged parent or another party is responsible to pay for genetic testing, although it does specify that the party seeking retesting will bear the cost. Because the alleged parent is responsible to file the results of a genetic test, it seems reasonable that they may be required to pay the costs of testing.

*Child Support:* The bill does not state whether the alleged parent, once declared as a legal parent, will owe back child support payments. However, it would appear that the new legal parent's obligations for child support relate back to the date of the child's birth because the new legal parent will be added to the birth certificate. Thus, it appears the newly established legal parent may owe an arrearage of child support.

Additionally, when the new legal parent replaces the mother's spouse on the birth certificate and the parental rights of the mother's spouse are terminated (which, again, implicates due process concerns), it is unclear from the bill whether the mother's spouse will be entitled to recoup the financial support provided to the child since the child's birth from the mother and the new legal parent.

It appears the "alleged parent" cannot be forced into the proceedings in order to force the payment of child support, because the alleged parent is responsible to file the genetic test results with the court. If the alleged parent fails to file the results, the petition will likely be dismissed.

#### C. Government Sector Impact:

The state court system and the guardian ad litem program have not provided information on the fiscal impact of the bill to committee staff. It appears the bill could add to the workload of the courts as well as to the guardian ad litem program. However, the amount of the fiscal impact is not known.

#### VI. Technical Deficiencies:

None.

#### VII. Related Issues:

None.

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<sup>69</sup> Section 742.045, F.S.

**VIII. Statutes Affected:**

This bill substantially amends sections 742.13 and 61.046 of the Florida Statutes.  
This bill creates section 742.19 of the Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families, and Elder Affairs on January 22, 2018:**

The amendment does the following:

- Relocates the definition of the term “alleged parent” from s. 742.13, F.S., to newly created s. 742.19, F.S.; and
- Makes additional technical and conforming changes.

- B. **Amendments:**

None.