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.)

BILL: CS/SB 2

SPONSOR: Senator Campbell and others

SUBJECT: Adoption

DATE: January 7, 1998 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.			CF	
3.				
4.				
5.				

I. Summary:

The bill amends Part IX of chapter 39, F.S. (Supp. 1998), relating to proceedings for termination of parental rights, and chapter 63, F.S., relating to other adoption proceedings. It provides that chapter 39, F.S., and certain provisions of chapter 63, F.S., shall apply to all adoptions initiated by the Department of Children and Families (DCF). Adoptions initiated by all other adoption entities including intermediaries, licensed child-placing agencies and registered child-caring agencies shall be governed entirely by chapter 63, F.S. The bill also requires the uniform application of the bifurcated procedural framework for the termination of parental rights and the creation of new parental rights in adoption proceedings in all adoptions. The bill streamlines the adoption process and sets forth explicit and extensive disclosure, consent, notice, service, and hearing requirements in adoption proceedings, including but not limited to,

- the prohibition of de facto pre-birth termination of parental rights without notice;
- requisite pre-birth and post-birth disclosures;
- prohibition of pre-birth execution of consent to adoption or affidavit of nonpaternity;
- a post-birth waiting period for execution of a consent to adoption by a birth mother and a 3-day revocation period under certain circumstances;
- criminal penalties and civil liability for withholding information and fraudulent acts;
- the duties of adoption entities and liabilities thereunder;
- the categories of fees, costs and expenditures which an adoptive parent may be assessed, threshold limits, and repayment under certain circumstances;
- the court pre-approval, final approval and reimbursement of fees, costs and expenses connected with an adoption;
- the expansion of out-of-state adoption by all adoption entities; and
- a one-year statute of repose barring all claims against a judgment for termination of parental rights or for adoption.

This bill substantially amends the following sections of the Florida Statutes: ss.39.01, 39.802, 39.806, 39.811, 39.812, 63.022, 63.032, 63.0425, 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, 63.152, 63.165, 63.182, 63.202, 63.207, 63.212, 63.219, 63.301, 984.03, and 985.03. The bill also creates the following sections of the Florida Statutes: 63.037, 63.038, 63.039, 63.087, 63.088, and 63.089. Section 63.072, F.S., is repealed.

II. Present Situation:

Three entities may handle adoptions in Florida: 1) the Department of Children and Families (DCF), 2) private adoption agencies licensed by DCF, and 3) intermediaries who must be licensed attorneys or medical doctors. Proceedings for adoptions and termination of parental rights handled by these entities, however, are subject to different statutory and procedural requirements. Proceedings for termination of parental rights and adoptions by DCF and private adoption agencies fall within the ambit of Part IX of chapter 39, Florida Statutes, while proceedings for adoption through intermediaries are governed exclusively by chapter 63, Florida Statutes. In addition, the conduct of DCF and private adoption agencies are governed by administrative rules while the conduct of intermediaries are governed by their respective professional codes of conduct.

The last major revision of Florida's adoption statutes occurred in 1992. In recent years, highly publicized and controversial court cases relating to adoption and termination of parental rights have underscored the emotionally charged and financially burdensome ramifications felt by all parties in the proceedings. Most of the cases center on the issues of due process in the areas of informed consent and adequate notice. In 1997, the Senate Judiciary Committee issued an interim report on adoption. *See* September (Interim Report 97-P-24). Fourteen individuals, representing various perspectives on the issue of adoption, were invited by the then chairman of the Senate Judiciary Committee to attend two round table discussions, held in August and September of 1997. These discussions led to a consensus on major issues for potential legislation. During the 1998 Legislative Session, Senate Bill 550, which addressed some of the areas identified by the RTD, passed the Senate but died in messages.

III. Effect of Proposed Changes:

Overall, the bill amends a number of provisions in Part IX of chapter 39, Florida Statutes, and chapter 63, Florida Statutes, whose cumulative effects are to conform and clarify proceedings for termination of parental rights and proceedings for adoption as follows:

- Part IX of chapter 39, Florida Statutes and certain provisions of chapter 63, Florida Statutes, as enumerated in the newly created section 63.037, F.S., apply solely to adoptions handled by the Department of Children and Families (DCF). Section 63.037, F.S., is created to exempt certain provisions of chapter 63, F.S., from adoption proceedings initiated by DCF. Specifically, sections 63.085, F.S. (disclosure requirements), 63.087, F.S. (general adoption proceedings provisions), 63.088, F.S. (notice and service requirements) and 63.089, F.S. (hearing and grounds for termination of parental rights requirements) are not applicable to those adoption proceedings initiated by DCF.

- Chapter 63, Florida Statutes, applies to all other adoptions initiated by adoption entities other than DCF.

- All individuals and agencies allowed to handle adoptions are brought into parity for purposes of adoptions under chapter 63, F.S., with the new definition for "adoption entity". The term "adoption entity" refers to DCF, a licensed child-placing agency, an intermediary or a registered child-caring agency. DCF is the state agency authorized to handle adoptions of children available through proceedings initiated under chapter 39, F.S. A child-placing agency is an agency licensed by DCF and authorized to place children for adoption. *See* s. 63.202, F.S. An intermediary is a licensed attorney who places children for adoption or a child-placing agency licensed in another state that is qualified by DCF to place out-of-state children for adoption in Florida. The definition for "intermediary" was changed to delete physicians as persons eligible to handle adoptions. A child-caring agency registered under section 409.176, F.S., is a newly added as an agency that may handle adoptions. Registered child-caring agencies are 24-hour staffed child care facilities and include, but are not limited to, maternity homes, runaway shelters, group homes, and wilderness camps. They are exempt from DCF licensure requirements if they are operated by a religious organization or are associated family foster homes, are certified by a Florida statewide child care organization, or have certificates of registration by a qualified association. *See* s. 409.176(4), F.S. Section 63.301, F.S., is revised to require membership of a representative from a registered child-caring agency on the advisory council on adoption to reflect the addition of these agencies to the definition for adoption entity.

  Other definitional changes include conforming amendments to "abandoned," "to place" or "placement,", and "suitability of the intended placement", all under s. 63.032, F.S. The term "parent" in sections 39.01, 63.032, 984.03, and 985.03, F.S., is amended to conform with changes to who may qualify as a father under the bill. The terms "legal custody", "parent" and relative" are added and ascribed the same meaning as terms already existing in section 39.01, F.S.

Due to the complexity of the bill, the following incorporates a more specific review of the current law and an analysis of the effects of the remaining proposed changes within the context of the major areas identified by the participants of the round-table discussions (hereinafter "RTD").

1. Proceedings Regarding Termination of Parental Rights of Birth Parents and Creation of Parental Rights in Adoptive Parents

a. *Bifurcated Proceedings*

The RTD reached consensus that the two-step process that occurs in all adoptions, i.e., the termination of parental rights of the birth parents and the creation of the new parental relationship with the adoptive parents, should occur in two *separate* proceedings to ensure that a child is truly available for adoption. Under current law, only adoptions handled by DCF and licensed child-placing agencies under Part IX, chapter 39, F.S., and chapter 63, F.S., occur in two separate proceedings.

In contrast, the two-step process (i.e., termination of parental rights and the creation of new parental rights in the adoptive parents) of adoptions handled by intermediaries under chapter 63, Florida Statutes, occurs simultaneously in one proceeding. Under section 63.102, F.S., with the exception of adoptions involving placement of a child with a relative within the third degree of consanguinity, a petition for adoption under chapter 63, F.S., may be filed at any time but no later than 30 days after placement of a child with a prospective adoptive parent. If the prospective adoptive parents do not file a petition for adoption before that time, any interested party, including the state, may file an action challenging the prospective adoptive parent's custody of the child. Under current law, a hearing on this single proceeding in chapter 63, F.S., can occur no sooner than 90 days after placement of the child. s. 63.122(1), F.S.

Effect of proposed changes:

The bifurcated procedural framework for adoptions which holds separate proceedings for the termination of parental rights and the creation of new parental rights in adoption is to be applied uniformily to adoptions handled by all adoption entities whether the proceeding was initiated under chapter 39, F.S., or chapter 63, F.S.

Sections 63.087, 63.088, and 63.089, F.S., provide the procedure for filing a petition for termination of parental rights and the process governing the proceedings. Specifically, section 63.087, F.S., allows a petition for termination of parental rights under chapter 63, F.S., to be filed by a parent or legal guardian of a minor at any time after the birth of the minor. An adoption entity may also file the petition for termination of parental rights if the parent or person having legal custody has executed a consent to adoption. Section 63.087, F.S. also specifies the content and the attachments required for a petition to terminate parental rights. Service of process can occur immediately. Section 63.089, F.S., relating to proceedings for petition of termination of parental rights, requires a full evidentiary hearing to be held on the petition and all the notice, service, and consent requirements to be completed prior to the judgment terminating parental rights. The hearing may not be held any sooner than 30 days after personal service has occurred or, if by constructive service, no sooner than 60 days after the first date notice is published.

Specifically, section 63.089(5), F.S., is created to provide for the dismissal of a petition with prejudice if the court fails to find by clear and convincing evidence that the parental rights should be terminated. Subsection (5) requires that the order include written findings and specifically list findings based on the criteria for rejecting a claim, if any, of abandonment. No judgment for termination of parental rights may be entered if a consent to adoption was timely withdrawn or the consent to adoption or an affidavit of nonpaternity was obtained by fraud or duress. The parent's parental rights remain in full force. Subsequently, the court must enter an order providing for the placement of the minor. The court may order a paternity test at any time the court has jurisdiction over the minor. Further proceedings regarding the minor must then be brought in a custody action under chapter 61, F.S., in a dependency action under chapter 39, F.S., or in a paternity action under chapter 742, F.S.

Section 63.102, F.S., relating to the petition for adoption, is amended to state that a petition for adoption may be filed no sooner than 30 days but no later than 60 days after the entry of a judgment terminating parental rights. The 30-day provision does not apply if the adoptee is an adult or the adoptee is a minor who was the subject of a judgment terminating parental rights

under chapter 39, F.S. This section does not amend the provision allowing any interested party, including the state, to file an action challenging a prospective adoptive parent's physical custody of the minor if no petition is filed, other than to expand the time period for filing a petition for adoption from 30 days to 60 days after entry of judgment terminating parental rights.

Section 63.122, F.S., relating to the form and content of the petition for adoption and filing requirements, is amended to add the requirement that a petition include the case style and date of entry of the judgment terminating parental rights, and have attached a certified copy of the judgment terminating parental rights.

Section 63.112, F.S., relating to notice of hearing on petition for adoption, is amended to prohibit a hearing from being held any sooner than 30 days after the date of judgment terminating parental rights or any sooner than 90 days after the minor has been placed in the petitioner's physical custody

Section 63.142, F.S., relating to the hearing and judgment of adoption, is amended to state a judgment of adoption cannot be entered and finalized until after the court determines that the appeal period for a judgment terminating parental rights has expired. This section provides the procedure for moving to set aside a judgment terminating parental rights.

b. *Persons Who Must Consent and Notice Requirements*

In any adoption proceeding, consent is required of certain persons. The current consent process under chapter 63, Florida Statutes, requires written consent from the birth mother, the minor if over 12 years old, and optionally if the court requests, any person with legal custody of the minor, or the court having jurisdiction over the child if the person with physical custody does not have legal custody. Consent is also required from the father only if he: 1) was married to the birth mother at the time of conception or birth of the child, 2) previously adopted the child, 3) had paternity established by court order, 4) filed an affidavit with the Division of Vital Statistics, or 5) provided support to the child in a repetitive, customary manner. *See* s.63.062, F.S. However, even if the father meets one of the statutory criterion, a court may excuse, i.e., waive, the consent requirements based on a number of grounds including abandonment. *See* s. 63.072, F.S.

Even an executed consent does not preclude the possibility of an overturned judgment of 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). Scientific testing exists to determine the paternity of a child. The DNA testing, whose average cost is $550, is relatively simple to obtain. The test is based on a swab sample taken from the inside of a person's cheek and can be done on a minor as soon as 2 hours after birth. A match also can be made with the birth father even if a sample from the mother is unavailable. A birth father's DNA sample can be collected at any time as the sample remains viable for matching at room temperature for 10 years or more. If the father is dead or unavailable, matching can be done through a sample from the paternal grandparents. The law even allows, under court order, samples to be taken from an alleged father who is imprisoned. An adoption agency or intermediary in an adoption proceeding can request a test from a paternity which in turn makes all the arrangements. *All information re DNA from Paternity Services of Florida.*

Effect of proposed changes:

Section 63.062, F.S., relating to whose consent to adoption is required, is amended. First, it eliminates the court's option to waive consent. Second, it clarifies those persons from whom consent to adoption must be obtained and notice given. Third, the bill adds new ways by which a person may qualify as a "father" from whom consent is required and notice must be given. The bill also prioritizes the three major categories of "fathers" from whom consent must be obtained or notice given:

1) a person who is the minor's father by marriage at the time of conception or birth, by adoption, or by an order of paternity;
2) a person who has been established to be the father by paternity testing;
3) a person who:
- has acknowledged, in writing, to be the father of the minor and has filed such acknowledgment with the Office of Vital Statistics in the Department of Health;
- has provided the birth mother during the pregnancy or the minor with support in a repetitive customary manner;
- has been identified by the birth mother, with reasonable belief, as the person who may be the minor's father in an action to terminate parental rights pending adoption; or
- is a party in any pending proceeding relating to paternity, custody, or termination of parental rights as pertains to the minor.

Therefore, consent or notice is required only of the man who qualifies as a "father" first in the order of the categories given. No consent or notice is required of any other person under a subsequent category. Any man who qualifies as the "father" under one of these categories would have standing to challenge a petition for or judgment for termination of parental rights and subsequent adoption. Subsection (1)(e) also requires consent of any person who is a party in any pending proceeding regarding paternity, custody, or termination of parental rights. This section does not amend the current law regarding consent of the minor, if more than 12 years of age (unless the court determines it is in the minor's best interest to dispense with the consent) nor does the bill change the requirement for consent of the person having legal custody or the court having jurisdiction over the minor if the person having physical custody of the minor does not have legal custody.

Subsection (2) allows a "father" to execute an affidavit of nonpaternity in lieu of a consent to adoption. Subsection (4) provides a detailed form for an affidavit of nonpaternity. Upon execution of a valid affidavit in accordance with s. 63.082, F.S., the person waives further notice of any subsequent proceedings.

c. *Due Diligence and Notice*

Existing notice requirements in adoption proceedings have been shown to be problematic. For example, under chapter 63, a contract for placement of a child may be executed, a court may pre-approve a contract for fees, costs, and expenses, an adoption agency or intermediary may file a report of intent to place a minor, or a child may be placed in a prospective adoptive home without any required notification to the birth father even if his whereabouts are known. *See* ss 63.102 and 63.092, F.S. Strict compliance with notice and service statutes, particularly constructive service

statutes, early on in the adoption proceedings has tended to mitigate the potential for future challenges to adoption judgments, otherwise the judgments are subject to being set aside much later in the process when the parties have become more entrenched emotionally and financially. *See Floyd v Federal National Mortgage Association*, 704 So.2d 1110 (Fla. 5th DCA 1998)(court set aside judgment as void due to failure of mortgagee to conduct diligent search to discover deceased mortgagor's heirs in mortgage foreclosure action opened judgment to a constitutional challenge on due process grounds).

Effect of proposed changes:

This bill provides additional and stricter procedural safeguards to ensure adequate notice and service of petitions and other documents to all persons whose consents are required. Section 63.088, F.S., is newly created to require an adoption entity to take certain steps to identify and locate the "father" once it has been contacted to place a minor or find a minor for adoption.

Subsection (1) requires the adoption entity to initiate steps to notify the "father" no later than 7 days after the adoption entity has been contacted in writing by the birth mother regarding her desire to place a child for adoption or if the birth mother has accepted any money permitted by law from the adoption entity.

Subsection (2) requires that the petition and the notice of hearing to terminate parental rights be personally served upon each person whose consent is required under section 63.0623, F.S., if the person has not executed an affidavit of nonpaternity, and their identity and location have been determined. The notice must be provided at least 30 days before the hearing. A form is provided.

Subsection (3) requires the court to conduct an in-court inquiry of the person placing the minor for adoption and of any relative or person having legal custody of the minor who is present at the hearing, in order to determine the identification and location of any person who may qualify as the "father" of the minor and whose consent is required. In lieu of an in-court inquiry, this information may be provided in an affidavit of inquiry to be filed with the court. This provision is similar to existing statutory language under section 39.803, F.S. Inquiry into the identification and location of the "father" may begin pre-birth.

Subsection (4) provides that if the court inquiry yields the identity, but not the location, of a person whose consent is required but who has not yet executed an affidavit of nonpaternity, the adoption entity must conduct an extensive diligent search for that person based on 15 enumerated sources. The sources include, but are not limited to, the United States Postal Service through the Freedom of Information Act, one Internet databank locator service, and medical patient financial responsibility forms. The diligent search provisions set out in the bill contain the same criteria in the diligent search provisions currently required by The Supreme Court of Florida to be used with Notice of Action for Dissolution of Marriage. *See* Instructions and Family Law Form 12.913(b), Affidavit of Diligent Search and Inquiry. Fla. Fam. R. P. The primary difference is that subsection (4) requires an inquiry of information held by medical providers regarding the party listed as financially responsible for the medical treatment and care to a birth mother or child, whereas the family law rules require an inquiry of Title IV-D agency records. The sources listed in subsection (4) are somewhat similar to the sources listed in sections 39.803(5)-(6), F.S.

Subsection (4) also provides that any person contacted by a petitioner or adoption entity in conjunction with this section must release the information unless otherwise prohibited by law. The adoption entity and petitioner must then execute jointly an affidavit of diligent search regarding the results of the search effort and file the affidavit with the court. The diligent search may be conducted prior to the birth of the minor.

Subsection (5) provides that if the identity and/or the location of the person still remains unknown after the court inquiry and the diligent search, then constructive notice of the petition and hearing to terminate parental rights must be made in accordance with chapter 49, F.S. Notice must be provided in each county identified in the petition as provided in section 63.087(6), F.S.

Specifically, subsection (5) requires extensive information to be provided in the notice:

- all information required in the petition under section 63.087(6)(f), F.S. (i.e., the minor's name, gender, date of birth and place of birth, all names by which the minor is or has been known, including the legal name, each city in which the mother resided or traveled during the 12 months before the minor's birth, the name and city of residence of the minor's mother, of any person reasonably believed to be the father, and of any person who has legal custody, all information required by the Uniform Child Custody Jurisdiction Act and the Indian Child Welfare Act, a statement of the grounds for the petition, the name, address, and telephone number of the adoption entity seeking to place the minor for adoption, and the name, address and telephone number of the circuit court in which the petition is filed);
- all information required in chapter 49, F.S., relating to constructive notice; and
- information regarding a physical description of the minor's mother and of any person reasonably believed to be the father, including, but not limited to, age, race, hair color, eye color, height and weight.

2. Termination of Parental Rights Prior to a Child's Birth; Grounds; Abandonment

The RTD reached consensus that no birth parent's rights should be terminated before his or her child is born. Under current law, written consent to adoption is required from certain persons after the birth of the minor, unless the court excuses, i.e., waives the requirement. *See* ss. 63.062 and 63.072, F.S. Under section 63.072, F.S., the court may waive consent of a parent who has deserted or otherwise abandoned a child, of a parent whose parental rights have been terminated in another jurisdiction, of a parent who has been declared judicially incompetent, of a legal guardian who has failed to respond, or of a spouse of the person to be adopted who is unreasonably withholding consent..

In adoption proceedings under chapters 39 and 63, F.S., the court may consider abandonment for purposes of terminating parental rights. However, what conduct constitutes "abandonment" is addressed differently in the two chapters. For example, the definition for "abandonment" under chapter 39, F.S., provides that incarceration of a parent does not bar a finding of "abandonment". This provision does not appear in the definition for "abandonment" under chapter 63, F.S. Nonetheless, the Florida Supreme Court recently held that a court may consider a father's commission of a violent criminal offense during a mother's pregnancy to support a finding of "abandonment". *See W.T.J. v. E.W.R.*, No.92,161 (Fla. December 3, 1998). Similarly, the definition for "abandonment" under chapter 63, F.S., provides that a court may consider the conduct of a father during a birth mother's pregnancy. *See* s. 63.032(14), F.S., *E.A.W. v. J.S.W.*,

658 So.2d 961 (Fla. 1995)("Baby Emily")(*See also* Interim Report for detailed discussion of case). This provision does not appear in the definition for "abandonment" under chapter 63, F.S. When making a determination of abandonment in adoption proceedings under chapter 63, F.S., the courts have interpreted pre-birth conduct broadly to include a lack of emotional support and/or emotional abuse towards the child's mother during her pregnancy." *Id.; See also In the Matter of the Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989). This raised some concern as expressed by the former Chief Justice Gerald Kogan in a separate concurring and dissenting opinion in *In re Baby E.A.W.* that consideration of a lack of emotional support of the mother might lend itself to abusive application or discrimination against the less privileged. *Id*. at 989.

Effects of proposed changes:

Section 63.089, F.S., relating to grounds for granting termination of parental rights, dismissal of petition and judgment in proceedings to terminate parental rights, is created. The court may terminate parental rights based on one or more of six grounds enumerated in the newly created s. 63.089(3), F.S. Specifically, prior to the entry of a judgment terminating parental rights, subsection (3) requires the court to determine by clear and convincing evidence and supported by written findings of fact, the following for each person whose consent to adoption is required:

a) execution of a valid consent that has not been withdrawn;
b) execution of a valid affidavit of nonpaternity;
c) proper and timely service of notice of proceeding and failure to file written response or appear at the evidentiary hearing;
d) proper and timely service of notice of proceeding and finding of abandonment;
e) judicially declared incapacitated parent;
f) failure of person who has legal custody, other than parent, to respond to request for consent to adoption or unreasonable withholding of consent after examination of reasons for refusal;
g) failure of spouse of person to be adopted to consent and that failure is not excused by reason of prolonged and explained absence, unavailability, incapacity or other circumstances.

Subsection (4) of section 63.089, F.S., provides specific criteria under which the court may make a finding of "abandonment" by a parent after the court considers whether:

a) a parent's actions constitute a willful disregard for the safety of the child or unborn child; a parent, while able to do so, refused to provide financial support or pay for medical care in an appropriate amount; anyone prevented the person alleged to have abandoned the child from providing support or paying for medical care; and the amount of support or expense paid was appropriate relative to resources available.

b) the parent of a child is incarcerated on or after October 1, 1999 in state or federal prison for a substantial period during the minor's minority; the parent is a career or serious felony offender; the continuing parent-child relationship would be harmful based on a finding of clear and convincing evidence.

Section 63.089, F.S., also eliminates the lack of emotional support to the mother during her pregnancy as a basis for a finding of abandonment. The only pre-birth conduct that may be

considered in making a finding of abandonment is conduct that occurred after diligent search and notice was made to the father who is informed that he is or may be the father of the minor.

3. Consent to Adoption or Voluntary Surrender: Waiting Period and Revocation

a. *Informed Consent and Disclosure*

The RTD reached consensus that intermediaries should specify to birth parents in the initial contact that the intermediaries represent the interests of the adoptive parents and not the interests of the birth parents. There are no comprehensive disclosure or consent format requirements for birth parents or adoptive parents other than that the intermediary secure a written acknowledgment signed by each person whose consent is required, stating that the intermediary represents only the adoptive parents. s. 63.085, F.S. The intermediary also must obtain a statement from the prospective adoptive parents acknowledging the disclosure requirements. s. 63.085(2), F.S.

Effect of proposed changes:

Section 63.082, F.S., relating to execution of consent to adoption, is amended to include reference to an affidavit of nonpaternity. This section provides the requisite procedure to execute a valid consent to adoption or affidavit of nonpaternity, including advance notice of a person's right to have an independent witness present and sign the form, and disclosure statements to birth parents as required under s. 63.085, F.S. Specifically, subsection (4) prohibits the execution of a consent to adoption or an affidavit of nonpaternity before the birth of a minor who is to be placed for adoption. This subsection also provides a comprehensive form for a consent to adoption to include, among a number of provisions, an enumeration of a parent's rights prior to and after execution of a consent. Subsection (5) requires disclosure requirements under section 63.085, F.S., to be satisfied before the forms are signed. Subsection (6) requires each person who executes a consent to adoption to be given a copy of the consent, via hand-delivery, with a written acknowledgment of receipt, or via first class mail. If an adoption entity can not provide the copy, the adoption entity must execute an acknowledgment of non-deliverability. The original consents and acknowledgments must be filed with the petition for termination of parental rights.

Section 63.085, F.S., is substantially revised to require adoption entities to provide an extensive adoption disclosure statement to the prospective adoptive parents and to the parents. The adoption entity must provide a written disclosure statement to the person seeking to adopt or the person placing a minor for adoption, within 7 days after contact by that person. If the parent was not the person who initiated the contact, the adoption entity must provide a written disclosure statement to the parent within 7 days after the parent is identified and located. The disclosure statement be given to parents pre-birth and again post-birth whereas the prospective adoptive parent must be given the form only once. In addition, a written acknowledgment of receipt must be obtained from each parent receiving the disclosure statement. This section also includes a comprehensive form for the disclosure statement to include, among a number of provisions, notice that an intermediary represents solely the interests of the prospective adoptive parents and that each person whose consent is required under chapter 63, F.S., including parents is entitled to seek independent legal advice.

b. *Waiting Period for Execution and Revocation of Consent*

The RTD reached consensus that current procedural safeguards for obtaining a birth mother's consent are inadequate, particularly considering the physical and psychological effects of childbirth and the effects of medication on the informed and willing nature of any consent executed near the time of birth. Under Florida law, a consent may be withdrawn only upon a court finding of fraud or duress. *See* s. 63.082(5), F.S.

With the exception of a 7-day revocation period for adoption conducted pursuant to a surrogacy agreement, Florida is one of 14 states that does not provide a waiting period before a consent may be signed after the child's birth, nor does it provide for a revocation period. Under current law, a mother's consent to adoption or a consent for voluntary surrender may be signed at any time after the birth of the child. *See* ss. 63.062(1) and 63.082(4), F.S. The consent for voluntary surrender must be in the form of an affidavit signed in the presence of two witnesses and notarized, or taken in court. *See* s. 63.082(4), F.S.

Over 23 states provide statutory waiting periods, typically a 72-hour waiting period, before a consent may be signed. According to the Child Welfare League of America (CWLA), consents and releases for adoption or surrender of custody should be executed in accordance with a parent's emotional readiness to make a definitive decision which should occur, at least, after the birth of a child and after a birth mother has had some opportunity to recover from the effects of a delivery. *See CWLA, Standards for Adoption Service, revised edition 1988.* The emotional and physical impact of childbirth on a birth parent are recognized in state and federal legislation relating to timelines for health insurance coverage of maternity and newborn care. For example, federal law generally prohibits restricting benefits for any hospital stay in connection with a child birth to less than 48 hours following a vaginal delivery or to less than 96 hours following a cesarean section. *See* s. 711, Newborns' and Mothers' Heath Protection Act of 1996. However, this does not prevent an earlier discharge made by a physician after consultation with the mother. Under state law, 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. These guidelines are 48 hours for a vaginal birth and 96 hours for a cesarean birth. s. 627.6406(2), F.S.

Over 21 states provide for a statutory revocation period during which a birth parent may revoke a 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 final hearing on termination of parental rights.

Effect of proposed changes:

Section 63.082, F.S., relating to execution of consent to adoption, is amended. Subsection (4) provides a 48-hour waiting period before execution of a consent may be made by a birth mother who has placed a minor for adoption following birth in a licensed hospital or birth center. The consent may not be executed until 48 hours after the birth of the minor or the day after the birth mother is determined fit for release, whichever occurs first. Consent can then only be withdrawn if the court finds that it was obtained by fraud or under duress. If the minor has not been placed for

adoption following birth in a licensed hospital or birth center, a consent to adoption may be executed at any time after the birth of the minor. However, subsection (7) provides that the consent to adoption may then be revoked 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 occurs 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.

c. *Statutes of Limitations or Repose and Motion to Set Aside Judgments*

Currently, the statute of limitations for fraud in adoption proceedings is 4 years. *See* 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.* Consequently adoptive parents face long-term emotional uncertainty and financial vulnerability in the event a judgment for adoption is based upon a fraudulently acquired waiver of consent or inadequate search efforts were made to identify or locate the father.

Effect of proposed changes:

Section 63.142, F.S., relating to hearing and judgment of adoption, is amended to allow a parent to challenge a judgment terminating parental rights within 1 year of the judgment date based upon a claim of a fraudulent concealment which precluded him or her from timely asserting parental rights under the law. A preliminary hearing must be held within 30 days of the motion. The court is authorized to enter an order to include written findings for placement of the minor pending resolution of the motion to set aside or otherwise invalidate the judgment and may order scientific testing upon the motion of any court or its own motion. A final hearing on the motion to set aside the judgment must be held within 45 days after the preliminary hearing. If a person whose consent to an adoption is required under section 63.062, F.S., prevails in an action to set aside the consent to adoption, the judgment terminating parental rights or a judgment of adoption based on a finding that the adoption entity's acts or omissions were the basis for the court's order, the prevailing party is entitled to an award of reasonable attorney's fees and must be paid by the adoption entity or the applicable insurance carrier on behalf of the adoption entity. *See* 63.039(4), F.S., relating to duties of an adoption entity and sanctions.

The court may only enter a judgment of adoption upon a determination that the period for appeal of a valid judgment terminating parental rights has passed and no pending litigation exists. This provision attempts to address the concern expressed by the former Chief Justice Gerald Kogan regarding the appropriate placement of a child or contact of a child with a parent pending litigation. *See* Baby Emily in *E.A.W. v. J.S.W.*, 658 So.2d 961, 967 (Fla. 1995)(Kogan, J., concurring in part, dissenting in part).

Section 63.182, F.S., relating to appeal and validation of judgments, is substantially reworded to create a 1-year statute of repose. Any challenge to a judgment of termination of parental rights or subsequent adoption based on any ground, including fraud or duress is barred forever within one year after entry of the judgment terminating parental rights.

4. Centralized State Registry of Adoption Information

The RTD reached consensus to continue the existence of the centralized repository for all adoption records. Currently, DCF maintains a statewide registry, established by the Legislature in 1982. The DCF registry is only required to maintain records of placed children, biological parents and adoptive parents in adoption proceedings conducted by DCF or adoption agencies under chapter 63, F.S. *See* Rule 65C-15.030, Florida Administrative Code; ss. 63.202 and 63.233, F.S. Under current law, the clerk must forward to DCF every petition for adoption and every affidavit of fees and expenditures filed. *See* ss. 63.112(4) and 63.132, F.S. The registry contains the names of adoptees, birth parents, and adoptive parents, as well as any information those persons wish to include. *See* s. 63.165, F.S. Registration of information is strictly voluntary and paid for through statutorily-authorized fees charged to users of the service. *See* s. 63.165(2), F.S. All information contained in the registry is confidential and exempt from the provisions of s. 119.07(1), F.S., except as permitted by law with the express permission of the registrant. *See* s. 63.165(1), F.S. There are no similar requirements for intermediaries to retain their documents in the registry although intermediaries as well as the DCF and adoption agencies are required to inform, in writing, birth parents, prior to termination of parental rights, and the adoptive parents before placement, of the existence and purpose of the registry. s. 63.165(3), F.S.

The court adoption files are sealed and retained for 75 years. *See* Rule 2.075(d)(6), Florida Rules of Judicial Administration. In cases of adoptions handled by an intermediary, the 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 investigation. *Id.* The records are retained in the Florida county where the final judgment of adoption was entered. This method of record retention has posed problems in situations such as a medical crisis where the case file containing the final judgment cannot be located or otherwise identified.

Effect of proposed changes:

The bill amends some statutory provisions to address concerns regarding the issue of non-centralized location of court adoption records. Sections 39.812 and 63.082, F.S., are amended to require that a form, provided by the department to adoption entities, contain the medical and social history of the parents and the social security number and date of birth of *each* birth parent *if readily obtainable*. s. 39.812, F.S. and 63.082(3), F.S. These sections also require DCF to forward the petitions for adoption and the medical and social history form to the state registry.

Section 63.152, F.S. requires a copy of the certified statement of entry of final judgment of adoption, which is already sent by the clerk of the court to the Office of Vital Statistics under current law, be also forwarded to the state adoption registry within 30 days after entry of the final judgement of adoption.

Section 63.165, F.S., relating to the state registry, is amended to maintain a copy of the certified statement of the final decree of adoption provided by the clerk of the court as stated in section 63.152, F.S., relating to application for new birth records. Additionally, this section requires DCF's registry to retain these documents of 99 years or as stated by applicable rule, whichever is longer. This retention provision applies to all records of adoptions.

5. The Best Interest of the Child

The RTD reached consensus that a determination of the best interest of the child should continue to be made *after* the parents' rights have been terminated. This is current case 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). Concern has been expressed that a best interest determination prior to proper termination of parental rights might deprive parents of parental rights to their children based solely on prospective adoptive parents' superior income or more formal education. *See In re Petition of Doe,* 638 N.E.2d 181, 182 (Ill. 1994).

Effect of proposed changes:

The bill proposes no change to current law.

6. Out-of-State Placement of Children for Adoption

The RTD reached consensus 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 to a stepparent or relative. Under current law, only intermediaries are prohibited from placing children for out-of-state adoption unless the child is a "special needs child" or being adopted by stepparents or relatives although intermediaries may provide interstate adoption services all incoming children. Current law defines a "special needs" child as 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.

According to the Office of Interstate Compact on the Placement of Children in the DCF, there were 116 children born in Florida who were placed for adoption out-of-state through public agencies during the fiscal year July 1, 1997 through June 30, 1998. According to the DCF, this number represents adoptions of both special needs children and dependent children by relatives. There were 388 children (non-special needs children) who were placed for adoption out-of-state by private adoption agencies. These numbers have steadily increased since 1991 when there were 56 out-of-state adoptions handled through public agencies and 211 out-of-state adoptions handled through private adoption agencies. Recent federal legislation provides that adoptions of children in foster care 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.

Effect of proposed changes:

Section 63.207, F.S., relating to out-of-state placement, is amended to lift the restriction on out-of-state adoptions. This section allows the out-of-state placement of a child for adoption by any adoption entity including an intermediary if: 1) the person placing a minor for adoption chooses to place the minor outside the state, 2) the minor is to be placed with a relative within the third degree or with a stepparent, 3) the minor is a special needs child as defined in s. 409.166(2), F.S., or 4) good cause is shown. "Person" as is currently defined by section 63.032(6), F.S., includes a

natural person, corporation, government or governmental subdivision, or agency, business trust, estate, trust, partnership, or association, and any other legal entity. Under this definition, "person" is not limited to a parent but may also include a person having legal custody of the minor or the adoption entity itself if it chooses to place a child for adoption outside the state. Existing law prohibits any "person" from placing or attempting to place a minor out-of-state for adoption, with the exception of placement through an adoption entity. *See* s. 63.212, F.S.

7. Report to the Court of Fees and Expenditures

The RTD reached consensus that there should be parity among the adopting entities as pertains to the reporting and court approval of all fees, costs, and expenditures relating to any adoption. Adoption agencies are required to file certain reporting and auditing requirements pursuant to administrative rules adopted by the DCF. Specifically, adoption 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.

Intermediaries are required to report fees, costs and expenditures with the court but they 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. 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. *See* s. 63.097, F.S. If the intermediary uses the services of a licensed child-placing agency, professional, the department, or other person, the prospective adoptive parent must pay the actual costs associated with the service provided, including the preliminary home study, counseling and the final home investigation. The court may order the payment of a lesser amount if there is a finding the prospective adoptive parent is unable to pay.

With the exception of adoptions by a stepparent whose spouse is a natural or adoptive parent of the child being adopted, an adoption by an intermediary requires the filing of a report of expenditures and receipts 10 days before a final hearing. *See* s. 63.132, F.S. The report must detail expenses or receipts incurred in connection with, but not limited to, the birth and placement of the minor and actual living and medical expenses for the birth mother.

At any time after an adoption agreement is reached 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.

Effect of proposed changes:

Section 63.097, F.S., relating to fees, is amended. Subsection (1) enumerates those fees, costs and expenditures related to the adoption which may be appropriately paid out by or assessed upon adoptive parents by the adoption entity including, but not limited to, reasonable living expenses, reasonable medical expenses, expenses associated with complying with chapter requirements, court and litigation expenses, advertising costs, and professional fees. Subsection (2) sets forth

the threshold limits for certain classes of fees before court approval is required. Subsection (3) requires the court to make a finding of extraordinary circumstances before approving any fee not enumerate or otherwise prohibited under this section. Subsection (4) prohibits certain fees such as: a) fees for locating a minor for adoption, b) cumulative pre-birth expenses incurred in excess of $1,500, relating to the minor, pregnancy, parent or adoption proceeding, c) non-refundable lump sum payments, and d) facilitation or acquisition fees if not specifically identified.

Section 63.102, F.S., relating to proceedings for approval of fees and costs, is amended to bring adoption agencies under the current mandate for intermediaries. Certain fees and costs in excess of set amounts must be pre-approved by the court and a contract for fees, costs and expenditures must be in writing. Additionally, this section provides a 3-day cancellation period of an adoption agreement for payment of fees, costs and expenditures.

Section 63.132, F.S., relating to reports of expenditures and receipts to the courts, is amended to require an adoption entity to file an affidavit with the court itemizing all fees, costs, and expenditures, and the basis for such, related to the termination of parental rights and subsequent adoption. The affidavit must be signed by the adoption entity and the prospective adoptive parents. A copy of the affidavit must be provided to the prospective adoptive parents at the time the affidavit is executed. This section now requires the DCF to maintain records of the affidavits forwarded to it by the clerk of the court for 5 years. This section also requires DCF to provide, upon request, all information on the affidavit. However, all identifying references to parties other than the adoption entity must be redacted. The purpose for this provision is to create a resource for prospective adoptive parents and others to determine what is the customary range for fees, costs, and expenditure, what are the available options for such charges, and what are reasonable fees in adoption cases as determined by the courts in Florida.

Upon final approval or disapproval of the fees, the court is required to issue a separate order and specify the basis for approval or denial of these fees. This section does not amend current law regarding the exception of these fee provisions in cases involving adoptions by a stepparent whose spouse is a parent of the minor.

8. Miscellaneous Provisions

A number of other areas were addressed by the RTD relating to the uniformity of adoption requirements among the adoption entities, the consistency and familiarity by the court of a minor throughout the adoption proceedings, and the importance of finality and certainty of judgments.

a. *Venue*

A conference of circuit judges and DCF advised the RTD that it would be best for children of parents whose rights were 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 chapter or terminated in juvenile dependency court under Chapter 39, F.S. There is currently no restriction that a petition for adoption or for a declaratory statement as to the adoption contract be filed in the same county or with the same court where the petition for termination of parental rights was granted.

Under sections 39.812 and 39.813, F.S., the court which terminated the parental rights in proceedings initiated by the DCF and licensed child-placing agencies under chapter 39, retains exclusive jurisdiction of the child and over all matters pertaining to the child's subsequent adoption.

Under s. 63.102, F.S., a petition for adoption or for a declaratory statement as to the adoption contract must be filed in the county where the petitioner or the minor resides, or where the agency with whom the minor has been placed is located.

Effect of proposed changes:

Section 39.812, F.S., relating to post-disposition relief following termination of parental rights in proceedings initiated by the DCF or licensed child-placing agencies, is amended to eliminate reference to licensed child-placing agencies and to require that a petition for adoption be filed in the same division of the court that entered the judgment terminating parental rights. However, upon motion, the court may grant a change of venue for the convenience of the parties or witnesses, or in the interest of justice as set forth in section 47.122, F.S., relating to change of venue based on inconvenience of the parties or in the interest of justice.

Section 63.087, F.S., relating to general provisions governing proceedings to terminate parental rights pending adoption by adoption agencies and intermediaries, is amended to specify that proper venue for these proceedings is in the county: a) where the minor resided for the prior 6 months, b) where the parent resided at the time the execution of the consent to adoption or the affidavit of nonpaternity, if the minor is younger than 6 months of age, or c) where the birth mother resides if there is no consent to adoption or an affidavit of nonpaternity executed by a parent. Additionally, jurisdiction to hear subsequent proceedings for adoption of the minor, after the petition for termination of parental rights is granted, lies with the same court whenever possible. The court may change the venue in accordance with s. 47.122, F.S., relating to change of venue.

In conjunction with section 63.087, F.S., section 63.102, F.S., relating to the venue for filing a petition for adoption, is also amended. This section requires a petition for adoption or a declaratory statement as to the adoption contract to be filed in the county where the petition for termination of parental rights was granted (which is set forth in s. 63.087, F.S.) but allows the court, in accordance with s. 47.122, F.S., to change venue to the county where the petitioner or minor resides, or where the adoption entity with whom the minor has been placed is located. The bill does not amend existing law which allows the filing of a petition for adoption or a petition for declaratory statement as to the adoption contract to be filed in a different county than the county where the petitioner or minor resides if filing in such county would tend to endanger the privacy of the petitioner or the minor. *See* s. 63.102(4), F.S.

b. *Criminal Penalties and Sanctions*

Additionally, some RTD participants suggested that criminal penalties be created for certain fraudulent practices.

Under chapter 39, F.S., a person commits a misdemeanor of the first degree if he 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. *See* s. 39.804, F.S. (Supp.1998)

Under chapter 63, F.S., a person commits a felony of the third degree for violating any act prohibited under section 63.212, F.S., punishable as provided in chapter 775. A person commits a misdemeanor of the second degree if the person advertises or otherwise publicizes the availability of a child for adoption. *See* s. 63.212(1)(h), F.S. Additionally, an intermediary or an agency is subject to sanctions under s. 63.219, F.S., relating to the prohibition of placing a child for adoption in the future upon a court finding that an intermediary or an agency violated a provision of chapter 63, F.S.

Effect of proposed changes:

Section 63.038, F.S., is created to impose criminal penalties and civil liabilities upon any person for certain violations. Any person who: a) knowingly and willfully provides false information, b), knowingly withholds material information, or c) intends to defraud an adoption entity by accepting benefits from more than one adoption entity in connection with the same pregnancy without disclosing such fact to that entity, commits a misdemeanor of the second degree, punishable as provided in sections 775.082 or 775.083, F.S. In addition, that person is liable for damages caused by those acts or omissions, including reasonable attorney's fees and costs. The damages may be recovered either through an award of restitution in a criminal proceeding or through an award in a civil action. With the exception of paragraph (c), it is not clear to whom the false information must be provided or from whom material information must be withheld for purposes of violating this section.

Section 63.039, F.S., is created to provide for the duties of an adoption entity and sanctions for violations thereof. Subsection (1) enumerates the duties of an adoption entity. The adoption entity must affirmatively follow these requirements to ensure that due process procedures are satisfied. Subsection (2) provides that a material failure on the part of the adoption entity to meet any of these duties may result in liability to the prospective adoptive parents for whom all sums paid by or on their behalf in anticipation or in connection with the adoption may be recovered. Subsection (3) holds an adoption entity liable for all sums paid by the prospective adoptive parents or on their behalf if the court finds that a consent or an affidavit of nonpaternity was obtained by fraud or duress attributable to the action of the adoption entity. In addition, the court may award reasonable attorney's fees and costs incurred by the prospective adoptive parents in connection with the adoption and any related litigation. The award must be paid directly to the prospective adoptive parents by the adoption entity or by any applicable insurance carrier on behalf of the adoption entity. Subsection (4) is discussed previously under the header relating to statute of limitations and appeals. Subsection (5) requires the court to forward to DCF a copy of any order imposing sanctions against an adoption agency, and to the Florida Bar, if the sanctions are imposed against an intermediary.

Section 63.212, F.S., relating to prohibited acts, is amended to apply to all adoption entities as newly defined in the bill.

Section 63.219, F.S., relating to the court-ordered sanction prohibiting an intermediary or an agency from placing a minor for adoption in the future is amended to apply to all adoption entities who violate any provision of chapter 63, F.S.

c. *At-Risk Placement*

Under state rules, a licensed adoption agency must obtain from prospective adoptive parents an executed "at-risk placement" statement prior to placement of the child if the parental rights of the birth parents 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 and why; that the 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. The prospective adoptive parents must agree to return the child to the agency.

In an adoption handled by an intermediary, there is no such requirement. 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. The only requirements for approval of placement, which may occur pre-birth, is that a report of intended placement be filed and a preliminary home study be completed. s. 63.092(1), F.S. The statute does not state what the report of intended placement should contain. *Id.* For placement purposes, a preliminary home study may be completed up to 12 months prior to placement. s. 63.092(2), F.S. In fact, as noted by a RTD participant, when a child is surrendered at birth but not immediately placed, intermediaries, unlike DCF and private adoption agencies, have no licensing or training regarding child care which may create safety concerns for the child.

Effect of proposed changes:

Section 63.092, F.S., relating to placement of children for adoption, is amended to require prospective adoptive 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 of a child before parental rights are terminated. This is similar to the existing administrative requirements by DCF for adoption agencies. *See*. Rule 65C-15.002(5) and (6), F.A.C.

d. *Placement with Relatives*

Finally, the RTD, case law, and members of the Legislature have been generally supportive of the policy that the court should consider the blood relationship with a child in determining suitability of a placement for the child. In dependency proceedings under chapter 39, F.S., placement with relatives is encouraged when placement with the birth parents is not recommended. Under section 63.0425, F.S., the court must give a grandparent first priority of right to adopt a child if the child has been living with the grandparent for at least 6 months.

Effect of proposed changes:

Section 63.0425, F.S., relating to a grandparent's right to adopt when a child has resided with a grandparent for at least 6 months, is amended to expand the right to great-grandparents. Sections 39.01, F.S. and 39.801, F.S., are amended to conform with this change.

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:

- The parent-child relationship is protected under the state and federal constitution. *See In the Matter of the Adoption of Doe v. Doe*, 543 So.2d 741, 746 (Fla. 1989). The bill tries to balance the interest in the fundamental and constitutionally protected parental right by requiring timely and strict adherence to consent, disclosure, service, notice and hearing provisions with the interest of parties in the finality and certainty of adoption proceedings and judgments. However, the proposed 1-year statute of repose raises some constitutional concerns as it would permanently bar a challenge even based on a claim of fraudulent concealment of a person's constitutionally protected parental rights in a child. The courts have traditionally found that no passage of time automatically cures any irregularity or procedural defect and that fraud on the court is grounds to attack collaterally the validity of a final judgment, even many years after it was rendered. *See Preston v. Tolone*, 661 So.2d 967 (Fla. 5th DCA 1995). In fact, fraud on the part of the mother to "thwart" a father from exercising his paternal rights has been 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 v. Rivera-Berrios*, 673 So.2d 12 (Fla. 1996)(mother led father to believe she was getting an abortion). Even maternal grandparents who were not parties to the adoption have been granted standing to attack a finalized adoption which was obtained through the concealment of material facts. *See Ramey v. Thomas*, 382 So.2d 78 (Fla. 5th DCA 1980).

- Constitutional concerns were initially raised in SB 2 regarding the restriction of out-of-state adoption to children qualifying as a "special needs child" as the definition includes children who are black or racially mixed parentage under s. 409.166(2)(a), F.S.

However, both state and federal legislation have been enacted to provide incentives for the adoption of special needs children who have historically been more difficult to place. In Florida, as of June 30, 1997, of the more than 1,700 children under the care and custody of DCF free and available for adoption, almost 3/4 of the children were of black or racially mixed parentage. In 1996, legislation was enacted to provide adopted foster children with a waiver of tuition to attend a Florida college. See s. 239.117(3)(c), F.S. Even the federal definition of "special needs child" similarly includes determinations based upon ethnic background or membership in a minority group. 42 U.S.C. s. 673. Beginning in 1997, the federal government allowed adoptive parents to take a credit of up to $5,000 for qualifying expenses paid to adopt a *special needs child*. *See* IRS publication 968, p. 2 (revised January 1998). Nevertheless, the bill , as now amended, allows broad placement of children other than special needs children for adoption out-of-state.

- The bill's constructive notice requirements under section 63.088(5), F.S., may raise some concern regarding privacy rights as recognized under article I, section 23 of the Florida Constitution. Section 23 states that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life." Specifically, subsection (5) requires extensive information to be provided in the published notice, including all information in the petition for termination of parental rights, all information required under chapter 49, F.S., detailed physical descriptions of the minor's mother and of any person reasonably believed to be the father, the minor's birth date, and the date, city, county and state in which conception may have occurred. In right of privacy cases where a reasonable expectation of privacy exists, the Florida Supreme Court has applied the compelling state interest standard of review. The compelling state interest standard requires a review of whether the State intruded on a petitioner's right of privacy to protect compelling state interests and that the State did so using the least intrusive means possible. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985). The Florida Supreme Court has been more willing to grant protection and restrict government intrusion to privacy in personal decision making cases than in disclosure of documentation cases. *See In re T.W.* 551 So.2d 1186 (Fla. 1989)(statute requiring pregnant minor to obtain parental consent before undergoing an abortion violated a minor's right to privacy).

- The bill also contains a number of provisions which arguably involve matters of judicial practice and procedure which may fall within the exclusive purview of the judicial branch. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate rules of practice and procedure. *See* art. V, s.2(a), Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. The Legislature cannot enact law that amends or supersedes existing court rules, it can only repeal them. *See Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978). What constitutes practice and procedure versus substantive law has been decided by the courts on a case by case basis. With few exceptions, it is not entirely clear or definitive. Generally, substantive laws create, define and regulate rights whereas court rules of practice and procedure prescribe the method of process by which a party seeks to enforce or obtains redress. *See Haven Federal Savings & Loan Assoc v. Kirian* 579 So.2d 730 (Fla. 1991). Based on current law, the courts tend to find certain

provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or others intruding into areas of practice and procedure within the province of the court.

Over the years, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the judicial system. In these situations, the court will typically invalidate the procedural statute as constitutionally infirm and then adopt the substance of the invalid section as a court rule. *See TGI Friday's Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995). Under Florida Rule of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the public policy.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The requirement to bifurcate the termination of parental rights of the parents and finalization of the adoption in two separate actions requiring distinct hearings in all adoptions may result in additional court and administrative costs. However, any increased costs may be dependent on factors such as travel time to the venues for the hearings by the different parties involved, i.e., the parent(s), the prospective adoptive parent(s), the person filing the first proceeding, and the person representing the birth parents in the second proceeding.

In adoptions by adoption agencies, there may be an additional increase in costs and other expenses associated with the submission of numerous documentation such as affidavits related to diligent search, inquiry, fees and expenditures, and acknowledgments of receipts of pre-birth and post-birth disclosure. Finally, there will be additional expenses incurred associated with conducting searches of and notices to persons whose consents are required, and with copying and distributing consent, disclosure and family medical and social history forms, to parents and other persons as required by the bill.

These additional costs or expenses up front, however, may be offset somewhat by the mitigation in costs of litigation in the future which have historically arisen from claims based on invalid or lack of informed consent, inadequate notice, fraud, duress and insufficient disclosure. Challenges to set aside or otherwise invalidate judgments terminating parental rights and subsequent judgments of adoptions may be more difficult to make if the parties adhere to the stricter and more explicit procedural safeguards. For example, certain provisions regarding extensive search and notice efforts to "fathers" attempt to foreclose future challenges by recognizing "the fact that unwed biological fathers have a constitutionally protected 'opportunity interest' in their offspring . . ." such that they must be

at least ". . . 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). Parents, especially prospective parents, may be more assured by the certainty and finality of judgments terminating parental rights and subsequent adoptions.

Additionally, parents may be better informed about the financial expenses engendered by adoption as the bill delineates guidelines and threshold limits for fees, costs and expenses, holds adoption entities more accountable for their actions based on their statutory duties to ensure compliance, and makes general fee adoption information available to the public via the state registry.

The bill may make certain information from the state registry easier and more accessible to adoptees, prospective adoptive parents and other interested parties since the state registry which will be acting as a storehouse of general and specific adoption documentation.

Both parents and prospective adoptive parents may benefit from a better understanding of their rights, responsibilities, and liabilities under the new adoption laws.

C. Government Sector Impact:

DCF has determined preliminarily that the requirements in this bill have minimal or fiscal impact and are manageable with current staff and resources. No formal fiscal impact statement on the committee substitute is yet available from the Office of State Court Administrator.

VI. Technical Deficiencies:

- Section 63.038, F.S., relating to prohibited acts, is unclear as to whom the false information must be provided or from whom material information must be withheld for purposes of violating paragraphs (a) and (b) under this section and who may seek damages under these paragraphs. As stated, any person, including an adoption entity, harmed by the acts or omissions may collect monies under a civil action for all sums paid or may be awarded restitution. It may be appropriate relocate this provision in section 63.212, F.S., relating to prohibited acts.

VII. Related Issues:

- An amendment may be needed to resolve a potential conflict between provisions regarding the jurisdiction of a court and appropriate venue for proceedings on petitions for termination of parental rights and petitions for adoption. "Jurisdiction" refers to the court's inherent power to decide a case. "Venue" refers to the geographical area (whether county or city) in which a court *with jurisdiction* may hear and determine a case. For example, section 39.812(4), F.S., as amended by this bill, states that the court retains "jurisdiction over any child placed in the custody of DCF until the child is adopted." Section 39.813, F.S. (Supp. 1998), (which was not amended by this bill) explicitly states "[T]he court which terminates the parental rights of a child who is the subject of a termination proceedings pursuant to this chapter shall retain exclusive jurisdiction in all matters pertaining to the child's adoption

pursuant to chapter 63." With the amendments to the bill as is, while venue may be proper, the court in the new venue may be without jurisdiction to hear the matter. Under the Rule 1.140 of the Florida Rules of Civil Procedure, the defense of improper venue or lack of jurisdiction over a person may be waived but the defense of lack of subject matter jurisdiction may be raised at any time. Sections 63.087, F.S., and 63.102, F.S., may similarly need to be clarified as to appropriate venue.

- An amendment to section 63.102(5)(e), F.S., may be needed to address a conflict arising with the provision allowing consolidation of a petition for adoption with a previously filed petition for termination of parental rights. In other provisions of the bill, a proceeding for termination of parental rights and a proceeding for adoption are treated as two distinct proceedings and the proceeding for adoption cannot be initiated until termination of the proceeding for termination of parental rights. Additionally, once the judgment for terminating parental rights is entered, the parties in the proceeding to terminate parental rights do not have the same legal right or interest in a subsequent adoption proceeding.

VIII. Amendments:

None.