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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 141
RELATING TO: Adoptions
SPONSOR(S): Representative(s) Lynn
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON CHILD & FAMILY SECURITY YEAS 7 NAYS 3
 - (2) COMMITTEE ON JUDICIAL OVERSIGHT
 - (3) COUNCIL FOR HEALTHY COMMUNITIES
 - (4)
 - (5)
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I. SUMMARY:

The bill amends chapters 39 and 63, F.S., to provide safeguards, uniformity, and clarification regarding proceedings for termination of parental rights and finalization proceedings in adoptions. The bill:

- Amends chapters 39 and 63 to provide that chapter 39 applies only to termination of parental rights proceedings that involve dependent children in the custody of or surrendered to the Department of Children and Families (DCF), and that chapter 63 applies to terminations of parental rights respecting children who have been placed with intermediaries or licensed child placing agencies for the purpose of adoption;
- Applies the two-step process currently required of adoption agencies and DCF to all adoptions: first parental rights are terminated and once it has been established that the child is legally free for adoption, there is a second proceeding creating parental rights in the adoptive parents;
- Requires written pre-birth and post-birth disclosures;
- Provides for execution of an affidavit of nonpaternity in lieu of a consent for adoption for certain persons from whom consent is required;
- Provides, in the case of a newborn, a waiting period for the execution of the consent for adoption until 48-hours post-birth, or the day the birth mother is released from the hospital whichever is earliest;
- Provides, in cases in which the waiting period does not apply, a 3-day period during which the consent to adoption may be revoked and specifies the procedures that must be followed;
- Establishes categories of fees, costs and expenses which an adoptive parent may be assessed, fee threshold limits, and providing for repayment under certain circumstances;
- Clarifies procedures for pre-approval, final approval and reimbursement of fees, costs and expenses connected with an adoption;
- Adds criminal penalties and civil liability for withholding information and fraudulent acts; and
- Enumerates the duties of adoption entities and liabilities for failure to perform duties.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Adoption is "the act of creating the legal relationship between parent and child where it did not exist." s. 63.032(10), F.S. Chapter 63, F.S., governs all Florida adoptions. In creating the Florida Adoption Act in 1973, the Legislature intended to provide safeguards to protect and promote the well being of persons being adopted and their birth and adoptive parents. s. 63.022(1), F.S. The first of the safeguards listed is that: "The child is legally free for adoption." s. 63.022, F.S. For this to occur, any existing parental rights must be terminated with all due process required under the federal and state constitutions to extinguish a fundamental right. While all adoptions are governed by chapter 63, how the initial step of terminating the rights of others to raise the child is done falls under either chapter 63 or chapter 39 depending on what entity is handling the adoption.

Chapter 39, F.S., contains the law applicable to children placed in the custody of the state through the DCF. Part XI of chapter 39 is the law governing the termination of parental rights of the parents of children placed in DCF's care. Currently, licensed child placing agencies must follow these chapter 39 standards for termination of parental rights when a parent has voluntarily placed their child with the agency for adoption. In contrast, when the voluntary termination of parental rights is handled through an intermediary (defined as a physician, attorney, or agency licensed out of state s. 63.032, F.S.), chapter 63 governs the matter. Not only are the statutory provisions controlling termination of parental rights different for agencies and intermediaries, but separate court rules apply as well. Florida Rules of Juvenile Procedure govern proceedings under chapter 39 while Florida Family Law Rules of Procedure govern proceedings under chapter 63. s. 39.801, F.S., and Rule 12.010, Fla. Fam. L. R. P. In *Stefanos v. Rivera-Berrios*, 673 So.2d 12, 14 (Fla. 1996), the Supreme Court of Florida entered a final ruling against a father who made repeated attempts under both chapters 39 and 63 to regain his rights after they were terminated based upon abandonment despite the mother's admission that she had led the father to believe she had an abortion. The complex procedural history of this case illustrates the quagmire that can result when the same set of facts is subject to the differing requirements and procedures of chapters 39 and 63 and required by law to be pursued separately and simultaneously under both chapters.

2. Informed Consent and Due Process

Unlike the enumerated variety of grounds for termination of parental rights available in chapter 39, the mechanism for termination of parental rights under chapter 63 is consent. In pertinent part, the statute provides that unless excused by the court, written consent must be obtained from the birth mother and from the birth father *if*: he is established to be the father by marriage, a court order of paternity or adoption, written acknowledgment with the Office of Vital Statistics; or if he has provided support in a repetitive manner. ss.63.062(1)(a) and §63.062(1)(b)1-5, F.S. Under current law, a consent to adoption or a consent for voluntary surrender may not be executed prior to the birth of the child. ss. 63.062(1) and 63.082(4), 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. Most states currently provide a waiting period, a revocation period or some combination of both. The two most populous states, California and New York, have revocation periods of 90 days and 45 days respectively. 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. s. 63.082(4), F.S. Current law provides that a consent to adoption may be set aside due to fraud or duress.

When a consent cannot be obtained, the only statutory alternative currently available is to have the court "excuse" or "waive" the need for the consent. Under s. 63.072, F.S., the court may excuse 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. While a termination of parental rights may occur under both chapter 39 and chapter 31 based on abandonment, these are not identical provisions. Two differences between what constitutes abandonment for the purposes of terminating parental rights under chapters 39 and 63, conduct toward a woman while she is pregnant and incarceration, are addressed in this analysis.

In 1989, in a case governed by chapter 63, the Supreme Court of Florida held that a father's conduct toward the mother during the pregnancy could evidence abandonment of his unborn child. *In the Matter of the Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989). Having found that the father had abandoned his child, the Court then held that the language in chapter 63, addressing consent to an adoption, precluded him from objecting to the subsequent adoption of his child, and therefore he had no right to notice or opportunity to be heard on the issue. *Id.* See ss.63.062, 63.072, and 63.122, F.S. In reaching this conclusion, the Court in *Doe* used the abandonment definition provided in s. 39.01(1), F.S., governing dependency cases, because chapter 63 contained no definition of the term. *Doe*, 543 So. 2d. at 745.

Subsequently, in 1992, a definition of abandonment was added to s. 63.032, based upon the definition in §39.01(1). In so doing, the Legislature codified the holding in *Doe* by specifically adding the phrase "[i]n making this decision, the court may consider the conduct of a father toward the child's mother during her pregnancy." See §3, ch. 92-96; SB 756. The Supreme Court of Florida interpreted "conduct" of a father for purposes of abandonment under chapter 63 to mean that a father's lack of *emotional* support or *emotional* abuse toward the mother during the pregnancy could constitute abandonment. *E.A.W. v. J.S.W.*, 658 So. 2d 961, 964 (Fla. 1995)(emphasis supplied). This case is known as the "Baby Emily" case. The majority noted that despite the Court having made such a determination, "absent direction from the legislature, we cannot dictate to trial courts precisely how to evaluate the factors that go into making this decision." *Id.* at 966. The problems stemming from this "lack of [statutory] direction" as to what constitutes abandonment are illustrated by the history of the Baby Doe and Baby Emily cases. A total of 14 written opinions resulted from the five appellate cases in Baby Doe and Baby Emily. While this count excludes the trial court opinions, it should be noted that the trial court in Baby Emily reversed itself twice on the issue of abandonment.

The definition for “abandoned” under chapter 39, F.S., provides that incarceration of a parent may support a finding of abandonment. This provision does not appear in the definition for “abandoned” under chapter 63, F.S. s. 63.032(14), F.S. 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).

The sanctity of the parent-child relationship is protected under both the federal and state constitutions. *In the Matter of the Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989)(citations omitted)(Barkett, J., specially concurring). Due process must be provided, including notice and an opportunity to be heard, before the court may deprive someone of this constitutionally protected relationship. An intermediary must disclose specified aspects of adoption law to the prospective adoptive parents and obtain a statement from them acknowledging the disclosure was made. See s. 63.085(2), F.S. Under chapter 39, notice must be provided by personal service to the parents before parental rights may be terminated. If the identity or whereabouts of the parent are unknown, specific steps must be taken and verified for the court before termination of parental rights may occur. See s. 39.803, F.S. However, under chapter 63, notice must be served pursuant to Florida Rules of Civil Procedure on any person whose consent to the adoption is required *only* if the consent has not already been obtained or excused by the court. s. 63.122, F.S. Therefore, if the court has excused consent under s. 63.072(1) by applying the definition of abandonment in s. 63.032(14), there is no notice requirement. Both chapter 39 and chapter 63 specifically prohibit a voluntary surrender of parental rights prior to the birth of the child. However, the combination of the abandonment definition and the consent provisions of chapter 63 as interpreted in case law can effectively terminate a father’s paternal rights without his consent, and without him receiving notice of the proceeding, based solely on his actions before the child is born.

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.

3. Fees and Expenditures

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 \$1,000 and costs more than \$2,500 *other than* actual documented medical costs and hospital costs. 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. s. 63.132, F.S. The report must detail expenses or receipts incurred in connection with, but not limited to, the birth and placement of the minor and actual living and medical expenses for the birth mother.

At any time after an adoption agreement is reached between a birth mother and the prospective adoptive parents, a petition may be filed for a declaratory statement on that agreement, and a hearing for prior approval of fees and costs may be held. s. 63.102(5), F.S. The statute does not indicate who may file this pleading or who must be noticed of such a proceeding.

4. Criminal Penalties and Sanctions

Currently, a person commits a misdemeanor of the first degree if he knowingly and willfully makes a false statement claiming paternity of a child in conjunction with a petition to terminate parental rights under chapter 39, F.S., and causes the false statement to be filed with the court. s. 39.804, F.S.

Under chapter 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 chapter 775, F.S. A person commits a second-degree misdemeanor if the person advertises or otherwise publicizes the availability of a child for adoption. 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 chapter 63, F.S. s. 63.219, F.S.,

5. Central Registry of Adoption Information

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. 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. 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. s. 63.165, F.S. Registration of information is strictly voluntary and paid for through statutorily-authorized fees charged to users of the service. 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. s. 63.165(1), F.S.

There are no similar requirements for intermediaries to retain their documents in the registry although intermediaries as well as the DCF and adoption agencies are required to inform, in writing, birth parents, prior to termination of parental rights, and the adoptive parents before placement, of the existence and purpose of the registry. s. 63.165(3), F.S.

The court adoption files are sealed and retained for 75 years. 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. 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.

C. EFFECT OF PROPOSED CHANGES:

1. Termination of Parental Rights

Chapter 39 is amended so that the termination of parental rights provisions within that chapter govern only cases initiated by DCF. Such terminations result from an inability or failure of the parents to care for a minor and thus, less often are simply a preliminary to an imminent adoption as is most often the case when the termination is sought by an agency or intermediary. The bill places all other adoption entities under the same standards in the same chapter of law for the purposes of terminating parental rights and establishing that a child is legally available for adoption prior to an adoption proceeding. The term "adoption entity" is created to include the department, licensed childcare agencies, a child-care agency registered under s. 409.176 and intermediaries.

The bill attempts to provide sufficient alternatives and clarity that obtaining termination of the rights of persons who are required to consent to adoption will not be burdensome. It requires either :

- A valid executed consent, (s. 63.082, F.S.) **or**
- An affidavit of nonpaternity (also waives service requirement) (s. 63.082, F.S.), **or**
- Due process notice given and person does not respond or appear (s. 63.089, F.S.), **or**
- Any of the grounds (enumerated) that under current law are grounds for "waiving" consent(s. 63.089, F.S.).

2. Informed Consent

The bill streamlines and clarifies the adoption process and builds in safeguards to reduce potential legal challenges to an adoption. The particulars by which this is accomplished are set out in greater detail in the Section-by-Section portion of this analysis. The following is an overview of the procedure incorporated in the bill:

Before Birth:

1. Disclosure to prospective adoptive parents
2. Disclosure to person seeking to place child
3. Disclosure to anyone whose consent is required once located
4. Affidavit of Inquiry
5. Due Diligence Search-- *only* if location unknown
6. Approval of intended placement, file preliminary home study with court

Child is Born:

7. File petition to determine for termination of parental rights.
8. Obtain necessary consents
9. Serve petition by personal service or begin service by publication
10. File due diligence affidavit if applicable
11. Hearing to terminate parental rights--

- 30 days after personal service
 - 60 days after the first date of publication when service is by publication
12. File petition for adoption. As soon as order terminating parental rights is filed.
 13. Hearing on adoption petition. No sooner than 30 days after order terminating parental rights is entered and no sooner than 90 days after placement.

In the vast majority of adoptions the identity and location of all persons whose consent to the adoption is required is known to the adoption entity. In those cases, this bill permits the court to terminate parental rights 30 days after the petition is served. If the petition is filed and served immediately upon the child's birth as permitted under the bill, parental rights could be terminated 30 days after birth. This as compared to the current law under which this can occur no sooner than 90 days after placement of the child in the intended adoptive home.

When the location or identity of a person whose consent to the adoption is required is unknown, if the inquiry and due diligent search are completed prior to the child's birth as permitted under the bill and service is initiated upon the child's birth, the bill permits the court to terminate parental rights at a hearing declaring the minor available for adoption 60 days after the first date service by publication is published (the reason this is 30 days longer than when personal service is obtained is that for constructive service to comply with law the notice must be published once a week for four consecutive weeks). If done immediately upon the child's birth, parental rights could be terminated 60 days after birth. Again, this is more quickly than under current law providing that the parental rights of birth parents cannot be terminated through an adoption hearing sooner than 90 days after placement of the child in the intended adoptive home.

The adoption petition is then filed and a hearing set. The adoption hearing may be held no sooner than 30 days after the parental rights have been terminated and 90 days after the minor has been placed for adoption. In both scenario A and B above this fits the two-step proceeding within the current law that provides that the final hearing for adoption can occur no sooner than 90 days after placement.

The bill eliminates burdensome consent processes while safeguarding against constitutional challenges with clear informed consent and notice provisions. First, no consent is needed if a termination of parental rights is supported by one or more grounds enumerated under 63.089(3). These grounds incorporate the criteria by which a court may currently "excuse" consent, including abandonment. On the issue of abandonment, the bill provides specific criteria under which the court may make a finding of "abandonment" by a parent for purposes of terminating parental rights. 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. s. 63.089(4), F.S. Pre-birth conduct may only be used as a basis for a finding of abandonment in 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. s. 63.089(5), F.S. The bill expressly excludes a finding of abandonment based on a lack of emotional support during a mother's pregnancy but does allow such a finding based on emotional abuse endured by the mother during her pregnancy. s. 63.089(4), F.S. Finally, grounds for a finding of abandonment include incarceration of a parent 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. s. 63.089, F.S.

In addition, the bill clarifies that parental rights may be terminated if the person whose consent is required fails to timely answer or appear after proper personal service or constructive service. The bill also creates an affidavit of nonpaternity that may be executed in lieu of consent. A person executing such an affidavit acknowledges they are waiving any right to further notice in the matter. The bill adds two categories of persons to the current list of persons whose consent to adoption is required: a person who has been identified by the birth mother as a person she has reason to believe may be the father of the minor in an action to terminate parental rights pending adoption pursuant to chapter 63; and any person who is a party in any pending proceeding in which paternity, custody, or termination of parental rights regarding the minor is at issue. To address instances where the identity or location of persons whose consent is required is unknown, the bill incorporates a modified version of the due diligent search and inquiry provisions that currently apply under s. 39.803 to agencies and the due diligence affidavit applicable in family law matters, Form 12.913(b), Florida Family Law Rules of Procedure.

Building on the current requirement that certain aspects of adoption law be disclosed to the prospective adoptive parents, the bill provides a detailed summation of the applicable law in a written form. The bill provides that the written disclosure form will be given to persons who consent to adoption is required and to prospective adoptive parents. Informing people fully of the implications of ending a parental relationship or creating one should both increase the likelihood that those participating are doing so aware of the result and reduce subsequent challenges. In addition, the bill also requires that prospective adoptive parents sign an "at risk statement" in all adoptions where the placement of a child with the prospective adoptive parents occurs 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.

In the case of a minor who is to be placed with prospective adoptive parents upon the minor's release from a licensed hospital or birth center following birth, the bill provides that the consent may not be executed until sooner than 48 hours after the minor's birth or the day the birth mother has been notified that she is fit to be released from a licensed hospital or birth center whichever is *earliest*. For any minor to whom the waiting period would not apply, while the consent is valid upon execution, it is subject to a 3-day revocation period or may be revoked any time prior to the placement of the minor with the prospective adoptive parents, whichever is later. **In no circumstance would both the waiting period and the revocation period apply.** This minimum time period allowing the person consenting to permanently surrendering all rights to the child to consider the decision having been provided written disclosure of the consequences would significantly diminish the credibility of any claim that the consent was given under fraud or duress. Further, the bill provides a written consent form stating clearly the rights being relinquished. Evidencing that such information has been made available *at the time the consent is executed* in addition to already being provided at the beginning of the process through the disclosure also reduces the chance that a challenge would arise that the consent was executed under fraud or duress.

The bill also incorporates in ss.63.089(7) and s. 63.142(4), F.S, the procedures currently found in s.63.0423, and thus currently only applicable with respect to abandoned newborns under those sections, 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.

3. Fees and Expenditures

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 adoption entity and the prospective adoptive parents must sign the affidavit. 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.

4. Criminal Penalties and Sanctions

Section 63.039, F.S., is created to provide for the duties of an adoption entity and states possible sanctions for violations thereof. The bill enumerates objective affirmative duties of an adoption entity and 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. Further, an adoption entity will be 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. Finally, the court must 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 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 that violate any provision of ch. 63, F.S.

5. Centralized State Registry of Adoption Information

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

D. SECTION-BY-SECTION ANALYSIS:

Sections 1- 5: Amends F.S. 39.703, 39.802, 39.806, 39.811 and 39.812 to delete reference to licensed child-placing agencies as part of the provisions of the bill moving the terminations of parental rights that do not involve the department into chapter 63; section 5 amending F.S. 39.812 also clarifies that certain provisions of chapter 63 do not apply to adoptions subsequent to chapter 39 terminations of parental rights to eliminate duplicative procedures.

Section 6: Amends F.S. 63.022 regarding legislative intent to make technical and conforming changes.

Section 7: Amends F.S. 63.032 to put the definitions in alphabetical order and to revise the following: "intermediary" is revised to delete physicians; "suitability of the intended placement" is revised to include any familial relationship between the child and the prospective placement; "adoption entity" is created as an inclusive term, and is defined as the Department; an agency; a child-caring agency registered under F.S. 409.176; or an intermediary; and "parent" is defined as in s. 39.01, F.S.

Section 8: Creates F.S. 63.037 to clarify that certain provisions of chapter 63 do not apply to adoptions subsequent to chapter 39 terminations of parental rights to eliminate duplicative procedures.

Section 9: Creates F.S. 63.039 regarding the duty of an adoption entity to prospective adoptive parents. Sets forth specific duties and provides for cause of action if failure to materially meet a specified duty causes stated damages. Requires the court provide any order that imposes sanctions against an attorney or agency for violations of chapter 63 to The Florida Bar or to DCF respectively within 30 days after the date the order was issued. Allows an applicable insurance carrier to pay a court-ordered award of damages on behalf of an adoption entity.

Section 10: Amends F.S. 63.0425 to conform to the new definition of adoption entity, with regard to a grandparent's right to adopt.

Section 11: Amends F.S. 63.052. Provides that a minor is to be placed in licensed foster care or with a birth relative if the minor is surrendered for subsequent adoption and a suitable prospective home is not available. Clarifies that the fact that a minor is temporarily placed with the prospective adoptive parents does not give rise to a presumption that the parental rights of the parents will subsequently be terminated. Clarifies that the court retains jurisdiction of a minor placed for adoption until the adoption is final.

Section 12: Amends F.S. 63.062 regarding persons who must consent. The specifics of that procedure are detailed under the "Effect of Proposed Changes" section of this analysis.

Section 13: Amends F.S. 63.082 regarding the execution of consent. Creates an affidavit of nonpaternity and provides that it may be executed in lieu of consent in certain circumstances. Requires each parent to be interviewed prior to the consent being executed but allows substitution of an affidavit of diligent search respecting either parent if the parent cannot be located or is unidentified. Allow persons signing the affidavits to give a driver's license number or state identification card number in lieu of the currently required social security numbers. The bill grants the person who signs the consent the right to have at least one of the witnesses be an individual of his or her own choosing.

Requires the consent to adoption to contain a specific acknowledgment of the parent's rights. Requires specified disclosure be given before any consent to adoption or affidavit of nonpaternity is executed, but after the birth of the child. Requires a copy of each consent signed to be provided to each person whose consent is required. The copy can either be hand delivered with a written acknowledgment of receipt, or mailed by first class United States mail. The original must be filed with the petition for termination of parental rights pending adoption.

Consent may not be signed earlier than 48 hours after the minor's birth, or the day the mother is determined in writing to be fit for release from a licensed hospital or birth center, whichever is sooner. Upon execution, the consent may only be withdrawn upon a judicial finding of fraud or duress.

If the minor is not placed upon release following birth from a licensed hospital or birth center, the waiting period does not apply. Instead, consent may be withdrawn for any reason within 3 days or until placement of the minor with the prospective adoptive parents, whichever is later. Provides procedures for notifying the adoption entity in writing by certified mail, return receipt requested, not later than 3 business days after execution of consent or 1 business day after the date of the birth mother's discharge from a licensed hospital or birth center, whichever occurs later. Defines "business day." Requires the adoption entity to return the minor within 3 days of receiving written notice of withdrawal of consent, unless upon motion for emergency hearing the court determines that placement with the person who withdrew consent would endanger the minor. Provides that an affidavit of nonpaternity may be withdrawn only if the court finds that the affidavit was obtained by fraud or under duress.

Section 14: Substantially rewords F.S. 63.085 regarding disclosure by adoption entities. Provides specific information to be disclosed and procedures for communicating the disclosure and evidencing that it has occurred.

Section 15: Creates F.S. 63.087 regarding proceedings to terminate parental rights pending adoption. Provides a procedure combining elements of termination proceedings involving the department and agencies under chapter 39 and those currently applicable to intermediaries under chapter 63. The specifics of that procedure are detailed under the "Effect of Proposed Changes" section of this analysis.

Section 16: Creates F.S. 63.088 regarding notice and service. Requires diligent search begin within abbreviated time limits, including specifying that it may be conducted prior to the birth of the child whose placement is anticipated. Requires specific diligent search process if location or identity of person whose consent is required is unknown similar to those required when parental rights are terminated under chapter 39. Incorporates a diligent search affidavit nearly identical to that currently applicable in dissolution of marriage cases. Sets forth the form of the notice of petition and hearing to terminate parental rights pending adoption.

Section 17: Creates F.S. 63.089 establishing the proceeding to terminate parental rights pending adoption. Requires a full evidentiary hearing. Provides prerequisites that must be met before the court may hold the hearing. Provides grounds upon which parental rights may be terminated. Provides factors for the court to consider in making a determination of abandonment. Allows for finding of abandonment by an incarcerated parent under certain circumstances.

Incorporates the procedures currently found in s.63.0423, and thus currently only applicable with respect to abandoned newborns under those sections, making them applicable to all judgments terminating parental rights and of adoption: provides that a judgment terminating parental rights pending adoption is voidable if upon the motion of the parent, the court finds that a person knowingly gave false information that prevented the parent from timely making known his or her desire to assume parental responsibilities toward the minor. The motion must be filed no later than 2 years after the date the judgment to which the motion is directed was entered. Requires the court to conduct a final evidentiary hearing no later than 45 days after the filing of such motion. Requires the court to conduct a preliminary hearing within 30 days of filing of such motion, to determine what contact, if any, shall be permitted between the parent and the child. Provides for confidentiality of records and papers.

Section 18: Amends F.S. 63.092 regarding the report to the court of intended placement by an intermediary. Makes technical and conforming changes. Requires the prospective adoptive parents to acknowledge in writing that the placement is at-risk if the minor is placed in the prospective adoptive home before the parental rights of the parents are terminated.

Section 19: Amends F.S. 63.097 regarding fees. Sets forth the fees, costs, and expenses that may be assessed or paid. Reasonable living expenses of the birth mother may only be paid if the birth mother is unable to pay due to involuntary unemployment, or medical disability. Also includes reasonable and necessary medical expenses, expenses to comply with the requirements of chapter 63, court filing expenses, and costs associated with advertising. Sets forth the professional fees that may be paid. Prior approval of the court is not required until the cumulative total of amounts permitted exceeds \$2,500 in legal or other fees; \$500 in court costs; or \$3,000 in expenditures.

Provides that the following fees, costs, and expenses are prohibited:

- (1) Any fee or expense that constitutes payment for locating a minor for adoption.
- (2) Cumulative expenses in excess of \$500 which are incurred prior to the date the prospective adoptive parent retains the adoption entity.
- (3) Any lump-sum payment to the entity which is nonrefundable directly to the payor or which is not itemized on the affidavit.
- (4) Any fee on the affidavit that does not specify the service that was provided and for which the fee is being charged, such as a fee for facilitation, or acquisition.

Section 20: Amends F.S. 63.102 regarding the filing of petition for adoption. Makes technical and conforming changes. Regarding prior approval of fees and costs requires a contract for the payment of fees, costs, and expenditures to be in writing. Any person who enters into the contract has 3 business days in which to cancel the contract. The contract may not require and the court may not approve any lump-sum payment that is nonrefundable or any amount that constitutes payment for locating a minor for adoption. Provides that prior approval of fees and costs by the court does not obligate the parent to ultimately relinquish the minor for adoption.

Section 21: Amends F.S. 63.112 regarding the petition for adoption. Requires the case style and the date of the entry of the order terminating parental rights or the judgment declaring a minor available for adoption to be included in the petition for adoption. Requires a certified copy of the court order terminating parental rights under chapter 39 or the judgment declaring a minor available for adoption to be filed with the clerk of the court at the time the petition is filed.

Section 22: Amends F.S. 63.122 regarding notice of hearing on adoption petition. Provides that the hearing may not be held sooner than 30 days after the date the judgment terminating parental rights was entered, or sooner than 90 days after the date the minor was placed in the physical custody of the petitioner.

Section 23: Amends F.S. 63.125 regarding the final home investigation to make technical and conforming changes.

Section 24: Amends F.S. 63.132 regarding the affidavit of expenditures and receipts. Requires the affidavit to be signed by the adoption entity and the prospective adoptive parents. Requires the department to retain records for five years. Copies of affidavits received by the department must be provided upon the request of any person. The department must redact all identifying references to the minor, the parent, or the adoptive parent. The intent is to create a resource for adoptive parents and others wishing to obtain information about the cost of adoption in this state. Requires the affidavit to state whether any of the expenses were or are eligible to be paid for by any collateral sources. Requires the court to issue a separate order approving or disapproving the fees, costs, and expenditures itemized in the affidavit.

Section 25: Amends F.S. 63.142 regarding judgment of adoption. Incorporates the procedures currently found in s.63.0423, and thus currently only applicable with respect to abandoned newborns under those sections, making them applicable to all judgments terminating parental rights and of adoption. Provides that a judgment terminating parental rights pending adoption is voidable, and any later judgment of adoption is voidable, if upon motion of the parent, the court finds that any person knowingly gave false information that prevented the parent from timely making known his or her desire to assume parental responsibilities. A motion must be filed with the court that entered the original judgment, and be filed no later than two years after the date the judgment to which the motion is directed was entered. Requires a preliminary hearing to

determine what contact, if any, shall be permitted between the parent and the child. Requires the court to conduct a final evidentiary hearing no later than 45 days after the filing of such motion.

Section 26: Amends F.S. 63.162 to conform to the new definition of adoption entities with regard to confidentiality requirements.

Section 27: Amends F.S. 63.165 regarding the state registry of adoption information. Requires the registry to include the certified statement of the final decree of adoption provided by the clerk of the court. Requires the department to maintain the registry records for the time required by rules, or for 99 years, whichever period is greater.

Section 28: **This section inadvertently presents currently law as newly created law and it is anticipated that it will be amended out during the committee process.** F.S. 63.182.

Provides that actions to vacate, set aside, or otherwise nullify an order of adoption or an underlying order terminating parental rights on any ground, with the exception of fraud or duress, which must be filed within 2 years, must be filed within 1 year after entry of the order terminating parental rights.

Section 29: Amends F.S. 63.202 to conform to the new definition of adoption entity as it relates to the authority of the department to license.

Section 30: Amends F.S. 63.207 regarding out-of-state placement. Expands those instances where a minor may be placed out of state to include instances when the parent placing the minor files an affidavit that the parent chooses to place the minor out of state and giving the reason why or "for other good cause."

Section 31: Amends F.S. 63.212 relating to prohibited acts to make technical and conforming changes.

Section 32: Amends F.S. 63.219 to conform to the new definition of adoption entity as it relates to sanctions.

Section 33: Creates F.S. 63.2325, provides that the failure to meet any requirements regarding the conditions for revocation of a consent to adoption or affidavit of nonpaternity as specified in this bill does not constitute grounds for revocation of a consent to adoption or affidavit of nonpaternity unless the extent and circumstances of such a failure result in a material failure of fundamental fairness in the administration of due process, or the failure constitutes or contributes to fraud or duress in obtaining a consent to adoption or affidavit of nonpaternity.

Section 34: Amends F.S. 984.03 to make technical and conforming changes to the definition of parent.

Section 35: Amends F.S. 985.03 to make technical and conforming changes to the definition of parent.

Section 36: Repeals F.S. 63.072, regarding persons whose consent to an adoption may be waived.

Section 37: Provides that any petition for adoption filed before October 1, 2001, shall be governed by the law in effect at the time the petition was filed.

Section 38: Allows valid provisions of the law to remain in effect if a court finds any specific provision invalid.

Section 39: Provides that this act shall take effect October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

The Department of Children and Families has determined preliminarily that the requirements in this bill have minimal fiscal impact and are manageable with current staff and resources.

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.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 additional 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.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill will not reduce the authority of municipalities and counties to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill will not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. 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 Supreme Court of Florida recognizes the interest of parents in determining the care and upbringing of their children free from governmental intervention as a "longstanding and fundamental liberty interest." *Beagle v. Beagle*, 678 So.2d 1271, 1275 (Fla. 1996), *quoting Padgett v. Department of Health and Rehabilitative Services*, 577 So.2d 565, 570 (Fla. 1991). In *Beagle*, the court stated that the fundamental interest in parenting is protected by both the Florida and Federal Constitutions. *Beagle*, 678 at 1271. See also *Santosky v. Kramer*, 455 US 745, 102 SCT 1388, 71 L ed 2d 599 (1982). The court goes on to explain that in Florida this protection stems from the privacy provision that was added to the state constitution in 1980, the enactment of which the court has interpreted as providing a right "much broader in scope than that of the Federal Constitution." *Beagle*, 678 at 1271, *quoting Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544, 548 (Fla. 1985). For an unwed father, these constitutional protections only extend to the opportunity to develop the parental relationship; the failure to grasp the opportunity by accepting some measure of

responsibility for the child can result in a loss of those protections. *In the Matter of the Adoption of Doe*, 543 So.2d 741, 748 (Fla. 1989).

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 6, 2001, the Committee on Child & Family Security adopted the following amendments to HB 141.

Amendment # 1 [Section 6, page 15, lines 3-7]

Clarifies legislative intent language that all parents, adoptive or otherwise and children in any adoption proceeding receive the benefits to which they are entitled by the requirements of the chapter.

Amendment # 2 [Section 9, page 20, lines 1-29]

Relocates a provision regarding award of attorney's fees to persons whose consent to adoption or affidavit of nonpaternity was obtained by fraud or under duress.

Clarifies that it is the clerk of the court that must forward copies of sanction orders to the respective regulating or qualifying entities.

Corrects omission and includes who should receive copies of court-ordered sanction orders against child-caring agencies registered under s. 409.176, F.S., or against out-of-state licensed agencies qualified to handle adoptions in the state such that all sanction orders against any adoption entity are forwarded by the clerk to the respective regulating or qualifying entity.

Amendment # 3 [Section 13, page 32, line 28]

Replaces the term "surrendered to" with the term "placed with the" since children are not surrendered to adoptive parents but placed with them.

Amendment # 4 [Section 13, page 33, between lines 28 & 29]

Adds a heading to the suggested statutory form for "Consent to Adoption" to provide clear notice as to what form is being executed.

Amendment # 5 [Section 14, page 48, line 27]

Clarifies that an affidavit of nonpaternity is withdrawn, not revoked like a consent to adoption. Corrects spelling error by replacing "or" with "of."

Amendment # 6 [Section 16, page 55, lines 16-20]

Adds in the notice of petition for termination of parental rights language that explains the law, states that a person is entitled to object to the termination of parental rights and to the waiver of venue by either appearing at the hearing or filing a written objection with the court.

Amendment # 7 [Section 17, page 63, line 17]

Changes the date from October 1, 2000, to October 1, 2001, to reflect the date after which a parent who is incarcerated may be considered to have abandoned his or her child for purposes of termination of parental rights proceedings.

Amendment # 8 [Section 18, page 67, line 28 and page 68, line 9]
Inserts child-caring agencies under 409.176 making the section parallel to the other sections of the bill.

Amendment # 9 [Section 20, page 73, line 27] Corrects a scrivener's error.

Amendment # 10 [Section 21, page 76, lines 25-26]
Removes incorrect terminology referring to the "judgment declaring a minor available for adoption"

Amendment # 11 [Section 28, page, 87, line 23 through page 88, line 8]
with title amendment. Eliminates re-enactment of existing statutory provision governing statute of repose in adoption proceedings.

Amendment # 12 [Section 33, page 99, line 12] with title amendment
Clarifies that an affidavit of nonpaternity is withdrawn, not revoked like a consent to adoption. Corrects spelling error by replacing "or" with "of."

VII. SIGNATURES:

COMMITTEE ON CHILD & FAMILY SECURITY:

Prepared by:

Bob Barrios

Staff Director:

Bob Barrios

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Carol Preston

Staff Director:

Carol Preston