SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 13, 1998 Revised: _____ _____ _____ _____

Subject: Adoption

	Analyst	Staff Director	Reference	Action
1.	Moody	Moody	JU	Favorable/CS
2.			WM	Withdrawn
3.				
4.				
5.				

I. Summary:

The bill amends chapters 39 and 63, Florida Statutes, to provide that ch. 39, F.S., applies to all adoptions that involve children surrendered to the Department of Children and Families (DCF), and ch. 63, F.S., applies to all other adoptions. The bill adopts the procedural framework for adoptions that is used by agencies under current ch. 39, F.S., bifurcating the two-step process currently accomplished in a single adoption proceeding under ch. 63, F.S. The first step, termination of the birth parents' parental rights is accelerated under the bill and the process is streamlined in several respects. The bill attempts to balance the accelerated termination of parental rights process with protections for the fundamental constitutional right being terminated. This is attempted by requiring compliance with specific, timely disclosure, notice and service provisions. If the birth parents' parental rights to the child are terminated, the bill retains the current court procedure for the second step, finalizing the adoption and creating the legal parent-child relationship with the adoptive parents.

The bill also:

- Amends current law to prevent de facto termination of parental rights without notice prior to the child's birth;
- Provides a period of 3 business days during which consent may be withdrawn after execution;
- Creates statute of repose ending all potential challenges one year after a judgment terminating parental rights is entered.
- Requires adoption agencies to follow the same law currently applicable to intermediaries regarding children out of state for adoption;
- Specifies the type of fees and expenses which an adoptive parent may be charged, and provides for repayment of those expenses under certain circumstances; and
- Gives the court authority to scrutinize the fees, costs, and expenditures connected with an adoption and to restore to adoptive parents monies paid that were not actually spent.

This bill substantially amends the following sections of the Florida Statutes: 39.461, 39.464, 39.469, 39.47, 63.022, 63.032, 63.037, 63.052, 63.062, 63.082, 63.085, 63.092, 63.097, 63.102, 63.112, 63.122, 63.125, 63.132, 63.142, 63.152, 63.165, 63.182, 63.207, and 63.212. The bill also creates the following sections of the Florida Statutes: 63.038, 63.039, 63.087, 63.088, and 63.089. Finally, the bill repeals section 63.072 of the Florida Statutes.

II. Present Situation:

Three entities may conduct adoptions in Florida: The Department of Children and Families (DCF), private adoption agencies licensed by DCF, and intermediaries who must be licensed attorneys or medical doctors. While adoptions conducted through DCF and those involving private adoption agencies are governed by the Florida Administrative Code, those involving intermediaries are not. *See* s. 63.202, F.S., Rule 10M-8.0013, and Rule 65C-15.001, Florida Administrative Code. Intermediaries are, however, subject to discipline under their respective professional codes of conduct. In addition, the legal requirements for termination of parental rights are different under ch. 39, F.S., governing DCF and private adoption agencies, and ch. 63, F.S., governing adoptions handled by intermediaries.

Adoption was an assigned interim project of the Senate Judiciary Committee in 1997 resulting in an interim report issued in September (Interim Report 97-P-24). Fourteen individuals, representing various perspectives on the issue of adoption, were invited by the chairman of the Senate Judiciary Committee to attend two round table discussions (RTD) in August and September, 1997. These discussions led to a consensus on eight areas of the law that the participants agreed needed to be addressed[1]. The bill concentrates on these consensus issues.

A. Termination of Parental Rights of Birth Parents and Creation of Parental Rights in Adoptive Parents

The RTD reached consensus that the two-step process that occurs in all adoptions, the termination of parental rights of the birth parents and the adoption creating the new parental relationship with the adoptive parents, should occur in two *separate* proceedings. While current law requires separate proceedings for each distinct legal step of the two-step process in adoptions handled by DCF and licensed child-placing agencies under ch. 39, in intermediary adoptions, both steps occur in one proceeding. Parental rights are terminated upon entry of the final judgment for adoption. s. 63.172(1)(b), F.S. The final judgment also creates between the adoptive parents, their families, and the child, a relationship "that would have existed if the adopted person were a blood descendant . . . born within wedlock." s. 63.172(1)(c), F.S. This single proceeding incorporating the two-step process can occur no sooner than 90 days after placement of the child. s. 63.122(1), F.S.

[1]It should be noted that one participant, Mr. Donald Jacobs, Esq., who represented the 14 members of the Florida Association of Adoption Attorneys, while participating in discussions as to changes that might be implemented, maintained a position that his group advocated no change to current law.

B. Termination of Parental Rights Prior to the Birth of the Child

The RTD reached consensus was that no birth parent's rights should be terminated before his or her child is born. Currently, the statute expressly prohibits termination of a birth parent's rights before the child is born. ss. 63.062(1) and 63.082(4), F.S. In contrast, the court may excuse, i.e., waive, obtaining a birth parent's consent to the adoption of his or her child, *even before that child is born*, if it finds by clear and convincing evidence that the birth parent has abandoned the child. s. 63.072(1), F.S., as defined by s. 63.032(14), F.S. *See E.A.W. v. J.S.W.*, 658 So.2d 961 (Fla. 1995)(Baby Emily)(citations omitted)(clear and convincing evidence is required before terminating parental rights based on abandonment). The current definition of abandonment in ch. 63, F.S., applying to intermediary adoptions, provides that in making a determination of abandonment, the court may "consider the conduct of a father toward the child's mother during her pregnancy." s. 63.032(14), F.S. *See also In the Matter of the Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989). This phrase is not included in the definition of abandonment in ch. 39, F.S., applicable to adoptions through DCF and private agencies. s. 39.01(1), F.S.

The combination of the abandonment definition and the consent provisions of ch. 63, F.S., have been interpreted in case law to mean that a father's parental rights can effectively be terminated without his consent, and without him receiving notice of the proceeding, based solely on his actions before the child is born. This is what occurred initially in the Baby Emily case, decided by the Florida Supreme Court. That case is discussed below and analyzed in detail in the 1997 Interim Report.

Presently, consent must be obtained under s. 63.082, F.S., from any man who has been established by law to be the father, or who has acknowledged paternity in an affidavit filed with the Division of Vital Statistics, or who has provided support to the child in a repetitive, customary manner. s. 63.062, F.S. This consent requirement can be waived by the court, as noted above, in certain circumstances. s. 63.072, F.S.

C. Consent to Adoption, a Voluntary Surrender of Parental Rights

The RTD reached consensus that current law is inadequate on the issue of protections in obtaining a birth mother's consent. A consent may be signed at any time after the birth of the child. ss. 63.062(1) and 63.082(4), F.S. The consent must be by an affidavit signed in the presence of two witnesses and notarized, or be taken in court. ss. 63.082(1)(c) and 63.082(4), F.S. Consent may be withdrawn only when a court finds that the consent was obtained by fraud or duress. s. 63.082(5), F.S. Currently, Florida law provides no waiting period before consent may be signed and no revocation period after the consent is signed, except in cases where the pregnancy was planned through a surrogacy arrangement, in which case the law provides a 7-day revocation period after the birth of the child.

Twenty-three states have statutory waiting periods, with most of those having a waiting period of 72 hours. According to the Child Welfare League of America (CWLA):

> A release for adoption, or surrender of a custody document should not be taken, until after the child is born and the mother has recovered from the effects of delivery. . . . Documents indicating a parental willingness to place the child for adoption should be signed in accordance with the parents' emotional readiness to make this definitive decision, and not in accordance with the immediate availability of an adoptive family.

CWLA, Standards for Adoption Service, revised edition 1988.

Issues raised in the RTD discussion of a waiting period included the physical and psychological effects of childbirth and the effects of medication on the informed and willing nature of any consent executed. The physical effects of pregnancy have led to legislation in response to the trend toward shorter hospital stays after childbirth. Under federal law, group health insurance coverage generally may *not* restrict benefits for any hospital stay in connection with childbirth for the mother or newborn child following a normal vaginal delivery to less than 48 hours, or following a cesarean section, to less than 96 hours. However, this does not prevent an earlier discharge made by a physician after consultation with the mother. Section 711, Newborns' and Mothers' Heath Protection Act of 1996. In Florida, health insurance coverage may not be limited to any time less than that determined to be medically necessary, in accordance with the proposed 1996 guidelines for prenatal care of the American Academy of Pediatrics or the American College of Obstetricians and Gynecologists as proposed May 1, 1996. These time frames are 48 hours for a vaginal birth and 96 hours following a cesarean. This statute preemptively exempts Florida from the time lines of the federal act. Section 711, Newborns' and Mothers' Heath Protection Act of 1996. s. 627.6406(18)(b), F.S., (1996 Supp.)

Twenty-one states provide a statutorily specified time for revocation of a birth parent's consent to adoption. The two most populous states, California and New York, have revocation periods of 90 days and 45 days respectively. Other states allow revocation until the hearing terminating parental rights. For example, in Ohio, which has a 72-hour waiting period, revocation is permitted until entry of the final judgment, 6 months after placement.

D. Intermediaries and Legal Representation

The RTD reached consensus was that there should be a statutory requirement that intermediaries specify to birth parents in the initial contact that the intermediaries represent the adoptive parents and *not* the birth parents' interest. Currently, birth parents must sign an acknowledgment that the intermediary represents only the adoptive parents. s. 63.092(2)(i), F.S. This fact must also be disclosed to the adoptive parents in a writing. s. 63.085, F.S.

E. The State Registry of Adoption Information

The RTD reached consensus was that there should be a centralized repository for all adoption records. In an agency adoption, all case records of children placed, their biological parents, and adoptive parents must be permanently retained. Rule 65C-15.030, Florida Administrative Code. *See* DCF rulemaking authority, ss. 63.202 and 63.233, F.S. The court file in an adoption is sealed

and must be retained for 75 years. Rule 2.075(d)(6), Florida Rules of Judicial Administration. Retention will be in whichever of the 67 Florida counties the final judgment of adoption was issued. If the records are needed, for example, due to a medical crisis, retrieval is difficult without knowledge of the specific county in which the judgment was issued and a case file number.

F. The Best Interest of the Child

The RTD reached consensus was that *after* the birth parents' rights were terminated, *then* the best interest of the child should govern. This is current law. *See E.A.W. v. J.S.W.*, 658 So. 2d 961, 966 (Fla. 1995)(best interest evidence was not relevant unless the child was first available for adoption).

G. Placement of Children for Adoption with Out-of-State Residents

The seventh consensus reached was that neither agencies nor intermediaries should place children for adoption out-of-state unless the child is a special needs child as defined by s. 409.166, F.S., or the adoption is by a stepparent or relative. Currently, this restriction applies only to intermediaries. Under current law, a child who has been placed with DCF or an agency, and who has established significant ties with foster parents or is not likely to be adopted because he or she is 8 years of age or older, mentally retarded, physically or emotionally handicapped, of black or racially mixed parentage, or is a member of a sibling group of any age, provided two or more siblings stay together through the adoption, is a special needs child. According to DCF, of the 1801 special needs children available for adoption as of July 1996, 67 percent were age 6 and older, 59 percent were black and 9 percent were of other ethnic heritage, and 39 percent belonged to sibling groups. DCF Adoption and Related Statistical Report FY 1995-96 (July 1996).

H. Report to the Court of Fees and Expenditures

The RTD reached consensus that all fees, costs, and expenditures relating to an adoption should be reported to and approved *by the court*. Currently, this is required only of intermediaries, although DCF, by administrative rule, has certain requirements regarding the reporting and auditing of adoption fees. At any time after an agreement regarding adoption has been entered between a birth mother and the prospective adoptive parents, a petition may be filed for a declaratory statement on that agreement, and a hearing for prior approval of fees and costs may be held. s. 63.102(5), F.S. The statute does not indicate who may file this pleading, nor who must be noticed of such a proceeding. Intermediaries must obtain court approval for fees in amounts greater than $1000 and costs more than $2,500 *other than* actual documented medical costs and hospital costs. s. 63.097, F.S. Current law provides that actual living and medical expenses for the mother may be paid. s. 63.212, F.S. At least 10 days before a final hearing for adoption, the petitioner and any intermediary must file an expense affidavit. s. 63.132(1), F.S.

I. Additional Provisions

The conference of circuit judges and DCF advised the RTD that it would be best for children for whom parental rights are terminated if the juvenile dependency judge, who had the greatest knowledge of the case, completed the adoption. Currently, all adoptions are commenced by filing a separate proceeding under Chapter 63, F.S., regardless of whether parental rights were terminated under that law or terminated in juvenile dependency court under Chapter 39, F.S.

More than one RTD participant suggested that criminal penalties be created for certain fraudulent practices. Currently, a person who knowingly and willfully makes a false statement claiming paternity of a child in conjunction with a petition to terminate parental rights under Chapter 39, F.S., and causes the false statement to be filed with the court commits a misdemeanor of the first degree. s. 39.4627, F.S.

The cases of contested adoptions have illustrated the impact on the child and all parties brought on by the fact that the child was placed in the prospective adoptive home during a long sustained court battle which has resulted in removal from that home after years of bonding. In an adoption handled by an agency, the agency must have an "at-risk placement" document signed by prospective adoptive parents prior to placement of the child if the parental rights have not yet been terminated. Rule 65C-15.002(5), (6), Florida Administrative Code. This document must state that the agency does not have commitment of the child for adoption; why it does not; that proceedings have begun to obtain commitment; that the agency will inform the prospective adoptive parents of the court's decision; and that the child may be removed from the prospective adoptive home. *Id.* The prospective adoptive parents must agree to return the child to the agency. *Id.*
Intermediaries have no such requirements. In fact, under current law a child may be placed with the prospective adoptive parents before consents are obtained so long as the placement is approved by the court. s. 63.092(2), F.S. In an intermediary adoption the only requirement for approval, which may occur pre-birth, is that a report of intended placement is filed and a preliminary home study is completed. s. 63.092(1), F.S. The statute does not state what the report of intended placement should contain. *Id.* For placement purposes, preliminary home study may have occurred up to 12 months prior to placement. s. 63.092(2), F.S. In addition, an RTD member, in a written response, raised the concern that when a child is surrendered at birth but not immediately placed, intermediaries, unlike DCF and private agencies, have no licensing or training regarding child care which may create safety concerns for the child.

Finally, the RTD, case law, and members of the legislature have all raised the issue that a blood relationship with the child should be a factor considered by the court in determining suitability of a placement for the child. Placements with relatives when placement with parents is not recommended are encouraged throughout dependency proceedings including final placement under Chapter 39, F.S.

III. Effect of Proposed Changes:

A. Termination of Parental Rights of Birth Parents and Creation of Parental Rights in Adoptive Parents

Bifurcated Proceedings

The bill amends chapters 39 and 63, Florida Statutes, to provide that ch. 39, F.S., applies to all adoptions that involve children surrendered to the Department of Children and Families (DCF) and ch. 63, F.S., applies to all other adoptions. In creating parity between adoption agencies and intermediaries, the bill creates the term "adoption entity" and defines it to include DCF, an adoption agency licensed by DCF, or an intermediary, as those terms are defined in ch. 63, F.S. The bill adopts the procedural framework for adoptions that is used by agencies under current ch. 39, F.S., bifurcating the two-step process currently accomplished in a single adoption proceeding under ch. 63, F.S.

Persons Who Must Consent

Presently, consent must be obtained under s. 63.082, F.S. from any man who has been established by law to be the father, or who has acknowledged paternity in an affidavit filed with the Division of Vital Statistics, or who has provided support to the child in a repetitive, customary manner. s. 63.062, F.S. The bill amends this aspect of current law in several respects.

First, it specifies that consent must be obtained *or notice given* under ch. 63, F.S., to the specified persons. This eliminates the current need to get a court waiver of consent when the person whose consent is required cannot be identified or located despite due diligence. Second, the bill prioritizes the "fathers" from whom consent is required or notice must be given, eliminating the need to contact anyone other than a father by legitimacy or paternity of one exists. This occurs by providing that the consent must be obtained or notice given to any man who is the child's father by marriage, adoption, or an order of paternity, and *only if* there is no one meeting those requirements, then any man who has been established to be the father by paternity testing.

Only if there is no one who has been established to be the father by legitimacy or paternity, does a consent need to be obtained or notice be provided to any man who meets certain criteria that could later result in a challenge to the adoption if he is not given due process regarding termination of his rights. The bill also provides that any man in these categories, who is not the father by legitimacy or paternity, may execute an affidavit of nonpaternity in lieu of a consent. A form affidavit is provided in the bill and a waiver of service is included. The bill specifies that if an affidavit of nonpaternity waiving service is executed *no further notice must be provided to that person*. This includes two categories from current law: any man who registers with the Division of Vital Statistics, and any man who has provided support to the child in a repetitive, customary manner. The bill adds three categories, any man who:

- Has provided support to the mother during her pregnancy in a repetitive customary manner, to include a man who under law can be found to have abandoned his child by not providing such prenatal support to the mother;
- Has been identified under oath by the birth mother as the father; or
- Is a party in a legal proceeding in which the custody, paternity, or termination of parental rights regarding the child is at issue.

Any man who meets one of the three added criteria arguably can later challenge an adoption and any underlying termination of parental rights. Thus, requiring consent, an affidavit of nonpaternity, or notice would preclude such challenges and related litigation.

Due Diligence and Notice

The bill requires the adoption entity to *begin* specified efforts to identify and locate the person no later than 7 days after the person seeking to place the child for adoption has evidenced a desire to do so with that entity in writing, or has accepted any money permitted by law from the entity relating to the adoption. In the case of an unborn child, the bill specifies that these efforts may begin prebirth. s. 63.088(1), F.S. An affidavit of inquiry as to the identity of the birth father must be filed with the court. s. 63.088(3), F.S. This is similar to s. 39.4625(1)-(3), F.S. The bill specifies that in the case of an unborn child, this affidavit can be executed prebirth. *See* s. 63.088, F.S., as created by the bill.

If the *identity* of the person who must consent or be given notice is *known* but the *location* of that person is *unknown*, a diligent search must occur, and subsequently an affidavit of diligent search must be filed with the court *unless that person has executed an affidavit of nonpaternity*. s. 63.088(3), F.S. This is similar to s. 39.4625(5)-(8), F.S. The diligent search set out in the bill is the same due diligence currently required by The Supreme Court of Florida in all dissolutions of marriage. *See* Instructions and Family Law Form 12.913(b), Affidavit of Diligent Search and Inquiry. FL Family Law Rules of Procedure. If the person is still not identified or not located, constructive service under ch. 49, F.S., must occur *unless that person has executed an affidavit of nonpaternity*. s. 63.088(5), F.S.

A lack of due diligence, and thus due process, can open a judgment to a constitutional challenge and the consequent litigation. *Floyd v Federal National Mortgage Association*, 23 Fla.L.Weekly D157. Based upon a lack of due diligence a court can find a judgment voidable and set it aside. *Id.* If the failure denies constitutional due process to someone whose rights are effected by the judgment altogether, the court can find the judgment void, as if it were never entered. *Id.* A statutory standard defining what constitutes due diligence and the filing of an affidavit with the court confirming compliance, strengthens a judgment against such challenges. *Id.* This bill provides that an adoption entity has an affirmative duty to follow specified due process provisions of the bill, and that a material failure on the part of the entity to meet this duty may result in the entity being liable to the adoptive parents for all sums paid by the adoptive parents in connection with the adoption. s. 63.039, F.S., as created by the bill.

Acceleration of Proceedings Terminating Parental Rights Pending Adoption

Under current law, a termination of parental rights related to an adoption under ch. 63, F.S., can occur no sooner than 90 days after placement of the child. s. 63.122(1), F.S. The bill allows the petition for termination of parental rights pending adoption to be filed anytime after the birth of the child. Service of process can occur immediately. The bill provides that parental rights may be terminated no sooner than 30 days after personal service has occurred or, if by constructive

service, 60 days after the first date notice is published (this distinction appears to be accounting for the law of constructive service that notice be published once a week for 4 successive weeks). Thus, finality regarding the rights of the birth parents can be achieved as much as 60 days *sooner* under the bill than under current law. The bill retains current law providing that the final hearing on adoption creating the new paternal relationship between the child and the adoptive parents can occur no sooner than 90 days after placement of the child. s. 63.122(1), F.S.

B. Termination of Parental Rights Prior to the Birth of the Child

To eliminate the ability under current law to terminate a person's parental rights without notice prior to the birth of the child, the criteria for a waiver of consent by the court under s. 63.072, F.S. are repealed by the bill and reinstated as grounds for termination of parental rights under s. 63.089, F.S. as created by the bill with some modifications, most notably in the area of abandonment. Abandonment is still a grounds for terminating parental rights and the bill retains unchanged the current definition under s. 63.032(14), F.S. As the Legislature has previously provided no guidance as to what specific "conduct" on the part of the father toward the mother during pregnancy constitutes abandonment, the courts have reached their own conclusions as to its meaning. These conclusions have varied widely. A total of 14 written opinions resulted from the five appellate cases in Baby Emily and *In the Matter of the Adoption of Doe*. While this count excludes the trial court opinions, it should be noted that the trial court in Baby Emily reversed itself twice on the issue of abandonment. However, the bill provides specific criteria for determining abandonment. The bill requires that in making a determination of abandonment the court must consider:

- If a parent's actions constitute a willful disregard for the safety of the child or unborn child;
- If a parent, while able to do so, refused to provide support or pay for medical care in an appropriate amount; and
- Whether anyone prevented the person alleged to have abandoned the child from providing support or paying for medical care.

The bill provides that if abandonment is based upon conduct of a father before a child is born, it can only be after "reasonable and diligent efforts have been made to inform the father that he is, or may be, the father of the child." It is arguable that to do otherwise can be challenged as an unconstitutional termination of a father's fundamental constitutional right to parent his child. For an unwed father, this right is a bit more narrow, with the United States Constitution protecting "an opportunity interest" in establishing legal fatherhood. *See Lehr v. Robertson*, 463 U.S. 248, 261-62 (1993). The bill attempts to foreclose future challenges by recognizing that "the fact that unwed biological fathers have a constitutionally protected 'opportunity interest' in their offspring necessarily implies that they must at least be given the 'opportunity' to exercise it, absent adequate proof of prenatal abandonment."*E.A.W. v. J.S.W.*, 658 So.2d 961, 976 (Fla. 1995)(Kogan, J., concurring in part, dissenting in part). Further, the requirement that reasonable and diligent efforts be made to make the "opportunity" known does not prevent termination of parental rights for a father whose identity or location is unknown, because the bill provides that the court may terminate the parental rights of a person who has received due

process notice by personal or constructive service, as provided for in the bill, when the person subsequently does not respond to or appear at the proceedings.

The definition of abandonment as retained in ch. 63, F.S., provides that in making a determination of abandonment the court may "consider the conduct of a father toward the child's mother during her pregnancy." s. 63.032(14), F.S. *See also In the Matter of the Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989). This phrase is not included in the definition of abandonment in ch. 39, F.S., applicable to adoptions through DCF and private agencies. s. 39.01(1), F.S. Further, in Baby Emily, the Florida Supreme Court held that "the [L]egislature's use of the word 'conduct' in section 63.032(14) encompasses a father's lack of emotional support and/or emotional abuse toward the mother during her pregnancy." *E.A.W. v. J.S.W.*, 658 So.2d 961, 963 (Fla. 1995). However, in a separate written opinion, dissenting in part and concurring in part, Justice Kogan, the current chief justice of the court stated:

> . . . I genuinely believe that a concept like "lack of emotional support of the mother" can too easily lead to abusive applications selectively discriminating against the less fortunate, in favor of the privileged. This is a broader and more insidious impact that I find even more horrible for a very basic reason: It suggests that the well-to-do can come to Florida to shop for babies among an underclass unschooled in vaguely defined middle-class values underlying a concept like "emotional support."

Id. At 989. The bill specifically eliminates a lack of emotional support to the mother during her pregnancy as a basis for a finding of abandonment.

C. Consent to Adoption, a Voluntary Surrender of Parental Rights

An *Informed* Consent

The bill revises the current consent form to specifically state certain rights of the birth parent. Under the bill, the person executing consent to an adoption or an affidavit of nonpaternity may have an independent witness present, and the bill requires advance notice of this right. The bill also creates a lengthy disclosure form to be given to birth parents early in the process and again after the child's birth. The same form setting out various adoption procedures and the rights of the parties must also be provided to the adoptive parents. These notice provisions, particularly when taken with the 3-day period for withdrawal of a consent, protect both the child and adoptive parents from later challenges to the adoption based upon fraud or duress while providing birth parents full notice that certain acts or omissions on their part will result in parental rights being terminated.

3-day Period to Withdraw Consent

Florida is one of only 14 states that does not have either a waiting period between birth and the execution of a consent to adoption by a birth mother, a period in which the consent may be revoked, or a combination of these methods. However, Florida does have a 7-day revocation period if the adoption is conducted pursuant to a surrogacy agreement.

The bill provides that a consent to an adoption may be withdrawn by certified mail within 3 business days after execution or 1 business day after a birth mother's discharge from a hospital or birth center whichever is later. A business day for this purpose is defined as a day on which the post office accepts certified mail. Thereafter, consent may only be withdrawn upon fraud or duress. However, such challenges would be more difficult in light of the time the 3-day period would give for reflection and being away from any person or environment that could arguably constitute duress or fraud. The two most populous states, California and New York, have revocation periods of 90 days and 45 days respectively. Other states allow revocation until the hearing terminating parental rights. For example, in Ohio which has a 72-hour waiting period, revocation is permitted until entry of the final judgment, 6 months after placement. In all, 21 states provide a statutorily specified time for revocation of a birth parent's consent to adoption.

Withdrawal of Consent Obtained by Fraud or Duress

Florida currently permits a consent to be withdrawn upon a court finding that it was obtained by fraud or under duress. s. 63.082(5), F.S. Although the statute does provide that any irregularity or procedural defect is cured after 1 year, this does not apply to fraud. *Preston v. Tolone*, 661 So.2d 967, 968 (Fla. 5th DCA 1995)(citations omitted). Currently, the statute of limitations for fraud is 4 years. s. 95.11(3), F.S. For an action relating to the determination of paternity, the statute of limitations does not begin to run until the child reaches majority. *Id.* Adoptive parents face long term uncertainty if the judgment is based upon "waived" consent or the birth father remains unidentified and unlocated. Even maternal grandparents who were not parties to the adoption have been granted standing to attack an adoption which was obtained through the concealment of material facts. *Ramey v. Thomas*, 383 So.2d 78 (Fla. 5th DCA 1980).

"Fraud on the court is a traditional ground to collaterally attack a final judgment many years after it was rendered, on the legal theory that a judgment so obtained is a legal nullity or void." *Preston* at 969 (citations omitted). Fraud on the part of the mother to "thwart" a father from exercising his paternal rights was the cause of a number of challenged adoptions in recent years. *See In re Petition of Doe*, 638 N.E. 2d 181,181(Ill. 1994)(Baby Richard)(mother told father baby died), *Stefanos-Rivera-Berrios*, 670 So.2d 12 (Fla. 1996)(mother led father to believe she was getting an abortion).

Further, even a signed consent could result in an overturned adoption years later if the man who signed the consent was not in fact the biological father. *See In interest of B.G.C.*, 496 N.W. 2d 239, 240-241 (Iowa 1992)(Baby Jessica). That circumstance can be cured by DNA testing. For $550, DNA testing can resolve this issue within 1 week of the child's birth. A sample taken by a swab rubbed inside a person's cheek is painless, as accurate as blood testing, and can be done as soon as 2 hours after birth. A birth father's DNA sample can be collected at anytime as the sample remains viable for matching at room temperature for 10 years or more. One company has 108 locations in 71 Florida cities. The company makes all the arrangements for all parties upon receiving a faxed request from the agency or intermediary. If the father is dead or unavailable, matching can be done through a sample from paternal grandparents. A match can be made with the birth father even if a sample from the mother is unavailable. Further, samples can be taken

through court order from an alleged father who is imprisoned. *All information re DNA from Paternity Services of Florida.*

By creating a 1-year statute of repose, the bill places a 1-year limit for any challenge based upon any ground, including fraud or duress, to a judgment of adoption or an underlying judgment terminating parental rights. The bill also make a provision for the court to enter an order, based upon written findings, for placement of the minor if a challenge based upon fraud is made during the 1-year period. The procedure it provides requiring the court to determine placement or contact with a birth parent during litigation addresses concerns raised by the current Chief Justice of the Supreme Court of Florida in the Baby Emily case:

> Consistent with federal case law, I believe the trial court erred in initially placing the child in the exclusive custody of the potential adoptive parents. . . . An arrangement should have been made for the biological father to have access to the child for the purpose of exercising his opportunity interest. I cannot overlook the terrible consequences that now have flowed from the trial court's initial error.

E.A.W. v. J.S.W., 658 So.2d 961, 967 (Fla. 1995)(Kogan, J., concurring in part, dissenting in part).

To protect the financial vulnerability of adoptive parents in the event an adoption entity does obtain a consent through fraud or by placing a person under duress, the bill requires court-ordered repayment to the adoptive parents of certain fees, costs, and expenditures by the adoption entity if the court sets aside a consent to adoption or a judgment under ch. 63, F.S., due to fraud or duress *attributable to the adoption entity*. In such circumstances, the bill also requires an award of attorneys fees to the adoptive parent. Further, the bill provides that a copy of any order imposing sanctions under ch. 63, F.S., be forwarded by the court to DCF if against an agency and the Florida Bar if against an intermediary. In addition, the bill provides that if the court sets aside a consent to adoption or a judgment under ch. 63, F.S., due to acts or omissions attributable to the adoption entity, the entity is liable to the prevailing party for a reasonable attorney's fee.

D. Intermediaries and Legal Representation

The bill specifically includes a statement within the disclosure form created in the bill that the intermediary represents the adoptive parents and does not represent the birth parents.
s. 63.085, F.S.

E. The State Registry of Adoption Information

Currently, DCF maintains Florida Adoption Registry, a registry established by the Legislature of the names of adoptees, birth parents, and adoptive parents, as well as any information those persons wish to include. s. 382.027, F.S. Registration of information is strictly voluntary and paid for by statutory authorization to charge a fee to users of the service. All information contained in the registry is confidential and exempt from the provisions of s. 119.07(1), F.S., except as released to certain persons specified by statute by the express permission of the registrant.
s. 63.165(1), F.S. The DCF, agency, or intermediary must inform the birth parents prior to

termination of parental rights, and the adoptive parents before placement, in writing, of the existence and purpose of the registry. s. 63.165, F.S.

However, if the records are needed, for example due to a medical crisis, retrieval is difficult without knowledge of the specific county in which the judgment was issued and a case file number. The bill contains two provisions to address this concern. Currently, DCF must provide a family medical history form to an intermediary who intends to place the child for adoption. s. 63.082, F.S. This form must be attached to the petition for adoption and incorporated into the final home study. *Id.* The bill requires that this form contain the social security number and date of birth of *each* birth parent *if readily obtainable*. Further, the bill requires that the clerk of the court forward to the adoption registry the one-page statement of certification of final judgement of adoption the clerk currently files under s. 63.155, F.S., with the Division of Vital Statistics in every adoption. If the DCF received a request for nonidentifying information related to an adoption from a person permitted that information under current law, this would enable the registry in cases that were not handled by the DCF or and adoption agency licensed by the DCF to provide the county of birth, and, regarding the final judgment of adoption, the circuit court, presiding judge, and case number. This would at minimum provide the information a person would need to file a motion to open the adoption file under circumstances as permitted under current law. As court records must be obtained for 75 years, this provides access, when a court deems it appropriate, to information related to the adoption and birth relatives.

Under current law, the clerk must forward every petition for adoption and every affidavit of fees and expenditures filed in an adoption to DCF. ss. 63.112(4) and 63.132, F.S. However, the statute does not specify what DCF must do with these documents once received. The requirements for retention of these documents from intermediary adoptions are also unclear. Permanent retention by rule references only records regarding a child placed by an *agency*. Rule 65C-15.030, Florida Administrative Code. The bill requires DCF to forward the petitions for adoption and the medical and social history form to the repository. s. 63.165, F.S. Further, the bill creates a retention requirement for these documents of 99 years or as stated by applicable rule, whichever is longer. *Id*. This retention provision applies regardless of whether an agency or intermediary handled the adoption. In addition, the bill also requires the DCF to provide information regarding fees, costs, and expenditures, including the name of the adoption entity, upon request. The bill specifies that all information identifying any party on the affidavit other than the adoption entity *must be redacted*. The stated purpose for this provision is to "create a resource for adoptive parents and others wishing to obtain information about the cost of adoption in this state." s. 63.132(1)(c), F.S., as amended in the bill. Such information could be used by adoptive parents to determine what is customary in regard to fees, costs, and expenditures, what the available range of options is for such charges, and by the courts in determining the reasonableness of fees in adoption cases.

F. The Best Interest of the Child

The bill proposes no change to current law. The Supreme Court of Florida has held that best interest evidence is not relevant unless the child was first available for adoption. *See E.A.W. v.*

J.S.W., 658 So.2d 961, 966 (Fla. 1995). Similarly, in Baby Richard, the court found that the appellate court below should *not* have addressed the question of best interests of the child when the father's rights had not been properly terminated in the first place. *In re Petition of Doe,* 638 N.E.2d 181, 182 (Ill. 1994).

> If it were otherwise, few parents would be secure in the custody of their own children. If best interests of the child were a sufficient qualification to determine child custody [as between parents and others], anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children. The law is otherwise.

Id. at 182-183.

G. Placement of Children for Adoption with Out-of-State Residents

The bill brings adoption agencies under the current law which allows intermediaries to place only special needs children as defined in s. 409.166(2)(a), F.S., or children being adopted by stepparents or relatives, with families residing outside the State of Florida. According to the Interstate Compact Office of the DFC, in 1997, 355 children born in Florida were placed for adoption with families in other states. This number has steadily increased in the 1991-97 period for which data was provided. These 355 children were private placements who were *not* special needs children. These placements were all by adoption agencies, as intermediaries may not place children with out-of-state families under *current* law except special needs children, as defined by statute, or children being adopted by stepparents or relatives. The bill would require that these children be placed with families seeking to adopt a child who are residents of Florida instead of the citizens of other states. This bill reflects the consensus of the RTD and addresses concerns raised in those discussions regarding the long wait of prospective adoptive parents for placement of a child in their home and the lack of follow-up the state of Florida has over these children who are born here but placed in other jurisdictions. *See* II. Present Situation, G. herein.

Also in 1997, 113 children were placed out of state through public agencies. According to the DCF, this number represents adoptions of both special needs children as well as dependent children by relatives. Except in the case of stepparent or relative adoption, the bill would restrict placement out of state to special needs children. This would allow a larger group from which to seek prospective families willing to take the children who have statistically been the more difficult to place, while placing those children who have not faced such barriers within the state to allow the greatest efficacy in follow-up services to those children and to place the several hundred children who are currently being placed outside of Florida with Florida families who are seeking to adopt. Similarly, recent federal legislation provides that adoptions may not be denied or delayed because the proposed adoptive family resides out of state. ch. 202, F.S., The Adoption and Safe Families Act of 1997. The legislation addresses only children in foster care. The current language of the bill may need to be amended to include all children in foster care to be in accord with the new federal requirements.

Concerns have been raised that such a restriction might incur constitutional challenges due to the inclusion of "black or racially mixed parentage" as one of the attributes that can qualify a child as

"special needs." s. 409.166(2)(a), F.S. Similarly, the federal definition of special needs in pertinent part includes determinations based upon ethnic background or membership in a minority group. 42 USC s. 673. However, the success of such a challenge is questionable. As of June 30, 1997, there were 1,700 children under the care and custody of DCF free and available for adoption. Nearly three times as many of these children were of black or racially mixed parentage as were not. These statistics alone may present a sufficiently compelling purpose to widen the search for permanent placements for these children beyond Florida. It should be noted that both the Florida Legislature, in passing legislation providing free tuition to Florida's colleges for foster children who are adopted in Florida, and the federal government, in allowing adoptive parents to take a credit beginning in 1997 of up to $5,000 for qualifying expenses paid to adopt a special needs child, have recognized that such children are more difficult to place and have provided incentives in response. For example, in 1996 the Florida Legislature passed legislation providing that *foster children* who are adopted in Florida may receive a waiver of tuition costs to attend Florida's colleges. s. 239.117(3)(c), F.S. The federal government, beginning in 1997, allows adoptive parents to take a credit beginning in 1997 of up to $5,000 for qualifying expenses paid to adopt a *special needs child*. *See* IRS publication 968, p. 2 (revised January 1998).

H. Report to the Court of Fees and Expenditures

The bill brings adoption agencies under the current mandate that fees and certain costs in excess of set amounts be pre-approved by the court and an affidavit of fees and expenses be filed with the court to include agency adoptions. ss. 63.097(1) and 63.132(1), F.S. These mandates currently only apply in intermediary adoptions. This parity between agencies and intermediaries was a recommendation of the RTD. *See* II. Present Situation, H., herein. RTD only addressed parity as to reports to the court. The consensus did not address, and the bill does not amend, current law to require intermediaries to meet the fee provisions to which the agencies are subjected by rule. Agencies must file a written fee schedule with DCF and provide it to all persons making application for services. Rule 65C-15,010(4), Florida Administrative Code. The schedule must disclose certain information. Further, agencies must execute a fee agreement with each applicant listing fees charged, services to be provided, and provisions for payment. *Id.* Intermediaries do not have to file a fee schedule with the DCF, provide a written fee schedule to persons applying for services, or execute a written fee agreement with such persons.

The bill also:

- Specifies the fees and expenditures related to the adoption that may be collected from adoptive parents by the adoption entity;
- Prohibits the charging of certain fees including nonrefundable lump sum payments and facilitation fees;
- Allows a party to an agreement for payment of fees, costs and expenditures related to an adoption to cancel the agreement within a period of 3 business days after signing it;
- Requires that the adoption entity file an affidavit with the court detailing all fees, costs, and expenditures, and the basis for such, related to the termination of parental rights and subsequent adoption; and

- Requires that the adoption entity provide a copy of the affidavit to the adoptive parents at the time the affidavit is executed.

I. Additional Provisions

The bill addresses each proposal discussed earlier in this analysis. *See* II. Present Situation, I. herein. The bill does the following:

- Amends chapters 39 and 63, Florida Statutes, to provide ch. 39, F.S., applies to all adoptions that involve children surrendered to DCF and ch. 63, F.S., applies to all other adoptions. This comports to the recommendation of the Conference of Circuit Judges and DCF.

- The bill provides that a person who knowingly and willfully provides false information under ch. 63, F.S., in connection with the adoption or, with intent to defraud, accepts benefits from more than one entity in connection with the adoption without disclosing it to the entities and adoptive parents commits a misdemeanor of the first degree. In addition, the bill provides for an award to the adoptive parents of sums paid in connection with the adoption against such a person.

- The bill requires parents to sign an "at risk statement" in all adoptions when the placement is at risk. "At risk" is defined in the bill as placement before parental rights are terminated. This is similar to the current requirement upon DCF and agencies under Rule 65C-15.002(5) and (6), Florida Administrative Code.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Currently, both the termination of parental rights of the birth parents and finalization of the adoption are handled in one proceeding. The requirement in the bill that these actions occur in two separate hearings may result in additional costs. However, it is also likely that each procedure will be half as long as a current adoption and therefore any increased cost will mostly involve travel time to court. The travel costs will be greater if the two hearings occur in different venues. This will depend upon several factors including the locations of the birth parents, the prospective adoptive parents, the person filing the first proceeding, and the person representing the birth parents in the second proceeding. In agency adoptions, there will be an additional small increase for filing an affidavit of fees and expenditures in each case. Finally, there will be a slight additional cost for copying and distribution of the disclosure form to adoptive and birth parents required by the bill.

C. Government Sector Impact:

DCF has determined that the requirement in the bill that the one-page certified statement of final decree of adoption "is manageable with current staff and resources." Mary Dee Richter, Chief Permanency Planning, DCF, letter to the Senate Judiciary Committee dated March 18, 1998.

VI. Technical Deficiencies:

The disclosure form created in the bill under s. 63.085, F.S., does not include any information reflecting provisions of the bill regarding fees, costs, and expenditures, or the remedies of reimbursement and award of attorneys fees. *See* ss. 63.039, 63.097 and 63.132, F.S.

VII. Related Issues:

None.

VIII. Amendments:

None.