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DATE: May 11, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FAMILY LAW AND CHILDREN
FINAL ANALYSIS**

BILL #: CS/HB 0197

RELATING TO: Adoption.

SPONSOR(S): The Committee on Family Law and Children, Representative Byrd, and Representative Roberts

COMPANION BILL(S): CS/SB 0002

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

- (1) Family Law and Children YEAS 6 NAYS 1
- (2) Health and Human Services Appropriations
- (3)
- (4)
- (5)

I. FINAL ACTION STATUS:

The bill failed to pass the Legislature.

II. SUMMARY:

The bill amends F.S. ch. 63 and portions of ch. 39, regarding adoption. Terminations of parental rights that involve children in the custody of or surrendered to the Department of Children and Family Services (the Department) are currently governed by ch. 39. All other terminations of parental rights resulting in adoption occur under ch. 63 which governs all adoptions. Under chapter 63 the termination of the parents' rights occurs simultaneously with the creation of parental rights in the adoptive parents. CS/HB 197 separates these two parts of the process into two distinct procedures. The first step, termination of parental rights pending adoption, occurs separately and sooner than under current law. The proceeding is similar to that used currently by licensed adoption agencies and the Department pursuant to chapter 39. The bill reduces the time required to terminate parental rights, and protects the constitutional rights of parents by requiring compliance with specific and timely disclosure, notice, and service provisions. If the parental rights of the parents are terminated, the bill retains the current procedure for the second step, which is the finalization of the adoption.

The bill also amends current law to prevent de facto termination of parental rights without notice prior to the child's birth; provides a waiting period of 48 hours after birth or until the day the mother is released from the hospital, whichever is sooner, before the consent for adoption may be signed; provides a 3-day revocation period for consents signed for adoption for minors not placed upon release from the hospital or birth center following birth; provides that consent may be revoked prior to the child's placement; creates a statute of repose ending all potential challenges one year after a judgment terminating parental rights is entered, except for fraud or duress, which must be brought within 2 years; provides consistency in the law regarding out of state placement of children; specifies the types of fees and expenses which may be charged; and clarifies the court's authority to scrutinize the fees, costs, and expenditures connected with an adoption.

No fiscal impact is projected.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Currently, chapter 39 provides for termination of parental rights hearings for dependent children through the Department, and for children voluntarily surrendered to a child-placing agency which has been licensed by the Department for purposes of adoption. Chapter 63 governs all adoptions, and currently provides for the termination of parental rights and the subsequent adoption in one proceeding; parental rights are terminated upon entry of the final judgment for adoption. F.S. 63.172(1)(b). In Florida, children may only be placed for adoption by the Department, a child-placing agency licensed by the Department, or an intermediary. F.S. 63.212. By definition, an intermediary is an attorney or doctor who is licensed to practice in Florida, or for purposes of placement of children from out of state with Florida citizens, a child-placing agency licensed in another state that is qualified by the Department. F.S. 63.032(8).

Residential child-caring agencies may place children in foster care, if the agency has registered with an association that is certified by a Florida statewide child-care organization that was in existence prior to January 1, 1984, and which publishes and requires compliance with its standards. F.S. 409.176. The Florida Association of Christian Child-Caring Agencies (FACCCA) is the only such association which qualifies. Although such agencies may currently provide foster care, they are not authorized to place the same children for adoption. The FACCCA is made up of religious organizations which do not directly receive state or federal funds. The FACCCA reports having provided foster care for 923 children in 1998, and for more than 5,000 children in Florida since FACCCA was organized in 1982.

Current law provides for **legislative intent** regarding adoptions. It is the intent of the legislature to protect and promote the well-being of persons being adopted and their parents and adoptive parents, and to provide to all children who can benefit by it a permanent family life, and whenever possible, maintain sibling groups. Basic safeguards are set out as follows:

- the child is legally free for adoption;
- the required persons consent or the parent-child relationship is terminated by judgment of the court;
- the required social studies are completed and the court considers them prior to judgment;
- all placements for minors are reported to DCF;
- a sufficient period of time elapses during which the child has lived in the proposed adoptive home;
- all expenditures by intermediaries and adoptive parents are reported to the court and become a permanent record;
- social and medical information concerning the child and the parents is filed with the consent;
- a new birth certificate is issued after entry of the adoption judgment;
- the court is authorized to order substitute care when it determines that the minor is in an unsuitable home;
- the records of all proceedings are confidential;
- the parents and the adoptive parents receive the same or similar safeguards, guidance, and counseling in intermediary adoptions as they receive in agency or department adoptions;
- the court shall enter all orders as it deems necessary to protect the best interests of the person to be adopted.

Consent/Waiver - Presently, consent must be obtained under s. 63.062, F.S., from the mother of the child, the father of the child, the minor, if more than 12 years of age and any man who has been established by law to be the father, or who has acknowledged paternity in an affidavit filed with the Division of Vital Statistics, or who has provided support to the child in a repetitive, customary manner. This consent requirement can be waived by the court in certain circumstances, including abandonment. F.S. 63.072.

Currently, the statute expressly prohibits termination of a parent's rights before the child is born. ss. 63.062(1) and 63.082(4), F.S. In contrast, the court may excuse, i.e., waive, obtaining a parent's consent to the adoption of his or her child, even before that child is born, if it finds by clear and convincing evidence that the parent has abandoned the child. s. 63.072(1), F.S., as

defined by s. 63.032(14), F.S. See *E.A.W. v. J.S.W.*, 658 So.2d 961 (Fla. 1995)(Baby Emily)(clear and convincing evidence is required before terminating parental rights based on abandonment).

The current definition of abandonment in ch. 63, F.S., which apply to intermediary adoptions, provides that in making a determination of abandonment, the court may "consider the conduct of a father toward the child's mother during her pregnancy." s. 63.032(14), F.S. See also *In the Matter of the Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989). This phrase is not included in the definition of abandonment in ch. 39, F.S., applicable to adoptions through the Department and private agencies. s. 39.01(1), F.S. Thus, the combination of the abandonment definition and the consent provisions of chapter 63 have been interpreted in case law to mean that a father's parental rights can be terminated without his consent, and without him receiving notice of the proceeding (see section on notice that follows), based solely on his actions before the child is born.

Consent can be executed orally in the presence of the court, by affidavit, or by an appropriate order of the court. The department is required to provide a consent form and a family medical history form to an intermediary who intends to place a child for adoption. Consent may only be executed after the birth of the child, in the presence of two witnesses, and must be acknowledged before a notary public. Consent may only be withdrawn when the court finds that the consent was entered by fraud or under duress.

Waiting/Revocation Period - A consent may be signed at any time after the birth of the child. ss. 63.062(1) and 63.082(4), F.S. The consent must be by an affidavit signed in the presence of two witnesses and notarized, or be taken in court. ss. 63.082(1)(c) and 63.082(4), F.S. Consent may be withdrawn only when a court finds that the consent was obtained by fraud or under duress. s. 63.082(5), F.S. Currently, Florida law provides no waiting period before consent may be signed and no revocation period after the consent is signed, except in cases where the pregnancy was planned through a surrogacy arrangement, in which case the law provides a 7-day revocation period after the birth of the child. F.S. 63.212(1)(l)1.b.

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

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

CWLA, Standards for Adoption Service, revised edition 1988.

The waiting period allows the mother time to recover from the effects of child birth. The physical effects of pregnancy have led to legislation in response to the trend toward shorter hospital stays after childbirth. Under federal law, group health insurance coverage generally may not restrict benefits for any hospital stay in connection with childbirth for the mother or newborn child following a normal vaginal delivery to less than 48 hours, or following a cesarean section, to less than 96 hours. However, this does not prevent an earlier discharge made by a physician after consultation with the mother. Section 711, Newborns' and Mothers' Health Protection Act of 1996. In Florida, health insurance coverage may not be limited to any time less than that determined to be medically necessary, in accordance with guidelines for perinatal care of the American Academy of Pediatrics or the American College of Obstetricians and Gynecologists, or by the treating obstetrical care provider or the pediatric care provider. These time frames are 48 hours for a vaginal birth and 96 hours following a cesarean. Section 711, Newborns' and Mothers' Health Protection Act of 1996; s. 627.6406(2), F.S.

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

Disclosure - Current law requires intermediaries to disclose different specified information to persons seeking to adopt a child, and to those placing a child for adoption. The law does not require any disclosure by agencies handling adoptions. A copy of the signed statement of disclosure to the adoptive parents must be included in the preliminary home study.

Preliminary Home Study - Before placing a minor in the intended adoptive home, a preliminary home study must be performed by a licensed child-placing agency, a licensed professional, or agency, unless the petitioner is a stepparent, a spouse of the birth parent, or a relative. A child may not be placed in the prospective home prior to the completion of the preliminary study unless ordered by the court.

Petition for Adoption

- (1)Venue: The petition for adoption must be filed in the county where the petitioner or the child resides, or where the agency with which the child has been placed is located.
- (2)Prerequisites: The petition for adoption must be filed within 30 working days after placement of a child with a parent seeking to adopt the child, except for relative adoptions. The law sets out the information that must be included in the petition. The following documents must be filed with the clerk of the court at the time the petition is filed: the required consents, unless excused; the favorable preliminary home study; and the surrender document showing that interviews were held with the birth mother, the birth father, and the child, if required.

Notice of Hearing on Adoption - The hearing must not be held sooner than 90 days after placing the minor in the physical custody of the petitioner. The minor must remain under the supervision of the department, the intermediary, or the licensed-child placing agency until the adoption becomes final. Notice of hearing must be given as prescribed by the rules of civil procedure. Notice of the hearing must be given to the department or licensed child-placing agency; the intermediary; any person whose consent is required, *unless excused*; and any person seeking to withdraw consent (emphasis supplied, see previous section on abandonment). The petitioner is required to make good-faith efforts to notify persons required to consent within 60 days after filing the petition. These efforts may include a specified investigation. A final home investigation must be completed before the adoption becomes final.

Hearing and Judgment of Adoption - The petitioner and the person to be adopted shall appear at the hearing on the petition unless the minor is under 12, or presence is excused by the court. If the petition is dismissed, the court must determine who is to have custody of the child. At the conclusion of the hearing, if the court determines that all necessary consents have been entered, and that the adoption is in the best interests of the person to be adopted, a judgment of adoption shall be entered. All hearings shall be held in closed court.

If parental rights have already been terminated in a separate proceeding under chapter 39, as is the case when the placement is through the Department or a child-placing

agency licensed by the Department, this hearing is solely on the issue of adoption. If the parental rights have not previously been terminated, as is the case when placement is through an intermediary, then all issues regarding both the termination of the parents' rights and the creation of the adoptive parents' rights through adoption are addressed at the hearing.

A judgment of adoption relieves the parents of all parental rights and responsibilities; it terminates all legal relationships between the adopted person and the adopted person's relatives, including the birth parents; so that the adopted person thereafter is a stranger to former relatives for all purposes, including inheritance; it creates the relationship between the adopted person and the petitioner and all relatives of the petitioner that would have existed if the adopted person were a blood descendant of the petitioner born within wedlock.

Out of State Placement - For any person to adopt *in Florida*, his or her primary residency and employment must be in Florida. F.S. 63.185. To place a child for adoption *outside* the state of Florida, the placement must be handled by a licensed child-placing agency. F.S. 63.207. An exception to both of these provisions is made if the child being placed for adoption meets the definition of a special needs child under F.S. 409.166. Pursuant to F.S. 63.207, intermediaries may place a child out of state only if the child being placed is a special needs child. Intermediaries can become licensed as agencies in order to place non-special needs children out of state. The Department reports that in fiscal year 1997-1998, 116 children were placed out of state by the Department, and 388 children were placed out of state by private agencies. Data from the Adoption and Related Services Yearly Statistical Report for FY 1997-1998, provided by the Department, shows that there were 474 approved adoptive families awaiting placement. Of these, 340 were white, 88 were black, and 48 were of other races; 417 families were willing to accept special needs children.

F.S. 409.166 defines a "special needs child" as a child whose permanent custody has been awarded to the department or to a licensed child-placing agency and:

- (3) who has established significant emotional ties with his or her foster parents; or
- (4) is not likely to be adopted because he or she is:
 - (a) eight years of age or older;
 - (b) mentally retarded;
 - (c) physically or emotionally handicapped;
 - (d) of black or racially mixed parentage;
 - (e) a member of a sibling group of any age, provided two or more members of a sibling group remain together for purposes of adoption.

Appeal - After one year from the entry of the judgment of adoption, any irregularity or procedural defect in the proceedings is cured, and the validity of the judgment shall not be subject to attack. However, this does not apply to fraud. The statute of limitations for actions based on fraud or negligence is four years. F.S. 95.11(3)(a) & (j). The statute of limitations for actions relating to the determination of parentage is four years and may be tolled so that it does not begin to run until the date the child reaches majority. F.S. 95.11(3)(b).

State Registry of Adoption Information - The Department is required to maintain a registry with the last known names and addresses of an adoptee and his or her natural parents, and any identifying information which the adoptee, natural parents, or adoptive parents desire to include in the registry. The Department, intermediary or licensed child-

placing agency must inform the parents before parental rights are terminated, and the adoptive parents prior to placement, of the existence and purpose of the registry.

In an agency adoption, all case records of children placed, their biological parents, and adoptive parents must be permanently retained. Rule 65C-15.030, Florida Administrative Code. See DCF rulemaking authority, ss. 63.202 and 63.233, F.S. The court file in an adoption is sealed and must be retained for 75 years. Rule 2.075(d)(6), Florida Rules of Judicial Administration. Retention will be in whichever of the 67 Florida counties the final judgment of adoption was issued. If the records are needed, for example, due to a medical crisis, retrieval is difficult without knowledge of the specific county in which the judgment was issued and a case file number.

Prohibited Acts - The following acts are unlawful: the placement of a child for adoption outside of the state unless stated exceptions apply; the act of selling or surrendering of a child to another person for money or anything of value; to charge or accept any fee or compensation for anyone making a referral in connection with an adoption; to advertise that a child is available for adoption or that a child is sought for adoption; to contract for the purchase, sale, or transfer of custody of any child or fetus yet unborn, subject to various exceptions; to fail to report to the court the intended placement of a child; for any intermediary to charge any fee in excess of the amounts stated in the law; to counsel a birth mother to leave the state for the purpose of securing a fee in excess of that which is allowable in Florida; failure to disclose the existence of a preliminary or final home investigation. A person who violates these provisions commits a felony of the third degree, except that a person who violates the prohibition against advertising commits a second degree misdemeanor.

The Florida Statutes do not currently provide a distinct civil cause of action for wrongful adoptions. However, in a recent case the West Virginia Supreme Court of Appeals upheld a jury award of compensatory damages of \$2 million and punitive damages of \$5.85 million awarded to a natural father against the birth mother, her family, and her attorney for tortious interference with his parental rights regarding the adoption of his child without his consent. Kessel v. Conaty, 1998 WL 407096 (W.Va. July 22, 1998).

Fees - At any time after an agreement regarding adoption has been entered between a birth mother and the prospective adoptive parents, a petition may be filed for a declaratory statement on that agreement, and a hearing for prior approval of fees and costs may be held. s. 63.102(5), F.S. The statute does not indicate who may file this pleading, nor who must be noticed of such a proceeding. Any fee over \$1,000 and costs over \$2,500 paid to an intermediary other than actual, documented medical costs, court costs, and hospital costs must be approved by the court prior to assessment of the fee and upon a showing of justification of the larger fee. When an intermediary uses the services of a licensed child-placing agency, a professional, or other specified entities, the person seeking to adopt must pay an amount equal to the cost of all services performed, including, but not limited to, the cost of conducting the home studies, and counseling. Only actual living and medical expenses for the mother may be paid. F.S. 63.212(1)(d) At least 10 days before a final hearing for adoption, the petitioner and any intermediary must file an expense affidavit. F.S. 63.132.

While agencies are not required to get prior court approval of any fees, the Department, by administrative rule, has certain requirements regarding the reporting and auditing of adoption fees. Agencies must file a written fee schedule with the Department and provide it to all persons making application for services. Rule 65C-15.010(4), Florida Administrative Code. Further, agencies must execute a fee agreement with each

applicant listing fees charged, services to be provided, and provisions for payment. *Id.* Intermediaries do not have to file a fee schedule with the department, provide a written fee schedule to persons applying for services, or execute a written fee agreement with such persons.

Court rules - Effective March 1, 1998, the Florida Supreme Court adopted amendments to the Florida Family Law Rules. Rule 12.200(2) includes the requirement that a case management conference be ordered by the court within 60 days of filing an adoption petition when:

- (5) there is a request for a waiver of consent by someone required to consent;
- (6) notice of the hearing on the petition to adopt is not afforded a person whose consent is required but who has not consented;
- (7) an intermediary, attorney, or agency is seeking fees or costs in excess of those provided under Florida Statutes;
- (8) an affidavit of diligent search is filed in lieu of personal service; or
- (9) the court is otherwise aware that any person having standing objects to the adoption.

In adopting this rule, the Family Law Rules Committee stated that such rule was necessary because it had become clear that the earlier the issue of notice is decided by the court, the earlier the balance of the issues can be litigated. The Committee further stated that because both parents' constitutional standing and guarantees of due process require notice and an opportunity to be heard, this rule amendment will help solve the problems of protracted adoption litigation. Furthermore, the rule will encourage both parents to be more candid with intermediaries and attorneys in the adoptive process. Noncompliance with this rule shall not invalidate an otherwise valid adoption.

Indian Child Welfare Act - Section 25 U.S.C. section 1901 is the Indian Child Welfare Act of 1978. It provides, among other things, that if a child or the child's parents are members of a Native American Indian tribe, that the tribe has primary jurisdiction over custody issues affecting the child, including adoption.

CONSTITUTIONAL ISSUES

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 Led 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).

Two major Florida Supreme Court cases have in recent years examined the rights of unwed fathers during the adoption process. In 1989, 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). Once the father was found to have abandoned the child, the court found 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 §§63.062, 63.072, and 63.122, F.S. More recently, in *In re the Adoption of Baby E.A.W.*, 658 So.2d 961 (Fla. 1995), the court upheld a finding of abandonment by the father based on his lack of emotional support and emotional abuse of the mother during her pregnancy.

It should be noted that the notice provisions currently provided for in chapter 63 were not raised as issues on appeal in either of these cases. The current process permits termination of a constitutionally protected right, *without* notice if the waiver provisions under current law are used. The Due Process Clause of the Fourteenth Amendment of the Federal Constitution and the Due Process Clause, of Article I, Section 9, of the Florida Constitution require procedural fairness.

B. EFFECT OF PROPOSED CHANGES:

Bifurcated proceedings - The bill amends chapters 39 and 63 to provide that chapter 39 applies to all termination of parental rights proceedings that involve dependent children in the custody of or surrendered to the department, and that chapter 63 applies to all other terminations of parental rights and to all adoptions. The bill creates the term "adoption entity" which is defined to mean the department, adoption agencies licensed by the department, intermediaries, or child-caring agencies registered under F.S. 409.176. The bill adopts the procedural framework for adoptions that is currently used under chapter 39; that is bifurcating the two-step process currently accomplished in a single adoption proceeding under ch. 63.

Consent - The bill amends this aspect of current law in several respects. First, it specifies that consent must be obtained *or notice given* to the specified persons. This provision eliminates the current ability to get a court waiver of consent when the person whose consent is required cannot be identified or located despite a diligent search. Second, the bill prioritizes the "fathers" from whom consent is required or to whom notice must be given, eliminating the need to contact anyone other than a father determined by legitimacy or scientific testing. Only if there is no father determined by legitimacy or by scientific testing, must other persons consent or be noticed. Prioritization occurs by providing that the consent must be obtained or notice given to any man who is the child's father by marriage, adoption, or an order of paternity, and *only if* there is no one meeting those requirements, then to any man who has been established to be the father by scientific testing (determination of parentage language found in chapter 742), and only if there is no one meeting the first two categories, to any man who meets the following three categories:

- (1) has acknowledged in writing that he is the father and filed such acknowledgment with the Office of Vital Statistics of the Department of Health;
- (2) has provided support to the mother during her pregnancy in a repetitive customary manner, to include a man who under law can be found to have abandoned his child by not providing such prenatal support to the mother; or
- (3) has been identified under oath by the birth mother as the father.

Further, the bill requires that consent be obtained or notice be given to 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.

Most of the categories of "father" exist in current law; CS/HB 197 adds three new categories: fathers by scientific testing, fathers identified by the mother in an action to terminate parental rights, and persons who are parties in pending proceedings regarding the minor. Two of these new categories are only applicable if there is no father determined by legitimacy. Currently, a person who meets one of the three added criteria could later challenge an adoption and any underlying termination of parental rights. Thus, requiring consent, an affidavit of nonpaternity, or notice would preclude such challenges and related litigation.

The consent or affidavit of nonpaternity is valid and binding upon execution, unless withdrawn pursuant to the requirements in this bill. The bill adds the requirement that the witnesses' driver's license numbers or state identification numbers must be included on the consent or on the affidavit of nonpaternity. The person who signs the consent or affidavit of nonpaternity has the right to have at least one of the witnesses be of their choosing. Current law requires that certain disclosures be made to the adoptive parents; the bill requires the person who signs the consent to also sign an acknowledgment of the parent's rights. The bill sets out the form of the acknowledgment. Copies of each consent signed must be provided to each person whose consent is required.

Waiting Period (revocation period does not apply) - 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. The waiting period allows birth mothers to recover from the effects of childbirth. Thus, the waiting period applies only to mothers who place their children following birth. Upon execution, the consent may only be withdrawn upon a judicial finding of fraud or duress.

Revocation of consent - When the minor to be adopted is not placed for adoption upon release from a licensed hospital or birth center following birth, consent may be withdrawn for any reason by notifying the adoption entity in writing by certified U.S. mail, return receipt requested, not later than three business days after execution of the consent or one business day after the date of the mother's discharge from a licensed hospital or birth center, whichever occurs later. Upon receiving written notice of a person's desire to withdraw consent, the adoption entity must contact the prospective adoptive parent to arrange a time certain for the adoption entity to regain physical custody of the child. Absent a court order for continued placement of the minor, the adoption entity must return the minor within three days to the physical custody of the person withdrawing consent. Thereafter, consent may be withdrawn only when the court finds that the consent was obtained by fraud or under duress. An affidavit of nonpaternity may be withdrawn only if the court finds that the affidavit was obtained by fraud or duress.

"Business day" is defined in the bill as a day on which the United States Post Office accepts certified mail for delivery.

Notwithstanding the waiting period or the 3-day revocation period, consent may be revoked at any time prior to the placement of the minor with the prospective adoptive parents.

Disclosure - The bill revises the current disclosure requirements to apply to all adoptions and requires identical disclosure to persons required to consent to the adoption and to prospective adoptive parents. The bill includes the form of the required disclosure and sets forth when the disclosure must be provided. The bill retains the current requirement that the disclosure be acknowledged, but includes acknowledgment from persons required to consent to the adoption and from prospective adoptive parents, and gives several specific options for evidencing that disclosure was given.

Proceeding to terminate parental rights pending adoption -

- **Jurisdiction:** The bill retains current law except to require that the same judge who handled the termination of parental rights proceeding also conduct the adoption proceeding whenever possible.
- **Venue:** Unless a motion for change of venue is granted, a petition to terminate parental rights pending adoption must be filed in the county where the child resided for the prior six months; or if the child is under six months of age or has not continuously resided in the same county for the previous six months, in the county where the parent resided at the time of the execution of the consent or affidavit of nonpaternity; or if no consent or affidavit, in the county where the birth mother resides.
- **Prerequisite:** The bill provides that unless the adoptee is an adult or the minor has been the subject of a judgment terminating parental rights under ch. 39 (similar provision already exists in that chapter), 30 days must elapse between the termination of parental rights and the adoption.

Petition for termination of parental rights pending adoption - The bill combines elements of current law applying to terminations for agencies under chapter 39 and those laws applying to intermediaries under chapter 63. The petition may be filed by a parent or legal custodian of the minor, or by the adoption entity, with the written consent of the parent or legal custodian. The consent, affidavit of nonpaternity, of affidavit of diligent search for each person whose consent is required must be attached to the petition. An answer to the petition is not required, but may be pleaded orally before the court or filed in writing. Any person present at the hearing to terminate parental rights pending adoption must be advised by the court that he or she has a right to ask that the hearing be reset so that the person may consult with an attorney; be given the opportunity to deny the allegations of the petition; and be given the opportunity to challenge the validity of any consents or affidavits of nonpaternity signed by any person.

Notice of proceeding to terminate parental rights pending adoption - While current law requires the petitioner to make good-faith efforts to notify persons required to consent within 60 days after filing the petition (which cannot be filed until after birth), the bill requires that the adoption entity must begin the inquiry and diligent search process no later than seven days after the date the person seeking to place the minor for adoption has evidenced in writing a desire to place the minor for adoption, or no later than seven days after the date any money is provided by the adoption entity for the benefit of the person seeking to place a minor for adoption.

The bill incorporates a portion of chapter 39 as currently applied to agencies as well as current procedural law in requiring personal service or constructive service depending on the circumstances. Under current law, a termination of parental rights related to an adoption under ch. 63, F.S., can occur no sooner than 90 days after placement of the child. s. 63.122(1), F.S. The bill allows the petition for termination of parental rights pending adoption to be filed anytime after the birth of the child. Service of process can occur immediately. The bill provides that parental rights may be terminated no sooner than 30

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

Hearing to terminate parental rights pending adoption - The court may terminate parental rights only after a full evidentiary hearing. The court may only hold the hearing when a consent has been executed and filed; an affidavit of nonpaternity has been executed and filed; **or** notice has been provided. The hearing may not be held until at least 30 days have elapsed since the date of personal service, at least 60 days have elapsed since the first date of publication of constructive service, or an affidavit of nonpaternity has been executed and filed with the court; the minor named in the petition has been born; and the petition contains all the information required.

- Grounds for terminating parental rights pending adoption: The court may issue a judgment terminating parental rights pending adoption if the court determines by clear and convincing evidence that each person whose consent is required:

- (a) has executed a valid consent that has not been withdrawn;
- (b) has executed an affidavit of nonpaternity;
- (c) has been properly served notice and has failed to file a written answer or appear;
- (d) has been properly served notice and has abandoned the child;
- (e) is an incapacitated parent of the child with restoration of competency found to be medically improbable;
- (f) is a legal guardian, other than a parent, of the child who is found by the court to be withholding consent unreasonably; or
- (g) is the spouse of the person to be adopted and found by the court to be withholding consent unreasonably.

These last four categories appear in current law as grounds for waiving consent. F.S. 63.072.

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

CS/HB 197 requires that in making a determination of abandonment the court must consider:

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

Further, in language similar to F.S. 39.806, the bill provides that the child has been abandoned when the parent is incarcerated under certain criteria. The criteria in the bill is similar to language recently used by the Florida Supreme Court. The court ruled that the commission of a violent criminal offense by the natural father during the mother's pregnancy and a resultant prison sentence which will confine the natural father for a substantial period of the child's majority are factors which may support a finding of abandonment under chapter 63. W.T.J. v. E.W.R., 23 FLW S604 (Fla. Dec. 3, 1998).

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

Judgment terminating parental rights pending adoption - The clerk of the court shall mail a copy of the judgment within 24 hours after filing to the department, the petitioner, and the respondent. The judgment is voidable if, upon the motion of a parent, the court finds that a person knowingly gave false information that prevented a parent from timely making known his or her desire to assume parental responsibilities toward the child. The motion must be filed no later than two years after the date of judgment to which the motion is directed was entered. No later than thirty days after the filing of such motion, the court must conduct an evidentiary hearing to determine what contact, if any, shall be permitted between a parent and the child pending resolution of the motion; current law provides no procedure to determine the contact between the parent and the minor in the event that a challenge is made to the termination of parental rights.

If the court does not find by clear and convincing evidence that parental rights of a parent should be terminated pending adoption, the court must dismiss the case with prejudice and the parent's rights remain in full force under the law. The court must include written findings in support of the dismissal, and provide for the placement of the minor. Further proceedings must be brought in a separate custody action, a dependency action, or a paternity action.

Report of intended placement; preliminary home study - The bill specifies that if the minor is placed in the home before parental rights are terminated, the placement is an at-risk placement, which requires the prospective adoptive parents to acknowledge in writing that the minor is subject to removal from the prospective adoptive home. This language mirrors the requirement of Rule 65C-15.002, Florida Administrative Code.

Filing of petition for adoption - A petition for adoption may not be filed until 30 days after the date the judge signed the judgment terminating parental rights. The petition must be

filed jointly by the adoption entity and each person who enters into the agreement. The petition must include the case style and date of entry of the order terminating parental rights, and a certified copy of the order must be attached to the petition. The petition must be filed in the county where the termination of parental rights was granted unless the court changes the venue to the county where the petitioner resides, the minor resides, or the adoption entity is located.

Notice of hearing on adoption - Notice provisions are the same as in current law. Retains current law 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.

Hearing and judgment of adoption - At the conclusion of the hearing, after the court determines that the date for a parent to file an appeal of a valid judgment terminating parental rights has passed and no appeal is pending, and that the adoption is in the best interest of the person to be adopted, a judgment of adoption shall be entered.

Statute of repose - The bill retains current law providing that a consent may be withdrawn upon a court finding that it was obtained by fraud or under duress. s. 63.082(5), F.S. Currently, the statute of limitations for fraud is four years. s. 95.11(3), F.S. For an action relating to the determination of paternity, the statute of limitations does not begin to run until the child reaches majority. *Id.* Adoptive parents face long term uncertainty if the judgment is based upon "waived" consent or the birth father remains unidentified and unlocated. Even maternal grandparents who were not parties to the adoption have been granted standing to attack an adoption which was obtained through the concealment of material facts. *Ramey v. Thomas*, 383 So.2d 78 (Fla. 5th DCA 1980).

"Fraud on the court is a traditional ground to collaterally attack a final judgment many years after it was rendered, on the legal theory that a judgment so obtained is a legal nullity or void." *Preston v. Tolone*, 661 So.2d 967 at 969 (Fla. 5th DCA 1995). Fraud on the part of the mother to "thwart" a father from exercising his paternal rights was the cause of a number of challenged adoptions in recent years. See *In re Petition of Doe*, 638 N.E. 2d 181,181(III. 1994)(Baby Richard)(mother told father baby died), *Stefanos-Rivera-Berrios*, 670 So.2d 12 (Fla. 1996)(mother led father to believe she was getting an abortion). Further, even a signed consent could result in an overturned adoption years later if the man who signed the consent was not in fact the biological father. See *In interest of B.G.C.*, 496 N.W. 2d 239, 240-241 (Iowa 1992)(Baby Jessica).

The bill creates F.S. 63.182 providing an absolute bar to an action or proceeding to vacate, set aside, or otherwise nullify an order of adoption or an underlying order terminating parental rights, one year after entry of the order terminating parental rights, with the exception of an action based on fraud or duress, which must be brought within 2 years of the order terminating parental rights.

Out-of-state placement - Revises the law to apply equally to both intermediaries and agencies: neither may place a child out of state unless the child is a special needs child, a relative, or a step-parent adoption. Concerns have been raised that such a restriction might incur constitutional challenges due to the inclusion of "black or racially mixed parentage" as one of the attributes that can qualify a child as "special needs." s. 409.166(2)(a), F.S. Similarly, the federal definition of special needs in pertinent part includes determinations based upon ethnic background or membership in a minority group. 42 USC s. 673. However, the success of such a challenge is questionable. The Department of Children and Family Services reports in their Adoption Related Summary Report for FY 1997-1998, that there

were 1,605 children under the care and custody of the Department free and available for adoption. Nearly twice as many of these children were of black or racially mixed parentage as were not. These statistics may present a sufficiently compelling purpose to widen the search for permanent placements for these children beyond Florida. It should be noted that both the Florida Legislature, in passing legislation providing free tuition to Florida's colleges for foster children who are adopted in Florida, and the federal government, in allowing adoptive parents to take a credit beginning in 1997 of up to \$5,000 for qualifying expenses paid to adopt a special needs child, have recognized that such children are more difficult to place and have provided incentives in response. For example, in 1996 the Florida Legislature passed legislation providing that *foster children* who are adopted in Florida may receive a waiver of tuition costs to attend Florida's colleges. s. 239.117(4)(c), F.S. The federal government, beginning in 1997, allows adoptive parents to take a credit beginning in 1997 of up to \$5,000 for qualifying expenses paid to adopt a *special needs child*. See IRS publication 968, p. 2 (revised January 1998).

State Registry of Adoption Information - The bill requires the Department to include in the adoption registry the certified statement of the final decree of adoption provided by the clerk of the court. The Department is required to maintain the registry records for the time required by rules of the Department, or for 99 years, whichever is greater.

Prohibited acts - Section 63.039 is created, which clarifies the duties of adoption entities to prospective adoptive parents. In addition to the criminal penalties already provided for in current law, the bill provides that an adoption entity that materially fails to meet a specified duty, may be liable to the prospective adoptive parents for damages caused by such acts or omissions. If a court finds that a consent was obtained by fraud or duress attributable to the adoption entity, the court must award all sums paid by the prospective adoptive parents. The court may also award reasonable attorney's fees and costs. The bill allows the award of damages to be paid by an applicable insurance carrier on behalf of the adoption entity. If a person whose consent is required prevails in an action to set aside a consent, a judgment terminating parental rights pending adoption, or a judgment of adoption, the court must award a reasonable attorney's fee to the prevailing party, which may be paid by an applicable insurance carrier on behalf of the adoption entity. The court is required to provide to The Florida Bar any order that imposes sanctions against an attorney, and provide to the Department any order that imposes sanctions against an agency.

Fees - F.S. 63.097 is amended to provide consistency among the various organizations that handle adoptions. The bill:

- (7)specifies the fees and expenditures related to the adoption that may be collected from adoptive parents by the adoption entity;
- (8)prohibits the charging of certain fees including nonrefundable lump sum payments and facilitation fees;
- (9)allows a party to an agreement for payment of fees, costs and expenditures related to an adoption to cancel the agreement within a period of three business days after signing it;
- (10)requires that the adoption entity file an affidavit with the court detailing all fees, costs, and expenditures, and the basis for such, related to the termination of parental rights and subsequent adoption; and
- (11)requires that the adoption entity provide a copy of the affidavit to the adoptive parents at the time the affidavit is executed.

The court must issue a separate order approving or disapproving the fees, costs, and expenditures itemized in the affidavit. The court may reject in whole or in part any fee, cost,

or expenditure listed if the court finds that the expense is contrary to ch. 63; not supported by receipt in the record; or not deemed by the court to be a reasonable expense.

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

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

Yes.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill amends F.S. sections 39.01, 39.703, 39.802, 39.806, 39.811, 39.812, 63.022, 63.032, 63.0425, 63.052, 63.062, 63.082, 63.085, 63.092, 63.097, 63.102, 63.112, 63.122, 63.125, 63.132, 63.142, 63.152, 63.162, 63.165, 63.182, 63.202, 63.207, 63.212, 63.219, 63.301, 984.03, and 985.03.

The bill creates F.S. sections 63.037, 63.038, 63.039, 63.087, 63.088, and 63.089.

The bill repeals F.S. section 63.072.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends F.S. 39.703 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 2: Amends F.S. 39.802 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 3: Amends F.S. 39.806 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 4: Amends F.S. 39.811 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: Amends F.S. 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. 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 revise several definitions, and to put the definitions in alphabetical order:

- (a) "intermediary" is revised to delete physicians.
- (b) "suitability of the intended placement" is revised to include any familial relationship between the child and the prospective placement.
- (c) "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.
- (d) "parent" is defined as in s. 39.01, F.S.

Section 8: Section 63.037 is created 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: Section 63.038 is created. Provides that a person who knowingly and willfully provides false information, or who with the intent to defraud, accepts benefits related to the same pregnancy from more than one agency or intermediary without disclosure, commits a misdemeanor of the second degree. Such person is liable for damages caused by such acts or omissions. Allows a person seeking to collect moneys to do so by filing a civil action or be awarded restitution in a criminal prosecution.

Section 10: 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 to provide to The Florida Bar any order that imposes sanctions against an attorney for violations of ch. 63. Requires the court to provide to the department any order that imposes sanctions against an agency. Requires that the order be provided 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 11: Amends F.S. 63.0425 to conform to the new definition of adoption entity, with regard to a grandparent's right to adopt.

Section 12: Amends F.S. 63.052. Rewords current requirements regarding placement of a minor but clarifies 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. Provides 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.

Section 13: The bill amends 63.062 regarding persons who must consent. See the discussion of consent on p.8 of this analysis.

Section 14: Amends F.S. 63.082 regarding the execution of consent or affidavit of nonpaternity. 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. Allows 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, provides that consent may be withdrawn for any reason by notifying the adoption entity in writing by certified mail, return receipt requested, not later than three business days after execution of consent or one 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 three 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.

Notwithstanding the waiting period or the 3-day revocation period, consent may be withdrawn at any time prior to the placement of the minor with the prospective adoptive parents.

Section 15: 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 16: 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 17: 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 18: 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.

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 two 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 19: 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 20: 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 ch. 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 which 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 21: 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 three business days in which to cancel the contract. The contract may not require and the court may not approve any lump-sum payment which 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 22: 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 23: 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 24: Amends F.S. 63.125 regarding the final home investigation to make technical and conforming changes.

Section 25: 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 26: Amends F.S. 63.142 regarding judgment 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 27: Amends F.S. 63.152 to require the clerk of court to mail a copy of the new birth record to the state registry of adoption information.

Section 28: Amends F.S. 63.162 to conform to the new definition of adoption entities with regard to confidentiality requirements.

Section 29: 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 30: Substantially rewords F.S. 63.182. Provides that an action 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 two years, must be filed within one year after entry of the order terminating parental rights.

Section 31: 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 32: Amends F.S. 63.207 regarding out-of-state placement. Prohibits out-of-state placement of minors unless the child is a special needs child.

Section 33: Amends F.S. 63.212 relating to prohibited acts to make technical and conforming changes.

Section 34: Amends F.S. 63.219 to conform to the new definition of adoption entity as it relates to sanctions.

Section 35: Amends F.S. 63.301 to conform to the new definition of adoption entity as it relates to the advisory council on adoption.

Section 36: Amends F.S. 39.01 to make technical and conforming changes to the definition of parent.

Section 37: Amends F.S. 984.03 to make technical and conforming changes to the definition of parent.

Section 38: Amends F.S. 985.03 to make technical and conforming changes to the definition of parent.

Section 39: Repeals F.S. 63.072, regarding persons whose consent to an adoption may be waived.

Section 40: Provides that any petition for adoption filed before October 1, 1999, shall be governed by the law in effect at the time the petition was filed.

Section 41: Provides that this act shall take effect October 1, 1999.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The Department of Children and Family Services has determined that this bill will not have a fiscal impact.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The bill requires termination of parental rights and finalization of the adoption to be handled in two separate proceedings, which may result in additional costs. However, it is also likely that each procedure will be half as long as a current adoption and therefore there may be an increased cost involving travel time to court. The travel costs may be greater if the two hearings occur in different venues. There will be a slight additional cost for filing an affidavit of fees and expenditures in each case. Further, there may be a slight additional cost for copying and distribution of the disclosure form to the parents and adoptive parents as required by the bill. However, a cost savings would be expected if fewer appeals were filed.

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

V. 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:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with municipalities.

VI. COMMENTS:

N/A

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 6, 1999, the Committee on Family Law and Children adopted an amendment to HB 197, that removed everything after the enacting clause, and replaced it with language that made several substantive changes, and numerous technical and conforming changes. The remove-everything amendment and the amendments to it were adopted as a committee substitute. This analysis is to the committee substitute. The changes made by the remove-everything amendment are as follows:

- a.allows the department the option to place children with either licensed or registered agencies;
 - b.requires a medical history of the minor under specified circumstances;
- c.allows damages to be awarded under specific circumstances; the original bill allowed recovery of "sums paid by anyone who paid sums permitted under this chapter in anticipation or in connection with an adoption."
- d.allows receipt of disclosure to be evidenced by the certified mail return receipt;
- e.deletes the requirement that a mother must include her address in the petition to terminate parental rights; retains the requirement that the mother must include her city, county, and state of residence;
- f.adds the ability to question current in-laws when conducting a diligent search;
- g.adds the ability to make inquiry of specified medical providers when conducting a diligent search;
- h.eliminates the reference to "birth" preceding the terms "father", "parent", and "mother" referring instead to "parent" as defined in chapter 39.

In addition, the Committee adopted several amendments to the above amendment, as follows:

- i.1A: allows licensed adoption entities that are accredited to recover the costs of counseling they incur;
- j.1B: allows applicable insurance carriers to pay damage awards on behalf of the adoption entity;
- k.1C-1E: allows venue of petition to be moved in accordance with s. 47.122, F.S.;
- l.2A-2H: allows consent to be revoked at any time prior to the placement of the minor with the prospective adoptive parents;
- m.3: amends the statute of repose to allow 2 years to file a challenge if the challenge is based on fraud or duress;
- n.4: clarifies the information to be included in the constructive notice to require publication of cities in which the mother resided or traveled, in which conception may have occurred.

The remove-everything amendment and the amendments to it were adopted as a committee substitute. This analysis is to CS/HB 197.

VIII. SIGNATURES:

COMMITTEE ON Family Law and Children:
Prepared by:

Staff Director:

Stephanie Olin Birtman

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DATE: May 11, 1999
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FINAL ANALYSIS PREPARED BY THE COMMITTEE ON FAMILY LAW AND CHILDREN:
Prepared by: Staff Director:

Carol Preston

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