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 346

SPONSOR: Senator Campbell

SUBJECT: Adoption

DATE: March 7, 2000 REVISED: 01/19/00

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Fav/ 7 amendments
2.	Dowds	Whiddon	CF	Favorable/CS
3.				
4.				
5.				

I. Summary:

The bill amends Part IX of ch. 39, F.S., relating to proceedings for termination of parental rights, and ch. 63, F.S., relating to other adoption proceedings. The bill provides for the uniform application of a bifurcated procedural framework for the termination of parental rights and the creation of new adoptive parental rights in all adoption proceedings. Only adoptions initiated by the Department of Children and Families (DCF) shall be governed by ch. 39, F.S., and ch. 63, F.S., with a few provisions excepted. All other adoptions initiated by adoption entities including intermediaries, licensed child-placing agencies and registered child-caring agencies shall be governed entirely by ch. 63, F.S. 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,

- Prohibiting de facto pre-birth termination of parental rights without notice;
- Requiring written pre-birth and post-birth disclosures;
- Prohibiting pre-birth execution of consent to adoption or alternatively, an affidavit of nonpaternity;
- Providing a 48-hour post-birth waiting period for execution of a consent to adoption by a birth mother of a child placed for adoption;
- Providing a specified revocation period of consent to adoption of a yet-unplaced child;
- Adding criminal penalties and civil liability for withholding information and fraudulent acts;
- Enumerating the duties of adoption entities and liabilities thereunder;
- Establishing categories of fees, costs and expenses which an adoptive parent may be assessed, fee threshold limits, and providing for repayment under certain circumstances;
- Clarifying procedures for pre-approval, final approval and reimbursement of fees, costs and expenses connected with an adoption;
- Expanding categories of children who may be placed for out-of-state adoptions; and
- Establishing a 1-year statute of repose barring claims based on any ground except for fraud, and a 2-year statute of repose for claims based upon fraud or misrepresentation.

This bill substantially amends the following sections of the Florida Statutes: 39.703, 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, 63.162, 63.165, 63.182, 63.202, 63.207, 63.212, 63.219, 984.03, and 985.03. The bill also creates the following sections of the Florida Statutes: 63.037, 63.039, 63.087, 63.088, and 63.089. Section 63.072 of the Florida Statutes, 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 are either licensed attorneys or medical doctors. However, different statutory and procedural requirements govern proceedings for termination of parental rights and adoptions handled by DCF, licensed child-caring agencies, and intermediaries. Proceedings for termination of parental rights and adoptions by DCF and private adoption agencies fall within the ambit of Part IX of ch. 39, F.S., while proceedings for adoption through intermediaries are governed exclusively by ch. 63, F.S. In addition, administrative rules govern the conduct of DCF and private adoption agencies while respective professional codes of conduct govern the actions of intermediaries.

The last major revision of Florida's adoption statutes occurred in 1992. In recent years, highly publicized and controversial court cases relating to termination of parental rights and adoption 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, particularly in the areas of informed consent and adequate notice. In 1997, the Senate Judiciary Committee issued an interim report on adoption based in part on two round table discussions (RTD) held by individuals representing various sectors and perspectives on the issue of adoption. (*See* September Interim Report 97-P-24). These discussions led to a consensus on major issues for potential legislation on adoption. In 1998, SB 550 was filed, addressing some of the RTD issues. Although the bill passed the Senate, it died in House messages. The bill was re-introduced during the 1999 Legislative session and passed the Senate, but it also died in House messages. *See* SB 2 (1999)

III. Effect of Proposed Changes:

Overall, the bill amends a number of provisions in Part IX of ch. 39, F.S., relating to termination of parental rights, and ch. 63, F.S., relating to adoption. The cumulative effects are to provide uniformity, conformity and clarification regarding proceedings for termination of parental rights and proceedings for adoption as follows:

- Adoptions handled by the Department of Children and Families (DCF) shall be governed solely by part IX of ch. 39, F.S. and ch. 63, F.S., except for specifically exempted provisions enumerated in s. 63.037, F.S. Section 63.037, F.S., exempts DCF from the following sections of which similar provisions already exist in ch. 39, F.S.: ss. 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).

- All adoptions handled by adoption entities other than DCF shall be governed by ch. 63, F.S.

- Individuals and agencies handling adoptions are brought into parity by amending or creating a number of definitions under ch. 63, F.S. The term "adoption entity" is created to expand upon authorized adoption entities to include Department of Children and Families (DCF), a licensed child-placing agency, an intermediary or a registered child-caring agency under s. 409.176, F.S. DCF is the state agency authorized to handle adoptions of children available through proceedings initiated under ch. 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. *See* s. 63.032(8), F.S. (The definition for "intermediary" was changed to eliminate reference to physicians as persons eligible to handle adoptions.) A child-caring agency registered under s. 409.176, F.S., is newly added as an agency that may handle adoptions.

  Other changes include conforming amendments for the terms "abandoned," "to place" or "placement," and "suitability of the intended placement," all under s. 63.032, F.S. The term "parent," as defined in ss. 63.032, 984.03, and 985.03, F.S., is amended to conform with changes in this bill. The terms "legal custody," "parent," and "relative" are added and ascribed the same meaning as terms already defined in s. 39.01, F.S.

Due to the complexity of the bill, the following discussion incorporates a more specific review of the current law and an analysis of the effects of the proposed changes within the context of the major areas initially identified by the participants of the RTD.

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

a. *Bifurcated Proceedings*

Present situation:

To ensure that a child is truly available for adoption the RTD reached consensus that 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* (or bifurcated) proceedings. Under current law, only adoptions handled by DCF and licensed child-placing agencies under Part IX, ch. 39, F.S., and ch. 63, F.S., occur in two separate proceedings.

In contrast, in cases of adoptions handled by intermediaries under ch. 63, F.S., the termination of parental rights and the creation of parental rights in adoptive parents occur in one proceeding. Under current law a petition for adoption may be filed no later than 30 days after placement of a child with a prospective adoptive parent with the exception of a placement of a child with a relative within the third degree of consanguinity. *See* s. 63.102, F.S. The hearing must then be held no earlier than 90 days after placement of the child with the petitioner. *See* s. 63.122(1), F.S. If the prospective adoptive parent fails to file a petition for adoption within 30 days, any interested party, including the state, may file an action challenging the prospective adoptive parent's custody of the child. *See* s. 63.102(3), F.S.

Effect of proposed changes:

All adoptions, whether initiated under ch. 39, F.S., or ch. 63, F.S., are uniformly subject to a bifurcated procedural framework that requires one separate proceeding for the termination of parental rights and another proceeding for the creation of parental rights in the adoptive parents. With the exception of DCF which is already subject to similar provisions in ch. 39, F.S., all other adoption entities are subject to the new procedure and proceedings for termination of parental rights set forth in the ss. 63.087, 63.088, and 63.089, F.S.

Specifically, s. 63.087, F.S., is created and provides that a parent or a person having legal custody may file a petition for termination of parental rights at any time after the minor's birth. An adoption entity may also file a petition if the parent or person having legal custody executed a consent to adoption. Additionally, s. 63.087, F.S., specifies the required content and attachments for a petition to terminate parental rights. Service of process can occur immediately.

Section 63.088, F.S., is created to set forth explicit notice, diligent search and service requirements for persons whose consents are required for termination of parental rights and adoption. (A more detailed discussion is made later in the analysis.)

Section 63.089, F.S., is created to require that a full evidentiary hearing be held on the petition and all the notice, service and consent requirements 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. The court may order a paternity test[1] at any time the court has jurisdiction over the minor. Under s. 63.089(5), F.S., the court must dismiss the petition for termination of parental rights if it fails to find by clear and convincing evidence that the parental rights should be terminated. The order of dismissal must include written findings and specify the basis for rejecting a claim, if any, of abandonment. If a consent to adoption is timely withdrawn or if the consent or alternatively, an affidavit of nonpaternity[2] was obtained by fraud or duress, the court may not enter a judgment for termination of parental rights. The parent's parental rights would then remain in full force and the court must enter an order providing for the placement of the minor. Any subsequent proceeding involving the minor must be brought in either a custody action under ch. 61, F.S., a dependency action under ch. 39, F.S., or a paternity action under ch. 742, F.S.

[1]The DNA testing to determine the paternity of a child is relatively simple to obtain and averages $550. 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, for 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 service which, in turn, makes all the arrangements. *All information re DNA from Paternity Services of Florida.*

[2]The affidavit of nonpaternity is an alternative sworn acknowledgment waiving any parental right during proceedings for termination of parental rights and adoption. The person executes a statement that he will not claim or establish paternity of a child who is a subject of an adoption, that he has not provided any pre-birth or child support, that he was not married to, is not married, and has no intention of marrying the birth mother, and that he has no interest in assuming the responsibilities of parenthood for the child. *See* s.63.062(4), F.S.

Section 63.102, F.S., is amended to alter the time from which a person may file a petition for adoption. A petition for adoption must be filed no later than 60 days (but no sooner than 30 days) after the entry of a judgment terminating parental rights rather the date of a child's placement with a prospective adoptive parent. The 30-day minimum 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 ch. 39, F.S. The 60-day maximum does not apply to adoptions involving placement of a minor with a relative.

As is currently the law, any interested person, including the state, may still file an action to challenge a prospective adoptive parent's physical custody of the minor if no petition for adoption is filed after the 60 days. Jurisdiction over the matter must remain with the circuit court in Florida until a final judgment is entered on the adoption. The Uniform Child Custody Jurisdiction Act will not apply until the final judgment is entered, as well. As is current law, there is no time-frame in which to file a petition for declaratory statement for pre-approval of an adoption contract although the bill provides that a petition for adoption may be consolidated with a previously filed petition for a declaratory statement.

Section 63.112, F.S., amends the requirements for the form, content and filing of a petition for adoption to include the date and case style of the judgment terminating parental rights and an attachment of a certified copy of the judgment terminating parental rights.

Section 63.122, F.S., amends the hearing requirement for a petition for adoption to prohibit the 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.

b. *Persons Who Must Consent and Notice Requirements*

Present situation:

Consent is required of specific persons in all adoptions. The current consent process under ch. 63, F.S., requires written consent from the mother, even a 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 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, the court may waive the requisite consent from a particular person based on a number of grounds including abandonment. *See* s. 63.072, F.S.

Effect of proposed changes:

Section 63.062, F.S., relating to required consent, is amended. First, it eliminates the court's discretion to waive consent. Second, it clarifies whose consent to adoption must be obtained and to whom notice be given. Third, the section expands the categories of persons who may qualify as a "father" from whom consent must be obtained and to whom notice must be given. The bill prioritizes three major categories of "fathers" from whom consent must be obtained or to whom notice must be given as follows:

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, he is the father of the minor and has filed such acknowledgment with the Office of Vital Statistics in the Department of Health;
   - Has provided or attempted to provide the minor or the birth mother during her pregnancy 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.

Consent or notice is only required of the man who first qualifies as a "father" in the order of the categories given. No consent or notice is required of any other person under a subsequent category. The man qualifying as the "father" would have standing to challenge a petition for or judgment for termination of parental rights and a subsequent adoption. 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). This section also does not change the existing requirement to obtain the consent of the person having legal custody or of the court having jurisdiction over the minor if the person having physical custody of the minor does not have legal custody.

With the exception of a person who has qualified as a minor's father by virtue of marriage at the time of conception or birth, by adoption, or by an order of paternity, a "father" may otherwise execute an affidavit of nonpaternity in lieu of a consent to adoption as provided under subsection (2). Subsection (4) provides a detailed affidavit of nonpaternity form. Upon execution of a valid affidavit in accordance with s. 63.082, F.S., such person waives further notice of any subsequent proceedings.

c. *Due Diligence and Notice*

Present situation:

Existing notice requirements in adoption proceedings have been shown to be problematic. For example, the following events may occur without requisite notice to a birth father even when his whereabouts are known: 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. *See* ss. 63.102 and 63.092, F.S. Some otherwise valid judgments have been subject to being set aside much later in the process after the parties have become more entrenched emotionally and financially. *See In interest of B.G.C.*, 496 N.W. 2d 239, 240-241 (Iowa 1992)(Baby Jessica)(the man who signed the consent was not in fact the biological father). 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.

Effect of proposed changes:

This bill provides additional and more exacting 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 created to require an adoption entity, once it has been contacted to place a minor or find a minor for adoption, to take certain steps to identify and locate the "father."

Specifically, 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 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 s. 63.062, F.S., if the person has not executed an affidavit of nonpaternity and their identity and location have been determined. The notice of hearing 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 identity 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 s. 39.803, F.S., which requires the court to make such inquiry of termination of parental rights proceedings handled by DCF. Although a consent to adoption or an affidavit of nonpaternity may not be executed until after the birth of the minor, the 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 upon 15 enumerated sources. The sources include, but are not limited to, the United States Postal Service through the Freedom of Information Act, one Internet data-bank locator service, and medical patient financial responsibility forms. The diligent search provisions set out in the bill contain the same criteria as 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 subsections 39.803(5) and (6), F.S., which is required of DCF in conducting its diligent search.

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 jointly execute 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 ch. 49, F.S. Notice must be provided in each county identified in the petition as provided in s. 63.087(6), F.S.

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

- All information required in the petition under s. 63.087(6)(f), F.S.[3], including each city in which conception may have occurred in the 12 months prior to the minor's birth (only in cases in which the minor is less than 6 months old and the father is unknown;
- All information required in ch. 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.

If any of this information is unknown or reasonably unascertainable, the notice must state so.

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

Present situation:

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 may only be obtained post-birth but the court may waive consent requirements. *See* ss. 63.062 and 63.072, F.S. Under s. 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 or lawful custodian 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 "abandoned" under ch. 39, F.S., provides that incarceration of a parent may support a finding of abandonment. This

[3]A petition for termination of parental rights must include: 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 but excluding the minor's prospective adoptive name to allow any interested parties to the action, including parents, persons having legal custody of the minor, persons with custodial or visitation rights to the minor and other persons entitled to notice pursuant to the Uniform Child Custody Jurisdiction Act or the Indian Child Welfare Act, to identify their interest in the action.

provision does not appear in the definition for "abandoned" under ch. 63, F.S. *See* s. 63.032(14), F.S. Recently, the Florida Supreme Court held that a father's commission of a violent criminal offense during a mother's pregnancy and subsequent long-term incarceration may support a finding of "abandonment." *See* W.T.J. v. E.W.R., 721 So.2d 723 (Fla. 1998). When making a determination of abandonment in adoption proceedings under ch. 63, F.S., the courts have considered pre-birth conduct to include evidence of a lack of emotional support or emotional abuse towards the child's mother during her pregnancy. *See* In Re Matter of Adoption of Baby E.A.W., 658 So.2d 961 (Fla. 1995)("Baby Emily"), cert. denied by G.W.B. v. J.S.W., 516 U.S. 1051, 116 S.Ct. 719, 133 L.Ed.2d 672 (1996); *In the Matter of the Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989), cert. denied, 493 U.S. 964, 110 S.Ct. 405, 107 L.Ed.2d 371 (1989). However, this has raised some concern that consideration of a lack of emotional support of the mother might lend itself to abusive application or discrimination against the less privileged. *See* E.A.W, 658 at 989 (Justice Kogan, concurring and dissenting opinion).

Effects of proposed changes:

Section 63.089, F.S., is created and lists grounds for dismissing or granting a petition for termination of parental rights. The court may terminate parental rights based upon one or more of the six grounds enumerated in s. 63.089(3), F.S. However, prior to the entry of a judgment terminating parental rights, the court must determine by clear and convincing evidence, supported by written findings of fact, that for each person whose consent is required one or more of the following has been satisfied or has occurred:

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) Has been properly served notice of the proceeding but who the court finds, after examining written reasons for the withholding of consent, to be unreasonably withholding consent; or
h) Failure of the adoptee's spouse to consent and that such failure is not excused by reason of prolonged and explained absence, unavailability, incapacity or other circumstances.

Subsection (4) of s. 63.089, F.S., provides specific criteria under which the court may make a finding of "abandonment" by a parent for purposes of terminating parental rights. This finding must be based on clear and convincing evidence. Under subsection (a), the court must consider whether a parent's actions constituted a willful disregard for the safety or welfare 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. Under subsection (b) a finding of abandonment will be made when the parent of a child is incarcerated on or after October 1, 2000, in state or federal prison and either the period of expected incarceration is for a substantial period during the minor's minority; the parent is a career or serious felony offender, as defined in specified sections

of law; or the continuing parent-child relationship would be harmful based on a finding of clear and convincing evidence. Additionally, subsection (4) expressly excludes a finding of abandonment based on a lack of emotional support during a mother's pregnancy but does allow such finding based on the emotional abuse endured by the mother during her pregnancy.

Subsection (5) limits consideration of pre-birth conduct as a basis for a finding of abandonment to only those situations in which the father was informed that he was the father or in which a diligent search and notice were made to inform the person that he was or could be the father of the minor.

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

a. *Informed Consent and Disclosure*

Present situation:

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

Effect of proposed changes:

Section 63.082, F.S., relating to the requirements for executing a consent to adoption, is amended to make the requirements applicable to affidavits of nonpaternity. This section clarifies and expands the requisites for executing a valid consent to adoption or an affidavit of nonpaternity, including advance notice of a person's right to have the presence of an independent witness and sign the form, and disclosure statements to birth parents as required under s. 63.085, F.S. The provision allowing for court waiver of consent is eliminated.

Specifically, subsection (4)(e) 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 s. 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 cannot 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., disclosure by an adoption entity, is substantially revised to require adoption entities to provide an extensive adoption disclosure statement to the parents and prospective adoptive 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. After the birth of the minor if the consent of adoption has not yet been executed, a parent must again receive the disclosure statements. This section also provides a comprehensive form for the disclosure statement that includes, 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 ch. 63, F.S., including parents, is entitled to seek independent legal advice.

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

Present situation:

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 other related state and federal legislation such as timelines for health insurance coverage of maternity and newborn care.[4]

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.

[4]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. *See* s. 627.6406(2), F.S.

Effect of proposed changes:

Section 63.082, F.S., relating to the requirements for executing a consent to adoption, is amended. Specifically, subsection (4) prohibits a parent from executing a consent to adoption or an affidavit of nonpaternity before the minor is born. Subsection (4)(b) provides the time period for executing and withdrawing a consent for adoption in cases of a minor placed for adoption with identified prospective adoptive parents following the minor's birth. A 48-hour waiting period is required before a consent for adoption may be executed in these cases. The 48-hour period begins after the birth of the minor in a licensed hospital or birth center or after the mother's notification that she is fit for release from the hospital or the birth center, whichever is sooner. Once such a consent is executed, it may only be withdrawn if the court finds that the consent was obtained by fraud or under duress.

Subsection (4)(c) provides the time period for executing and revoking a consent for adoption in cases of a minor not initially placed for adoption as provided under s. 63.052, following the minor's birth. Such consent to adoption may be executed at any time following the birth of the minor. This consent may be withdrawn or revoked in one of two ways, whichever occurs later: a) within 3 business days after execution or 1 business day after the mother's discharge, or b) at any time prior to the minor's placement with the prospective adoptive parents. Subsection (7) provides the method for revoking by certified mail. Following either the 3-day revocation period or the placement of the minor with the prospective parent, such consent can only be withdrawn upon a finding of fraud or duress.

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

Present situation:

Currently, the statute of limitations for any action based on fraud is 4 years. *See* s. 95.11(3)(j), F.S. It is measured from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. *See* s. 95.031(2)(a), F.S. However, a 12-year period of repose exists for actions based on fraud, beginning from the date the fraud was committed. *Id.* There is also a 4-year statute of limitations for actions to determine paternity, beginning from the time a child reaches majority. *See* s. 95.11(3)(b), F.S. Consequently, adoptive parents often 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 efforts were made to identify and locate the father or determine paternity. *See* *Stefanos v. Rivera-Berrios*, 673 So.2d 12 (Fla. 1996)(mother led father to believe she was getting an abortion).

Effect of proposed changes:

Sections 63.089(7), F.S., relating in part to judgments terminating parental rights, and s. 63.142(4), F.S., relating in part to judgments of adoption, are amended to provide a specific procedure for setting aside a judgment terminating parental rights or a subsequent judgment of adoption based on a claim of fraudulent concealment which precluded the parent from timely asserting parental rights under the law. However, such motion cannot be filed later than 2 years after the date of the judgment terminating the parental rights. Unless good cause is shown

otherwise, a preliminary hearing must be held within 30 days of the motion to determine parent-child contact, if any, pending resolution of the matter, and specific written findings must be included in the order. The court may also order paternity testing on its own or upon motion of any party, if paternity has not been previously established. Within 45 days (except for good cause shown) of the preliminary hearing, the court must hold a final hearing on the motion to set aside the judgment.

Under s. 63.039(3), F.S., relating to duties of an adoption entity and sanctions, a person (whose consent to an adoption is required under s. 63.062, F.S.) who prevails in an action, as described, is automatically 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.

Subsection (4) of s. 63.142, F.S., specifically precludes the court from entering a judgment of adoption until the period for appeal of a valid judgment terminating parental rights has passed and no pending litigation exits. This provision attempts to address the concern 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 and 2-year statutes of repose. Any challenge to a judgment of termination of parental rights or subsequent adoption based on any ground, including duress but excluding fraud, is barred forever within 1 year after entry of the judgment terminating parental rights. A similar claim based on fraud is barred after 2 years after entry of the judgment terminating parental rights.

4. Centralized State Registry of Adoption Information

Present situation:

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 ch. 63, F.S. *See* Rule 65C-15.030, F.A.C.; 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(1)(c), 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. *See* 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, DCF must provide a family medical history form to an intermediary who intends to place the child for adoption. *See* 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 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 all information as required by the department. *See* ss. 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 63.165, F.S., relating to the state registry, is amended to require DCF's registry to retain these documents for 99 years or as stated by applicable rule, whichever is longer. This requirement to maintain records applies to all records of adoptions.

5. The Best Interest of the Child

Present situation:

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

Present situation:

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 is

being adopted by stepparents or relatives, although, intermediaries may provide interstate adoption services for 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 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 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 out-of-state adoption 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 and adoption of a child if: 1) The parent placing a minor for adoption chooses to place the minor outside the state and files an affidavit stating the reason for said placement, 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) For other good cause shown.

7. Report to the Court of Fees and Expenditures

Present situation:

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 expenses relating to any adoption. Adoption agencies are required to meet certain reporting and auditing requirements pursuant to administrative rules adopted by DCF. Specifically, adoption agencies must file a written fee schedule with DCF and provide it to all persons making application for services. *See* Rule 65C-15.010(4), F.A.C. 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 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 handled by an intermediary requires the filing of a report of expenses 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. *See* 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) allows specific fees to be assessed by an adoption agency which is licensed by the department. Subsection (2) enumerates those fees, costs, and expenses related to the adoption which may be appropriately paid out by or assessed upon adoptive parents by the adoption entity. Those fees, costs, and expenses include but are not limited to, reasonable living expenses, reasonable medical expenses, court and litigation expenses, advertising costs, professional fees and other expenses associated with complying with chapter requirements, subsection (3) sets forth the threshold limits for certain classes of fees before court approval is required. Subsection (4) requires the court to make a finding of extraordinary circumstances before approving any fee not enumerated or otherwise prohibited under this section. Subsection (5) prohibits certain fees such as: a) fees for locating a minor for adoption, b) non-refundable lump sum payments, and c) facilitation or acquisition fees if not specifically identified.

Section 63.102, F.S., relating in part to proceedings for approval of fees and costs, is amended to make all adoption entities subject to the mandates currently imposed on intermediaries. Certain fees and costs in excess of set amounts must be pre-approved by the court and a contract for fees, costs, and expenses must be in writing. Additionally, this section provides a 3-day period from the date of execution to cancel an adoption agreement for payment of fees, costs, and expenses.

Section 63.132, F.S., relating to reports of expenses and receipts to the courts, is amended to require an adoption entity to file an affidavit with the court itemizing all fees, costs, and expenses, 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.

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

RTD addressed a number of other areas including uniformity of adoption requirements among adoption entities, continuity and consistency by the court throughout the adoption proceedings and the importance of finality and certainty of judgments.

a. *Venue and Jurisdiction*

Present situation:

A conference of circuit judges and DCF advised the RTD that it was most conducive and best for a child to have the same juvenile dependency judge oversee the entire adoption process from the termination of parental rights through the final adoption. There is no specific requirement that the same judge, even if available or practicable, complete the adoption process. Under ss. 39.812 and 39.813, F.S., the court which terminated the parental rights in proceedings initiated by DCF and licensed child-placing agencies under ch. 39, F.S., retains exclusive jurisdiction of the child and over all matters pertaining to the child's subsequent adoption. However, all adoptions are commenced by filing a separate proceeding under ch. 63, F.S., regardless of whether parental rights were terminated under that chapter or terminated in juvenile dependency court under ch. 39, F.S. There is currently no requirement for a petition for adoption or declaratory statement (as to the adoption contract) to be filed in the same county or with the same court where the petition for termination of parental rights was granted. 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 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 s. 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., is amended to specify that proper venue for proceedings to terminate parental rights pending adoption (initiated by adoption agencies and intermediaries), may lie in the county where:

- the minor resided for the prior 6 months,
- the parent resided at the time of the execution of the consent to adoption or the affidavit of nonpaternity, if the minor is younger than 6 months of age or the minor has not resided continuously in one county for 6 months,

- the adoption entity is located if the minor is under 6 months of age and there is a properly executed waiver of venue,
- the birth mother resides if there is no consent to adoption or an affidavit of nonpaternity executed by a parent, or
- the adoption entity is located if neither parent resides in the state.

If a parent contests the termination of parental rights, then venue lies either in the county where at least one parent resides, where at least one parent resided at the time of the executed consent or affidavit of nonpaternity, or lastly if neither of the former applies, where the adoption entity is located. 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 adoption entity or the petitioner bears the cost of the venue transfer. The court may change the venue in accordance with s. 47.122, F.S., relating to change of venue. Waiver of venue may be executed but only in those cases where the child is younger than 6 months and proper venue may lie in a county other than where the parent whose rights are to be terminated resides. Section 63.062, F.S., provides a form for waiver of venue which must be executed as a separate document from all other documents.

Section 63.102, F.S., is amended to specify that proper venue for proceedings for adoption or for a declaratory statement as to the adoption may only lie in the county where the petition for termination of parental rights was granted. However, in accordance with s. 47.122, F.S., relating to change of venue, venue may still be changed 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 a petition to be filed in a county other than where the petitioner or minor resides when filing the petition in the county where the petitioner or minor resides may endanger his or her privacy, provided the substantives rights of any person are not affected. *See* s. 63.102(4), F.S.

This section is also amended to add that until the judgment of adoption is final, the circuit court will retain jurisdiction over the case and that the Uniform Child Custody Jurisdiction Act does not apply.

b. *Criminal Penalties and Sanctions*

Present situation:

Additionally, some RTD participants suggested additional criminal penalties for certain fraudulent practices. Under ch. 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 ch. 39, F.S., and causes the false statement to be filed with the court. *See* s. 39.804, F.S. (Supp.1998) Under ch. 63, F.S., a person commits a third-degree felony for violating any act prohibited under s. 63.212, F.S., punishable as provided in ch. 775. F.S. A person commits a second degree misdemeanor if the person advertises or otherwise publicizes the availability of a child for adoption. *See* s. 63.212(1)(h), F.S. Additionally, a court may prohibit an intermediary or an agency from placing children for adoption in the future if it finds that the intermediary or an agency violated a provision of ch. 63, F.S. *See* s. 63.219, F.S.,

Effect of proposed changes:

Section 63.039, F.S., is created to provide for the duties of an adoption entity and states possible sanctions for violations thereof. Subsection (1) enumerates the affirmative 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 them 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., related to prohibited acts, is amended to apply to all adoption entities defined in this bill. This section is also amended to impose criminal penalties and civil liabilities upon any person for specific violations. A person commits a second degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S., for any of the following acts:

- Knowingly and willfully providing false information,
- Knowingly withholding material information,
- Intending 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, or
- Knowingly filing a petition for termination of parental rights in a county inconsistent with the venue required when a parent intends to object to said termination.

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.

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 ch. 63, F.S.

c. *At-Risk Placement*

Present situation:

Under state rules, in adoptions handled by DCF and adoption agencies, if a child is placed with the prospective adoptive parents prior to the termination of parental rights, the prospective adoptive parents must execute an "at-risk placement" statement prior to the actual placement. *See* Rule 65C-15.002(5), (6), F.A.C. This document must state that the agency does not have

commitment of the child for adoption and why; that the commitment proceedings have begun; 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 requirement for executing an "at-risk placement" statement. 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 be approved 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.* 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 an 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 the 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 the 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*

Present situation:

Finally, the RTD and case law have been generally supportive of the policy that the court should consider the blood relationship with a child in determining the suitability of placement for the child. In dependency proceedings under ch. 39, F.S., placement with relatives is encouraged when placement with the birth parents is not recommended. Under s. 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 only slightly amended from a technical perspective.

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 bill tries to balance the constitutionally protected rights of parents against the interest of all parties, including the children, in the finality and certainty of adoption proceedings and judgments. The bill requires strict and timely adherence to consent, disclosure, service, notice and hearing requirements prior to the entry of judgments for termination of parental rights and subsequent adoption. It also imposes a statute-of-repose period barring challenges to such judgments. For example, a claim based on fraud or intentional misrepresentation that was not discoverable or began to accrue after the period of repose had expired would be permanently barred.

  The courts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts as provided under Section 21 of Article I of the State Constitution. However, the Legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity. *Psychiatric Assoc. V. Siegel, et al.*, 610 So.2d 419 (Fla. 1992), citing *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

- The bill's constructive notice requirements under s. 63.088(5), F.S., may raise some concern regarding privacy rights as recognized under Section 23 of Article I of the State 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." Under the bill, subsection (5) requires extensive information to be provided in the published notice in a proceeding to terminate parental rights, when a person whose consent is required or who has not executed an affidavit of nonpaternity, has not yet been identified or located. The notice must include 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 to 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 contains provisions that arguably involve matters of judicial practice and procedure which would fall within the exclusive purview of the judicial branch. *See* art. V, s. 2(a), Fla. Const. The bill requires specific timelines and procedures for processing termination of parental rights and adoption proceedings which may be contrary to or incompatible with existing court rules. See e.g., Fla. Fam. L Rules of Procedure and Fla. R. Juv. Proc. What constitutes practice and procedure versus substantive law has been decided by the courts on a case by case basis. 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. However, 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There may be some additional court and administrative costs to participants arising from the requirement to bifurcate the termination of parental rights of the parents and the finalization of the adoption proceedings in two separate actions. However, any increased costs may be dependent on a number of factors including, but not limited to, travel time to the venues for the hearings by the different parties involved, and the number of hearings held.

In adoptions handled by adoption agencies, there may be an increase in costs and other expenses associated with the submission of extensive documentation such as affidavits related to diligent search, inquiry, fees and expenses, 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.

However, these additional front-end costs or expenses may be offset somewhat by the mitigation in litigation that 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. Parents, especially prospective parents, may be more assured by the certainty and finality of judgments terminating parental rights and subsequent adoptions, particularly after the statutory period of repose expires.

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. Adoption entities may be held more accountable for their actions based on their statutory duties to ensure compliance.

The bill may make certain information from the state registry 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 fiscal impact and are manageable with current staff and resources.

As previously reported by the Office of State Court Administrator on SB 2 (1999), the requirement to bifurcate termination of parental rights and finalization of the adoption in two separate actions (thus requiring two distinct hearings in all adoptions) may possibly result in additional costs to the court system. However, OSCA acknowledged that the procedural safeguards should reduce the number of court proceedings necessary. The minimal fiscal impact of this bill, as filed, was reportedly manageable by the courts with current staff and resources. No formal fiscal impact statement on the committee substitute, as it emerged from the Senate Judiciary Committee, was ever received from the Office of State Court Administrator.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.