

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 138

SPONSOR: Children and Families Committee, Judiciary Committee, Senator Campbell and others

SUBJECT: Adoption

DATE: February 16, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Dowds</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The committee substitute substantially revises Florida’s adoption law, particularly as it pertains to adoptions handled by private adoption entities. The committee substitute provides for a uniform bifurcated procedural framework for the termination of parental rights and the creation of new adoptive parental rights in all adoption proceedings. Adoptions initiated by the Department of Children and Families (DCF) shall be solely governed by Part IX, ch. 39, F.S., and ch. 63, F.S., with a few provisions excepted. Adoptions initiated by all other adoption entities-- intermediaries, licensed child-placing agencies and registered child-caring agencies-- shall be governed entirely by ch. 63, F.S. The committee substitute streamlines the total adoption process. It also sets forth explicit and comprehensive disclosure, consent, notice, service, and hearing requirements in termination of parental rights and adoption proceedings, including but not limited to:

- C Prohibiting de facto pre-birth termination of parental rights without notice;
- C Requiring written pre-birth and post-birth disclosures;
- C Prohibiting pre-birth execution of consent to adoption or affidavit of nonpaternity;
- C Providing a 48-hour post-birth waiting period for birth mothers to execute a consent to adoption;
- C Providing a specified revocation period of consent to adoption of a yet-unplaced child;
- C Enumerating the duties of adoption entities and liabilities thereunder;
- C Adding criminal penalties and civil liability for withholding information and fraudulent acts;
- C Establishing categories of fees, costs and expenses which an adoptive parent may be assessed, fee threshold limits, and providing for repayment under certain circumstances;
- C Clarifying procedures for pre-approval, final approval and reimbursement of fees, costs and expenses connected with an adoption;
- C Expanding the opportunities for placing children in out-of-state adoptions;
- C Retaining the confidentiality of records and maintaining them for a specified period;

- C Expanding to parents in all adoptions the right to move to set aside judgments terminating parental rights and judgments for adoption based on willful acts precluding a parent from rightfully asserting his or her parental rights;
- C Prohibiting a child to be placed in a home where a convicted sexual predator or other specified convicted felony offenders reside.

This committee substitute 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, 63.0427, 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, 63.202, 63.207, 63.212, 63.219, 984.03, and 985.03. The committee substitute also creates the following sections of the Florida Statutes: 63.037, 63.039, 63.087, 63.088, 63.089 and 63.2325. 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 or out-of-state licensed adoption agencies. However, the statutory and procedural requirements differ depending on which entity is handling the termination of parental rights and adoption. 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 handled through intermediaries are governed exclusively by ch. 63, F.S. Administrative rules govern the conduct of DCF and private adoption agencies while respective professional codes of conduct govern the actions of intermediaries unless they are an out-of-state licensed entity.

The last major revision to 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 adoption issues to include in proposed legislation. Adoption bills were filed in 1998 (SB550), 1999 (SB 2) and 2000 (SB 345). To date, none have passed the Legislature.

III. Effect of Proposed Changes:

Overall, the committee substitute comprehensively amends Florida's adoption law as found in Part IX of ch. 39, F.S., relating to termination of parental rights and adoption, and in ch. 63, F.S., relating to adoption. The cumulative effect of the committee substitute is to provide uniformity, continuity, clarification and finality regarding proceedings for termination of parental rights and proceedings for adoption as follows:

- C Adoptions handled by the Department of Children and Families (DCF) shall be governed solely by provisions in part IX of ch. 39, F.S. and ch. 63, F.S., as limited by s. 63.037, F.S.

Section 63.037, F.S., exempts DCF from the following sections as 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 termination of parental right proceedings and adoptions handled by adoption entities other than DCF shall be governed by ch. 63, F.S.

- C All individuals and agencies authorized to place children for adoption are brought into parity and relative uniformity. The umbrella term ~~Adoption entity~~¹ refers to: 1) the Department of Children and Families, 2) a child-placing agency (licensed by DCF under s. 63.202, F.S.), 3) an intermediary (licensed attorney or a child-placing agency licensed in another state that is qualified by DCF to place out-of-state children for adoption in Florida under s. 63.032 (8), F.S.)¹, and 4) a child-caring agency registered under s. 409.176, F.S. The latter entities represent a new category of entities authorized to handle adoptions. In order to receive a child for continuing full-time care or custody, or to place a child for full-time continuing care or custody in a family foster home, a residential child-caring agency² must first register with an association that is certified by a Florida statewide child care organization which was in existence on January 1, 1984, (i.e., the Florida Association of Christian Agencies, Inc.) and which publishes, and requires compliance with, its standards, filed with the DCF.
- C Other changes include conforming amendments for the terms “abandoned,” “to place” or “placement,” “suitability of the intended placement,” and “parent.” The terms and definitions in s. 39.01, F.S., for “legal custody,” “parent,” and “relative” are added to ch. 63, F.S.

Due to the complexity of the committee substitute, the following review and analysis incorporates a discussion of the current law and the effects of the proposed changes within the context of the major areas of concern initially identified by the participants of the 1997 Round Table Discussions.

¹ The definition for “intermediary” is amended to eliminate reference to physicians who were previously eligible to handle adoptions.

² A residential child-caring agency means “any person, corporation, or agency, public or private, other than the child’s parent or legal guardian, that provides staffed 24-hour care for children in facilities maintained for that purpose, regardless of whether operated for profit or whether a fee is charged.” See s. 409.175, F.S. They would include, but are not limited to, maternity homes, runaway shelters, group homes that are administered by an agency, emergency shelters that are not in private residences, and wilderness camps. They do not include hospitals, boarding schools, summer or recreation camps, nursing homes, or facilities operated by a governmental agency for the training, treatment, or secure care of delinquent youth, or facilities licensed under s. 393.067, F.S., or s. 394.875, F.S. or ch. 397, F.S.

1. Termination of Parental Rights and Adoption

a. *Bifurcated Proceedings*

Present situation:

Under current law, the process for terminating parental rights and creating parental rights in adoptive parents occurs in one proceeding in all adoptions handled by intermediaries under ch. 63, F.S. In contrast, adoptions initiated and handled by the Department of Children and Families and licensed child-placing agencies under ch. 39, F.S., are finalized through two separate proceedings, one for the termination of parental rights and one for the final adoption. Under ch. 63, F.S., the petition for adoption can not be filed any later than 30 days after placement of a child with a prospective adoptive parent unless the child is placed 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 (other than a relative) 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:

To ensure that a child is truly available for adoption, all adoptions, whether initiated under ch. 39, F.S., or ch. 63, F.S., are uniformly subject to a bifurcated procedural framework involving 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 will now be subject to the new procedure and proceedings for termination of parental rights as set forth in the ss. 63.087, 63.088, and 63.089, F.S.

Specifically, ss. 63.087, 63.088, and 63.089, F.S., are created, to set forth the procedure and proceedings for the termination of parental rights as follows:

- A petition for termination of parental rights can not be filed until after the minor's birth. A parent, a person having legal custody, or an adoption entity (upon written consent of the parent or legal custodian) can file the petition. [s. 63.087, F.S.]
- Explicit notice, diligent search and service requirements must be satisfied in an effort to secure the consents of those persons whose consents are required for termination of parental rights and adoption to the entry of a judgment. [s. 63.088, F.S.]

- Hearing requirements include a full evidentiary hearing on the petition and the completion of notice, service and consent requirements before a judgment terminating parental rights may be entered. 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 test³ at any time the court has jurisdiction over the minor. The petition for termination of parental rights must be dismissed if the court 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 consent to adoption is timely withdrawn, or if the consent or alternatively, an affidavit of nonpaternity was obtained by fraud or duress, no judgment for termination of parental rights may be entered. 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 then be initiated as 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. [s. 63.089, F.S.]

Specifically, ss. 63.102, 63.112, 63.122, and 63.142, F.S., are revised to set forth the procedure and proceedings for adoption as follows:

- The timeframe in which a person may file a petition for adoption subsequent to a judgment for termination of parental rights is altered. 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. Adult adoptees or minors who were the subject of a proceeding for termination of parental rights initiated under ch. 39, F.S., are not subject to the 30-day minimum. Adoptions involving placement of a minor with a relative are not subject to the 60-day maximum. 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 until a final judgment is entered on the adoption. A petition for declaratory statement to seek prior court-approval of an adoption fee agreement may be filed at any time. The petition for declaratory statement may subsequently be consolidated with a petition for adoption. [s. 63.102, F.S.]
- The hearing requirements for a petition for adoption are amended . No hearing may be held sooner than 30 days after the entry of the judgment terminating parental rights or sooner than 90 days after the minor has been placed in the petitioner's physical custody. [s. 63.122, F.S.] A judgment for adoption cannot be entered until after the date of appeal has expired and there is no pending appeal.

³The DNA paternity test is relatively simple to obtain and averages \$550. The test involves taking a swab sample from the inside of a person's cheek. A sample can be taken from a newborn 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.*

b. 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, 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 but 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. Under ch. 63, F.S., the court can waive the requisite written consent of a parent (which can only be obtained post-birth of the child) before terminating parental rights or finalizing the adoption on specified grounds: 1) if the parent deserted or otherwise abandoned the child, 2) if the parent's parental rights have been terminated in another jurisdiction, 3) if the parent has been declared judicially incompetent, 4) if the legal guardian or lawful custodian has failed to respond in the proceeding, or 5) if the spouse of the person to be adopted has unreasonably withheld consent. *See* ss. 63.062 and 63.072, F.S.

Effect of proposed changes:

Consent and waiver requirements under sections 63.062, F.S., and 63.072, F.S., are revised. First, the committee substitute eliminates the court's discretion to waive requisite consents by repealing s. 63.072, F.S. 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. Fourth, it provides for the execution of an affidavit of nonpaternity for specified persons. Fifth, it provides for a waiver of venue in specified cases.

Specifically, subsection (1) of s. 63.062, F.S., prioritizes four major categories of "fathers" from whom consent must be obtained or to whom notice must be given. With the exception of the last category, consent or notice is only required of the man who first qualifies as a "father" in the order of the categories 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:
 - C 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;
 - C Has provided or attempted to provide the minor or the birth mother during her pregnancy with support in a repetitive customary manner;
 - C 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
 - C Is a party in any pending proceeding relating to paternity, custody, or termination of parental rights as pertains to the minor.
- 4) If consent is provided by the person who was married to the birth mother at the time of conception or birth (i.e. legal father), a person (i.e. biological father) who has provided or attempted to provide support to the child or the mother during her pregnancy in a repetitive, customary manner.

No consent or notice is required of any other person under a subsequent category, with the exception of a *biological father* who has assumed or attempted to assume parental responsibilities when the *legal father* by marriage has consented to the adoption. 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). The affidavit of nonpaternity is an alternative sworn acknowledgment waiving any parental right during proceedings for termination of parental rights and adoption. Subsection (4) provides a detailed suggested affidavit of nonpaternity form. 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. Upon execution of a valid affidavit, such person waives further notice of any subsequent proceedings.

c. Due Diligence and Notice

Present situation:

Inadequate notice requirements or failure to adhere to notice and service requirements have been the basis for a number of challenges in adoption proceedings. 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).

Effect of proposed changes:

This committee substitute 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 identify, locate and notify the “father.” Such efforts must begin 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 personal service of the petition and the notice of hearing to terminate parental rights upon each person whose consent is required under s. 63.062, F.S., unless the person has executed an affidavit of nonpaternity or the person's identity and location are unknown after diligent search. A minimum of 30-days notice of the hearing is required. A statutorily suggested notice of petition and hearing form is provided.

Subsection (3) sets forth the inquiry process for determining the identity and location of any person who may qualify as the "father" of the minor and whose consent is required. The court must inquire 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. There is no requirement, however, that this inquiry be documented or reported which may be problematic if there is a court challenge based on whether this court-inquiry occurred. Alternatively, the information may be provided in a court-filed affidavit. This provision is similar to s. 39.803, F.S., which requires the court to make such inquiry at a termination of parental rights proceeding handled by DCF. The inquiry into the identification and location of a "father" may begin before the minor's birth.

Subsection (4) sets forth the diligent search process. If the court inquiry or other inquiry yields the identity, but not the location, of a person whose consent is required and 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, including, but 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. With the exception of 3 sources, these sources are similar to those listed in the Affidavit of Diligent Search and Inquiry in the family law rules, approved by the Florida Supreme Court for notice in dissolutions of marriage. Subsection (4) does not require inquiries of unions, Title IV-D child-support agencies, or the Department of Motor Vehicles although it does require inquiry for information held by medical providers as to the party listed as financially responsible for the medical treatment and care to a birth mother or child. The sources listed in subsection (4) fall somewhat into the general categories of sources under subsections (5) and (6) of s. 39.803, F.S., which DCF must conduct for a diligent search. Under the new section, any person contacted by a petitioner or adoption entity must release the information requested unless otherwise prohibited by law. The adoption entity and petitioner must then jointly execute and file with the court an affidavit of diligent search regarding the search results. The diligent search may be initiated before the minor's birth.

Subsection (5) provides that if the court inquiry and the diligent search do not yield the identity and/or location of the person whose consent is required, then constructive notice of the petition and hearing to terminate parental rights must be made in accordance with ch. 49, F.S. Notice is required in each county identified in the petition as provided in s. 63.087(6), F.S. Unless unknown and reasonably unascertainable, the following information must be in the notice:

C All information required in the petition under s. 63.087(6)(f), F.S.⁴, including each city in which conception may have occurred in the 12 months prior to the minor's birth;

⁴A 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

- C All information required in ch. 49, F.S., relating to constructive notice; and
- C 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; Grounds; Abandonment

Present situation:

In adoption proceedings the court may consider abandonment as grounds for terminating parental rights. However, what conduct constitutes "abandonment" is addressed differently by chapters 39 and 63, F.S. Under ch. 39, F.S., the definition for "abandoned," may encompass a finding of abandonment based on a parent's incarceration. This provision does not appear in the definition for "abandoned" under ch. 63, F.S. However, the Florida Supreme Court has 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). Additionally, the courts have held that a determination of abandonment in adoption proceedings under ch. 63, F.S., may be found based on a consideration of pre-birth conduct, including 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).

Effects of proposed changes:

Section 63.089, F.S., is created and sets forth the provisions for proceeding to terminate parental rights. These provisions require a full evidentiary hearing before terminating parental rights, delineate the prerequisites for holding the hearing and list grounds for dismissing or granting a petition for termination of parental rights. 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.

Welfare Act, to identify their interest in the action. In addition, if the petition is filed before the minor is 6 months old, the petition must include each city in which the mother resided or traveled in which conception may have occurred within the 12 months preceding the minor's birth.

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, 2001, 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 may allow a finding of abandonment based on emotional abuse endured by the mother during her pregnancy. Any consideration of pre-birth conduct, however, is limited to those cases in which the father was informed that he was the father or after 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:

Inadequate initial and continued informed consent and disclosure to birth parents and adoptive parents of their rights and who represents their interests have sometimes presented conflicts and confusion in adoption proceedings. Under current law, 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 consent requirements, is clarified and expanded. It applies the revised requirements to affidavits of nonpaternity. In particular a person must be informed that he or she may request an independent witness to be present and sign a consent or affidavit. Subsection (4)(e) provides a comprehensive statutory 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 (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. No consent form or affidavit may be signed prior to satisfaction of the disclosure requirements under s. 63.085, F.S.

Section 63.085, F.S., relating to disclosure requirements, is expanded to require extensive adoption disclosure statement to be made to 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. The point at which a parent is considered to be seeking to place a minor for adoption for the purposes of providing the written disclosure statement is specified. 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 includes a comprehensive statutory form for the disclosure statement, including but not limited to 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., is entitled to seek independent legal advice.

b. Waiting Period for Execution and Revocation of Consent

Present situation:

The Round Table Discussion group reached consensus that current procedural safeguards for obtaining a birth mother's consent are inadequate, particularly in light of the physical and psychological effects of childbirth and the effects of medication on someone's ability to make an informed and willing 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 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 an affidavit signed in the presence of two witnesses and notarized or taken in court. *See* s. 63.082(4), F.S. The Child Welfare League of America (CWLA), recommends that consents and releases for adoption or surrender of custody 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 payment of care by health insurance coverage of maternity and newborn care.

Many of the states provide for a statutory revocation period during which a birth parent may revoke a consent to adoption, including allowing revocation up until the final hearing on the termination of parental rights. The two most populous states, California and New York, have revocation periods of 90 days and 45 days respectively.

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. In cases in which the minor is placed for adoption with identified prospective adoptive parents subsequent to the minor's birth, there is a 48-hour waiting period before a consent for adoption may be executed. The 48-hour period is measured from the time the minor is born, or from the time the mother is informed that she is fit

for release from the hospital or the birth center, whichever is sooner. Once the consent is executed, it can only be withdrawn if the court finds that the consent was obtained by fraud or under duress.

Under subsection (4)(c), when the minor is not initially placed for adoption following the minor's birth as provided under s. 63.052, F.S., there is no waiting period for executing the consent to adoption. 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) allows revocation by certified mail. After the 3-day revocation period or the placement of the minor with the prospective adoptive parent, the consent can only be withdrawn upon a finding of fraud or duress.

Section 63.2325, F.S., is created to state that grounds for revocation of a consent for adoption or withdrawal of an affidavit of nonpaternity can not be based solely on the failure to meet a requirement of the adoption law but must be based on a material failure of fundamental fairness in the administration of due process, or the failure must constitute or contribute to fraud or duress in obtaining the consent or affidavit.

4. Appeals, Statutes of Limitations and Repose

Present situation:

Until recently, adoptive parents often faced long-term emotional uncertainty and financial insecurity in the event a judgment for adoption was challenged due to fraudulently acquired consents or inadequate efforts to identify and locate the father. *See Stefanos v. Rivera-Berrios*, 673 So.2d 12 (Fla. 1996)(mother led father to believe she was getting an abortion). The 4-year statute of limitations period for traditional cases of fraud applied to adoption challenges. It was measured from the time the facts giving rise to the cause of action was discovered or should have been discovered with the exercise of due diligence. *See* s. 95.11(3)(j), F.S., and s. 95.031(2)(a), F.S. Also applicable was the traditional 12-year period of repose for actions based on fraud, beginning from the date the fraud was committed.⁵ *Id.* Last year, the Legislature substantially amended s. 63.182, F.S., to create 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 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.⁶

⁵ 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.

⁶ In addition, recently enacted law allows a parent in adoptions of abandoned newborns to move to set aside a judgment terminating parental rights or a subsequent judgment of adoption based on a claim of fraudulent concealment which kept the parent from asserting his or her parental rights. *See* s. 63.0425(9), F.S.

Effect of proposed changes:

Section 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 reinforce the objective to achieve finality in adoptions and mitigate the potential for future challenges to final adoption judgments.⁷ Using the same statutory provision currently applicable to adoptions of abandoned newborns, these sections now allow a parent in any adoption to move to set aside a judgment terminating parental rights or a subsequent judgment of adoption based on a claim of fraudulent concealment which kept the parent from timely asserting his or her parental rights. In any adoption, such motion must be filed within a reasonable time but absolutely no 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 motion, 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.

Subsection (4) of s. 63.142, F.S., also 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 exists.

5. Centralized State Registry of Adoption Information

Present situation:

The Round Table Discussion group reached consensus to continue the existence of the centralized repository of information in all adoptions. Currently, DCF maintains a statewide registry, established by the Legislature in 1982. 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. Intermediaries, DCF, and private adoption agencies must inform, in writing, birth parents, prior to termination of their parental rights, and the adoptive parents before placement, of the existence and purpose of the registry. *See* s. 63.165(3), F.S.

⁷ Section 63.182, F.S., was revised last year to provide a statute of repose for challenges to termination of parental rights and adoption.

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.* Under current law the clerk of the court must forward to DCF and the agency placing the minor (if any), every petition for adoption and affidavit of fees and expenditures filed. *See* ss. 63.112(4) and 63.132(1), F.S. The DCF 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. There are no similar requirements for intermediaries to retain their documents. The adoption records are also retained in the Florida county where the final judgment of adoption was entered. The court adoption files are sealed and retained for 75 years. *See* Rule 2.075(d)(6), Florida Rules of Judicial Administration. 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:

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. The current statutory requirement that this information be incorporated into the final home investigation report under s. 63.125, F.S., was maintained and expanded to include the social history.

Section 63.165, F.S., relating to the state registry, is amended to require DCF's registry to retain adoption information in all adoptions for 99 years or as stated by applicable rule, whichever is longer. In addition, the references to the parents were more specifically defined as those parents whose consent was required under s. 63.062, F.S. However, participation in the state registry remains voluntary consistent with the closed adoption policy underlying the law at this time.

6. 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 the best interest evidence is not relevant in placing a child for adoption until the child is 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 committee substitute proposes no change to current standard but facilitates the use of this standard by providing for separate proceedings for the termination of parental rights and the creation of parental rights in adoptive parents.

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

Present situation:

The Round Table Discussion group 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. However, federal law prohibits the denial or delay in the out-of-state adoption of children in foster care. The Adoption and Safe Families Act of 1997. Under current Florida 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.

Effect of proposed changes:

Section 63.207, F.S., relating to out-of-state placement, is amended to allow out-of-state adoptions to be handled by any adoption entity and to lift the current restriction on children who can be placed in out-of-state adoptions. This section expands the conditions under which out-of-state placement and adoption of a child can occur to include: the parent placing a minor for adoption who chooses to place the minor outside the state and files an affidavit stating the reason for said placement, and for other good cause shown.

8. Report and Court Approval of Fees and Expenditures

Present situation:

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 to 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. However, 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. If the prospective adoptive parent is unable to pay, the court may order payment of a lesser amount. 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.

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 or who must be noticed of such a proceeding.

Effect of proposed changes:

Section 63.097, F.S., relating to fees, is amended and with the exception of subsection (1), is applicable to all adoption entities. Subsection (1) allows fees for foster care expenses, placement social services; and facility and administrative costs to be assessed by a licensed child-placing agency if approved by DCF during the licensing process. Subsection (2) lists those adoption fees, costs, and expenses which may be appropriately paid out by or assessed upon adoptive parents by the adoption entity. They include but are not limited to, reasonable living expenses, reasonable and necessary medical expenses, court and litigation expenses, advertising costs, professional fees and other expenses associated with chapter requirements. Subsection (3) sets forth the threshold limits for certain classes of fees before court approval is required. Under subsection (4) a finding of extraordinary circumstances must be made before the court can approve any fee, cost or expense not otherwise allowed or prohibited under subsections (2) or (5). Subsection (5) prohibits: 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 court-approval of fees and costs, is amended to make all adoption entities, not just intermediaries, subject to the mandates. The court must pre-approve certain fees and costs in excess of set amounts. A contract for fees, costs, and expenses must be in writing but may be cancelled within 3 days from the date of execution. The adoption entity and each person who enters into the agreement must jointly file the petition for declaratory statement on the agreement.

Section 63.132, F.S., relating to reports of expenses and receipts to the courts, is amended to require all adoption entities to file an affidavit with the court itemizing all fees, costs, and expenses, and their basis, related to the termination of parental rights and subsequent adoption. Both the adoption entity and the prospective adoptive parents must sign the affidavit. A copy of the executed affidavit must be provided to the prospective adoptive parents. A separate court order for the approval or disapproval of the fees must be issued and must specify the basis for the order. As is current law, these fee provisions do not apply in cases involving adoptions by a stepparent whose spouse is a parent of the minor.

9. Venue and Jurisdiction

Present situation:

Currently there is no requirement that the entire adoption process (from termination of parental rights through the final adoption) be overseen by the same judge or even the same circuit court. A petition for adoption or declaratory statement (as to the adoption contract) does not have to be filed in the same county or with the same court where the petition for termination of parental rights was granted. 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. In addition, the court has continuing jurisdiction to conduct a judicial status review of the child and the progress towards the child's permanent adoptive placement. Under ch. 63, F.S., the termination of parental rights and the subsequent adoption occur in one proceeding. The only venue requirement is that the petition for adoption or for declaratory statement as to the adoption contract be filed in the county where the petitioner or the minor resides or where the agency is located with whom the minor has been placed. *See* s. 63.102, F.S.

Section 63.052, F.S., relating to guardianship and commitment of a child placed for adoption, sets forth the authority and responsibility of the intermediary, adoption agency and department for the children placed with them for adoption. However, no direction is provided relative to placement of the child prior to placement in the prospective adoptive home.

Effect of proposed changes:

Section 39.812, F.S., relating to post-disposition relief following termination of parental rights in proceedings initiated by DCF and licensed child-placing agencies, is amended to eliminate reference to licensed child-placing agencies (consistent with other changes in the committee substitute) 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., provides that proper venue for proceedings to terminate parental rights pending adoption (initiated by adoption agencies and intermediaries), may lie in the county where:

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

If a parent contests the termination of parental rights based on legally recognized grounds as determined by the court in a hearing, then venue lies in the county where that parent resides, or

alternatively 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. In the court hearing to consider the venue, witnesses located in another jurisdiction are permitted to testify by deposition or by electronic means, such as telephone or audiovisual means. 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 where proper venue may lie in a county other than where the parent whose rights are to be terminated resides, s. 63.062, F.S. A form for waiver of venue is set forth 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 committee substitute 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.

Section 63.052, F.S., is amended to identify where children surrendered to an intermediary for adoption can be placed prior to a court terminating parental rights pending adoption and a court ordered preliminary approval of placement of the minor in the adoptive home. For a child for whom a prospective adoptive home has been identified, placement can be either with a relative, in foster care or in the care of a prospective adoptive home. However, the child cannot be placed in the home of the prospective adoptive parents until that home has received a favorable preliminary home study. For a child for whom a prospective adoptive home has not been identified, the child must be placed in foster care until a suitable prospective adoptive home is available. Subsection (7) is added to s. 63.052, F.S. to state that the court retains jurisdiction of a minor placed for adoption until the adoption is final. It is the court's discretion whether to judicially review the status of a minor placed for adoption with an adoption entity or prospective adoptive parent and the progress toward permanent adoptive placement. Under current law, this judicial review is required in all adoptions handled by the department under ch. 39, F.S., and remains unchanged by this committee substitute.

10. Criminal Penalties, Civil Sanctions and Liabilities

Present situation:

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. 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 requirements are satisfied. Subsection (2) 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 (3) provides that the court must award reasonable attorney's fee to the person whose consent to the adoption is required if that person prevailed in setting aside a judgment to terminate parental rights or a judgment of adoption. Subsection (4) requires the court to forward copies of sanction orders to the respective adoption entity's regulating, governing or certifying body.

Section 63.212, F.S., related to prohibited acts, is amended to apply to all adoption entities defined in this committee substitute and to create additional 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:

- C Knowingly providing false information,
- C Knowingly withholding material information,
- C 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
- C Knowingly filing a petition for termination of parental rights in a county inconsistent with the venue required when it is known that 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 that violate any provision of ch. 63, F.S.

11. 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 and can be performed by either a licensed child-placing agency, a licensed psychologist, clinical social worker, marriage and family therapist, or mental health counselor or the DCF. s. 63.092(2), F.S. The preliminary home study determines the suitability of the intended adoptive parents [s. 63.092(2), F.S.], and, therefore, whether a child can be placed with or adopted by the prospective adoptive parents. The “suitability” of the placement or adoptive parents considers the fitness and capabilities of the adoptive parents, the compatibility of the child with the home, and the welfare of 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 committee substitute as the placement of a child before parental rights are terminated. In signing this statement, prospective adoptive parents are acknowledging that the minor can be removed. This is similar to the existing administrative requirements by DCF for adoption agencies. *See* Rule 65C-15.002(5) and (6), F.A.C. Also, the committee substitute expands the entities permitted to perform the preliminary home study to include a child-caring agency registered pursuant to s. 409.176, F.S.

In addition, the committee substitute sets forth conditions whereupon a child cannot be placed in a home for adoption. Specifically, a child is prohibited from being placed in a home where the following persons reside: a convicted sexual predator as defined in s. 775.21, F.S., a convicted child abuser as defined in s. 827.03, F.S., a violent career criminal as defined in s. 775.084, F.S., a habitual violent felony offender as defined s. 775.084, F.S., a convicted first degree or second degree murderer in violation of s. 782.04, F.S., a convicted sexual batterer whose violation is a capital, life, or first degree felony pursuant to s. 794.011, F.S., or a person convicted of a substantially similar offense in another jurisdiction.

12. Placement and Communication 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. In addition, certain procedural adoption requirements are more lax or inapplicable when the adoption involves a child who is to be placed with a relative or stepparent.

Section 63.0427, F.S., allows the courts to consider and include in the final adoption order continued communication or contact with the child's sibling(s). The court must determine if postadoption communication or contact with any sibling is in the best interest of the child. However, the postadoption communication or contact provision of the final adoption order does not impair the adoptive parent and child's ability to change residence nor is the continuing validity of the adoption contingent upon the communication or contact. The postadoption communication or contact can be terminated by the court or conditions imposed if determined by the court to be in the best interest of the child.

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 to reflect the obligation of all adoption entities to notify grandparents of an impending adoption before a petition for adoption is filed. The postadoption communication or contact with the child's sibling(s) provided for in s. 63.0427, F.S., is expanded to include other specified biological relatives with the agreement of the adoptive parents.

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:

- C The committee substitute attempts to balance the constitutionally protected rights of parents against the interest of all parties, including the children. However, the committee substitute'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 committee substitute, 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. 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).

- C The committee substitute 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 committee substitute 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:

This committee substitute may assist all adoption entities in the state through a streamlined and uniform adoption process. Adoption entities may be held more accountable for their actions based on their statutory duties and imposition of sanctions for noncompliance. According to the Department of Children and Families, there are 151 licensed child-placing agencies in the state, and 25 registered child-caring agencies.⁸ According to the Florida Bar, there are 228 board-certified family law attorneys in the state, although board certification is not required to handle adoptions.

There may be some additional court and administrative costs resulting from a bifurcated adoption process which requires a separate proceeding for the termination of parental rights of the parents before the creation of adoptive rights in prospective parents can occur in another proceeding. 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.

⁸The state does not track the number of out-of-state licensed agencies qualified to handle adoptions in Florida.

There may also be a minimal increase in legal and administrative costs and other expenses associated with the additional procedural safeguards. However, these additional front-end costs or expenses may be offset somewhat by a mitigation in costly post-adoption litigation which historically arise from claims based on invalid or lack of informed consent, inadequate notice, fraud, duress, and insufficient disclosure. Post-adoption challenges to set aside or otherwise void judgments terminating parental rights or finalizing adoptions will be more difficult to assert.

In addition to the assurance of more certainty and finality in adoptions, parents, adoptees, and especially prospective adoptive parents, may be better informed at the outset about the financial expenses engendered by an adoption through the guidelines and threshold limits for fees, costs, and expenses. Both parents and prospective adoptive parents may also benefit from a better understanding of their rights, responsibilities, and liabilities under the new adoption laws. The committee substitute also facilitates accessibility to specified information from the state registry for adoptees, prospective adoptive parents and other interested parties since the state registry will be acting as a storehouse of general and specific adoption documentation.

The committee substitute also extends the authority to all adoption entities to place children, including special needs children, out-of-state, which may facilitate adoption of more children. According to the Department of Children and Families, there are currently 2987 children (all of whom qualify as special needs children under the law) with the department who are up for adoption.

C. Government Sector Impact:

DCF has determined preliminarily that the requirements in the bill as filed have minimal fiscal impact and are manageable with current staff and resources. However, DCF will have to undergo a revision of its administrative rules to conform with the new statutory requirements.

The Office of State Court Administrator reported that the bifurcation of the private adoption process into distinct proceeding termination of parental rights and finalization of the adoption in two separate actions may engender additional costs and workload to the court system. However, OSCA acknowledged that the procedural safeguards should reduce the number of post-adoption challenges relating to termination of parental rights and adoptions. The minimal fiscal impact of the bill, as filed, is reportedly manageable by the courts with current staff and resources. The court may have to revise its rules and forms for the family law and juvenile division to conform with the new statutory requirements.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 11 amends s. 63.052, F.S., relating to issues of guardianship and commitment of a child placed for adoption. This section, however, is not revised to reflect recent statutory changes in ch. 39, F.S., to remove archaic terminology relating to permanent commitment and guardianship

to describe the relationship between the child/adoptee and the department or the child-placing agency. [See page 23, lines 12-18 through page 25, lines 10-19] In addition, the new subsection (7) which is applicable to adoptions handled by the department conflict with the jurisdictional and judicial review provision in ss. 39.811 and 39.812, F.S., governing termination of parental rights and adoptions proceedings handled by the department. Moreover, judicial reviews of a minor's status and progress toward permanent adoptive placement are mandated under s. 39.812, F.S., but are discretionary under this amended section.

Section 16 creates s. 63.088, F.S., relating to notice and diligent search. This section enumerates 15 sources to use in conducting a diligent search for a person whose consent is required under this chapter. This listing omits 3 additional sources listed in the family law rules form for an Affidavit of Diligent Search and Inquiry, approved by the Florida Supreme Court for use in family law cases. The committee substitute does not require inquiries to be made of unions, Title IV-D child-support agencies, or the Department of Motor Vehicles. [See page 59, lines 14-30 through page 61, lines 1-10]

Section 30 amends s. 63.207, F.S., relating to out-of-state adoption placement of children. Existing law requires that in all out-of-state adoptions, a petition for declaratory statement as to fees for adoption must be *automatically converted* into a petition for adoption upon the placement of a minor in a home. Otherwise a petition for declaratory statement must be *consolidated* with a subsequently filed petition for adoption. However, the committee substitute revises the requisite consolidation provision such that a petition for declaratory statement *may be consolidated* with a subsequently filed petition for TPR [page 54, lines 8-12] or a subsequently filed petition for adoption [page 78, lines 16-19]. The law remains unchanged about the automatic conversion of a petition for declaratory statement into a petition for adoption. This may be problematic if a child is placed for adoption out-of-state before a judgment on a petition for the termination of parental rights is finalized (term "at-risk placement"). This is contrary to the committee substitute which prohibits the filing of a petition for adoption until the judgment on a petition for termination of parental rights is actually finalized.

The committee substitute does not amend s. 63.185, F.S., relating to residency requirements, which requires primary residency and place of employment in this state of any person who is to adopt in this state except when the person is to adopt a special needs child. These requirements are now in conflict with the provisions of s. 63.207, F.S., as amended by the committee substitute, which allow all children (including special needs children) to be adopted out-of-state under specified circumstances.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
