

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/CS/SB 1084

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; Senator Rich, and others

SUBJECT: Termination of Parental Rights/Adoption/Paternity

DATE: April 11, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Jameson	CF	Fav/CS
2.	Daniell	Maclure	JU	Fav/CS
3.	Hendon	Sadberry	JA	Favorable
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill substantially amends Florida law relating to adoption and the rights and responsibilities of unmarried biological fathers. The bill:

- Mandates that prospective adoptive parents acknowledge receipt of adoption disclosures;
- Authorizes service of process by publication in termination of parental rights actions;
- Makes changes to the definitions of “child,” “parent,” “primarily lives and works outside Florida,” and “unmarried biological father”;
- Clarifies that certain adoption proceedings are not exempted from new requirements proposed by the bill for disclosure to adoptive parents;
- Clarifies that an adoption entity has an affirmative duty to provide an adoption disclosure statement to all persons whose consent to the adoption is required;
- Provides that an unmarried biological father who fails to file a claim of paternity with the Putative Father Registry prior to the date a petition for termination of parental rights is filed is also barred from filing a paternity claim, with some exceptions;

- Clarifies that notice must be served to an unmarried biological father if he secures a paternity judgment or files a paternity affidavit prior to the date that a petition for termination of parental rights is filed, and provides for the court to enter a default under certain circumstances;
- Requires an adoption entity to serve a notice of intended adoption plan on any known and locatable unmarried biological father, unless the unmarried biological father signs a consent for adoption or an affidavit of nonpaternity;
- Provides that the notice and consent provisions of the chapter do not apply to cases in which a child is conceived as the result of a violation of certain criminal laws of this state or another state, and adds to the list of applicable criminal laws, the law regarding sexual activity with certain minors;
- Limits the revocation period for consent to adoption to three business days, and provides instruction for the placement of a child if consent is withdrawn;
- Modifies the requirements for adoption disclosures;
- Clarifies that in relative, adult, and stepchildren adoptions, the petitioner may file a joint petition for termination of parental rights and adoption;
- Provides that an answer and an appearance are required in response to a petition for termination of parental rights, and that the failure to respond or appear may constitute grounds for termination of parental rights;
- Adds language to the diligent search section, stating that anyone who is contacted by a petitioner or adoption entity for information must release the requested records;
- Provides that abandonment as a result of incarceration may be found when the time period for which a person has been, as well as is expected to be, incarcerated constitutes a significant portion of the child's minority;
- Clarifies that the name by which a child was previously known may not be disclosed in adoption documents, unless it is a joint petition for the adoption of a stepchild, relative, or adult;
- Adds "privacy" to the reasons a child's or a parent's name may be deleted from a notice of adoption;
- Provides that an affidavit of expenses does not apply in certain circumstances;
- Provides that the petitioner or adoption entity must file an affidavit under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);
- Clarifies that a foreign decree terminating a parental relationship is recognized in this state; and
- Requires the clerk of court to provide each man who files a paternity action with a disclosure advising him of the requirement to file with the Putative Father Registry.

This bill substantially amends the following sections of the Florida Statutes: 39.812, 49.011, 63.032, 63.037, 63.039, 63.0425, 63.054, 63.062, 63.063, 63.082, 63.085, 63.087, 63.088, 63.089, 63.092, 63.102, 63.122, 63.132, 63.135, 63.142, 63.192, 63.212, 742.021, and 742.10. This bill creates section 63.236, Florida Statutes.

II. Present Situation:

Adoption is the “act of creating the legal relationship between parent and child where it did not exist.”¹ The Legislature enacted the Florida Adoption Act in 1973,² to “protect and promote the well-being of persons being adopted and their birth and adoptive parents and to provide to all children ... a permanent family life.”³ The Florida Legislature conducted a major rewrite of the Florida Adoption Act in 2001, to “provide safeguards, uniformity, and clarification regarding proceedings for termination of parental rights and finalization proceedings in adoptions.”⁴ Due to the substantial challenges the 2001 adoption reform encountered, the Legislature again revised Florida’s adoption law in 2003.⁵

Putative Father Registry (See, among others, sections 7, 8, 9, 11, 13, 14, and 24 of this bill)

In 2003, Florida enacted a Putative Father Registry (Registry), joining at least 23 other states with similar legislation.⁶

The Registry is maintained by the Office of Vital Statistics of the Department of Health (DOH or the department).⁷ The department is required, within existing resources, to provide and distribute a pamphlet or publication informing the public about the Registry.⁸ According to the department, 54, 110, and 184 men registered with the Registry in 2004, 2005, and 2006, respectively.⁹ At the same time, there were 89,976, 96,895, and 105,770 children born out of wedlock in Florida in 2004, 2005, and 2006, respectively.¹⁰

If a man thinks that he may be the father of a child born or about to be born to a woman, and that man wishes to establish parental rights, he must file as a “registrant” with the Registry. By filing with the Registry, the potential father is claiming paternity for the child and confirms his willingness to support the child.¹¹ Additionally, he consents to DNA testing and may ultimately be required to pay child support.¹² A claim of paternity may be filed at any time prior to the child’s birth, but a claim of paternity may not be filed after the date a petition is filed for

¹ Section 63.032(2), F.S.

² Chapter 73-159, s. 2, Laws of Fla. Chapter 63, F.S., the Florida Adoption Act, governs all Florida adoptions.

³ Section 63.022(3), F.S.

⁴ Comm. on Child & Family Security, House of Representatives, *House of Representatives as Further Revised by the Child & Family Security Final Analysis, CS/HB 141* (June 27, 2001), available at <http://www.flsenate.gov/data/session/2001/House/bills/analysis/pdf/2001h0141z.cfs.pdf> (last visited March 26, 2008).

⁵ See ch. 2003-56 and ch. 2003-58, Laws of Fla.

⁶ Comm. on Children, Families, and Elder Affairs, Fla. Senate, *Open Government Sunset Review of Section 63.0541, F.S., Relating to the Florida Putative Father Registry*, 4 (Interim Project Report 2008-206) (Oct. 2007), available at http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-206cf.pdf (last visited March 26, 2008).

⁷ Section 63.054(1), F.S.

⁸ Section 63.054(11), F.S.

⁹ Conversation with Betty Shannon, Office of Vital Statistics, Dep’t of Health (March 28, 2008). In 2007, 248 men registered with the Florida Putative Father Registry.

¹⁰ Florida Dep’t of Health, Fla. Vital Statistics Annual Reports, *Live Births*, 39, available at <http://www.flpublichealth.com/VSBOOK/pdf/2004/Births.pdf>, <http://www.flpublichealth.com/VSBOOK/pdf/2005/Births.pdf>, and <http://www.flpublichealth.com/VSBOOK/pdf/2006/Births.pdf> (last visited March 27, 2008).

¹¹ Section 63.054(1), F.S.

¹² Section 63.054(2), F.S.

termination of parental rights.¹³ The putative father may change his mind and, prior to the birth of the child, execute a notarized revocation of the claim of paternity.¹⁴ Once that revocation is received, the claim of paternity is deemed null and void. Additionally, if a court determines that a registrant is not the father of a minor, the court will order the man's name removed from the Registry.¹⁵

The Registry, and the concurrent revisions to ch. 63, F.S., were designed to protect the rights of all parties to an adoption proceeding: the rights of the unmarried biological father to notice and an opportunity to be heard, the rights of the birth mother to make an independent decision when the father fails to act, and the rights of the adoptive parent in retaining custody of the child.¹⁶

The Legislature's findings with respect to the 2003 revisions to ch. 63, F.S., are codified in s. 63.053, F.S., and summarized as follows:

- If an unmarried biological father fails to take the actions that are available to him to establish a relationship with his child, his parental interest may be lost entirely;
- The interests of the state, the mother, the child, and the adoptive parents outweigh the interest of an unmarried biological father who does not take action in a timely manner to establish and demonstrate a relationship with his child;
- An unmarried biological father has the primary responsibility to protect his rights and is presumed to know that his child may be adopted without his consent unless he complies with the provisions of this chapter and demonstrates a prompt and full commitment to his parental responsibilities; and
- A birth mother and a birth father have a right to privacy.¹⁷

The United States Supreme Court has upheld the constitutionality of putative father registries, holding that an unmarried biological father does not have an absolute constitutional right to his biological child and that his rights are protected by the due process clause only if he takes some responsibility for the child.¹⁸ The Florida Supreme Court has recognized this rationale as well.¹⁹ Since its enactment, Florida's Registry has been the subject of conflicting case law questioning its applicability.²⁰ In 2007, the Florida Supreme Court accepted *J.A. v. Heart of Adoptions, Inc.*,²¹ for review, and answered the following question, which had been certified as a matter of great public importance:

¹³ Section 63.054(1), F.S.

¹⁴ Section 63.054(5), F.S.

¹⁵ *Id.*

¹⁶ Amy U. Hickman and Jeanne T. Tate, *Florida's Putative Father Registry: More Work is Needed to Follow the Established National Trends Toward Stable Adoption Placements*, 82 FLA. B.J. 42, 42-43 (Jan. 2008); *see also* s. 63.022(1), F.S.

¹⁷ *See also* ch. 2003-58, Laws of Fla.

¹⁸ *Lehr v. Robertson*, 463 U.S. 248, 260-61 (1983).

¹⁹ *Matter of Adoption of Doe*, 543 So. 2d 741, 748-49 (Fla. 1989); *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966-67 (Fla. 1995).

²⁰ *See J.S. v. S.A.*, 912 So. 2d 650 (Fla. 4th DCA 2005); *A.F.L. v. Dep't of Children and Families*, 927 So. 2d 101 (Fla. 5th DCA 2006); *B.B. v. P.J.M.*, 933 So. 2d 57 (Fla. 1st DCA 2006); *In re Adoption of Baby A.*, 944 So. 2d 380 (Fla. 2d DCA 2006); *In re Baby R.P.S.*, 942 So. 2d 906 (Fla. 2d DCA 2006); *S.D.T. v. Bundle of Hope Ministries, Inc.*, 949 So. 2d 1132 (Fla. 1st DCA 2007).

²¹ *J.A. v. Heart of Adoptions, Inc.*, 32 Fla. L. Weekly D807 (Fla. 2d DCA 2007).

IN A PROCEEDING ON A PETITION FOR TERMINATION OF PARENTAL RIGHTS PENDING ADOPTION, MAY THE UNMARRIED BIOLOGICAL FATHER'S RIGHTS IN RELATION TO THE CHILD BE TERMINATED BASED ON THE UNMARRIED BIOLOGICAL FATHER'S FAILURE TO PROPERLY FILE A CLAIM OF PATERNITY WITH THE FLORIDA PUTATIVE FATHER REGISTRY?²²

In response, the Court held that “the rights of an unmarried biological father in relation to the child, who is known or identified by the mother as the potential father and who is locatable by diligent search, may be terminated based on his failure to file a claim with the Florida Putative Father Registry only if the father was served with notice under section 63.062(3)(a), Florida Statutes (2005), and he fails to comply with the requirements of that subsection within the thirty-day period.”²³

The Florida Supreme Court's decision, while it upholds the Registry, “swings the burden of providing notice back to the birth mother and the adoption entity and the risk of disrupted placements onto the adoptive parents and the child.”²⁴ Because the opinion addresses situations in which a mother identifies a potential, locatable biological father, it leaves uncertain the applicability of the Registry in cases in which the mother does not identify the father, either fraudulently or as a matter of privacy.²⁵

In addition, while the majority recognized the provision in statute (s. 63.088(1), F.S.) which provides that an unmarried biological father is on notice of a potential pregnancy and adoption when he engages in a sexual relationship with a woman, Chief Justice Lewis' concurring opinion questioned whether such notice was sufficient, absent receipt of an adoption plan, creating a potential for disrupted placements in cases when the father is not identified until after placement.²⁶

Disclosure to Prospective Adoptive Parents (See sections 1, 5, and 11 of this bill)

Adoption entities are required to provide a written disclosure statement to individuals seeking to adopt a child and to individuals seeking to place a child for adoption.²⁷ The disclosure must notify the individuals of the following:

- Name, address, and telephone number of the adoption entity providing the disclosure;
- The adoption entity does not provide legal representation or advice;
- A child cannot be placed into a prospective adoptive home unless the prospective adoptive parents have received a favorable preliminary home study;
- Valid consent for adoption may not be signed by the birth mother until 48 hours after the birth of the child or after she is discharged from the hospital or birth center;

²² *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 191 (Fla. 2007).

²³ *Id.*

²⁴ Amy U. Hickman and Jeanne T. Tate, *supra* note 16, at 46.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 63.085, F.S.

- Consent for adoption signed before the child attains the age of six months is binding and irrevocable from the moment it is signed and a consent for adoption signed after the child attains the age of six months is valid from the moment it is signed, but may be revoked until the child is placed in an adoptive home, or up to three days after it was signed, whichever period is longer;
- Consent for adoption is not valid if the signature of the person who signed the consent was obtained by fraud or duress;
- There are alternatives to adoption, including foster care, relative care, and parenting the child;
- The birth parent has the right to have someone witness the signing of the consent or affidavit of nonpaternity;
- The birth parent, 14 years of age or younger, must have a parent, legal guardian, or court-appointed guardian ad litem to assist and advise the birth parent as to the adoption plan;
- The birth parent has a right to receive supportive counseling; and
- Payment of living or medical expenses by the prospective adoptive parents prior to the birth of the child does not, in any way, obligate the birth parent to sign the consent for adoption.²⁸

Current law does not specifically require the disclosure of the child's background information to the prospective adoptive parents, but complete disclosure can benefit the child, the adoptive family, and the adoption entity as follows:

- Families who know a child's complete medical, social, and placement history are better able to make an informed decision about whether they are emotionally and financially prepared to meet the child's needs;
- It ensures the child is placed in an environment that can meet his or her needs;
- It ensures the adopted person has full and accurate knowledge of his or her family, medical, and genetic history; and
- It helps protect agencies and intermediaries from wrongful adoption lawsuits.²⁹

Service of Process (See section 2 of this bill)

Service of process can be effectuated in several ways. Primarily, service of process occurs through actual delivery of a copy of the process to the witness or defendant, or through substitute service which can occur by delivery to a person's residence, or through notice by mail or publication, as allowed by law. Section 49.011, F.S., permits service of process by publication in a number of specified legal proceedings. Currently, it does not specifically allow service by publication in termination of parental rights proceedings pursuant to ch. 63, F.S.

In May 2006, the Supreme Court of Florida looked at the process-by-publication statute in the context of a paternity action and noted:

²⁸ *Id.*

²⁹ CHILD WELFARE INFORMATION GATEWAY, *Providing Background Information to Adoptive Parents, Bulletin for Professionals* (2003), http://www.childwelfare.gov/pubs/f_backgroundbulletin.cfm (last visited March 26, 2008).

The service of process statute does not permit constructive service of process in paternity cases, and there is no express provision within chapter 409 to authorize constructive service or to ensure that a legal father's interests are appropriately protected ... Whether the statutes should be modified to address this dilemma is a policy decision for the Legislature to decide.³⁰

Under this ruling, it appears that unless constructive service by publication is expressly permitted by s. 49.011, F.S., it is not permitted.

However, Florida's Family Law Rules provide that "[f]or constructive service of process on the legal father in any case or proceeding to establish paternity which would result in termination of the legal father's parental rights, the petitioner shall file an affidavit of diligent search and inquiry that conforms with Florida Family Law Rules of Procedure Form 12.913(c)."³¹ These rules apply to all actions concerning family matters, including adoption.³² It would appear that in light of the Florida Supreme Court's notation above, this rule is not able to be utilized because constructive service of process in ch. 63, F.S., proceedings are not specifically listed in s. 49.011, F.S.

Incarceration and Abandonment (See section 14 of this bill)

Section 63.089(4)(b), F.S., is substantively identical to s. 39.806(1)(d), F.S. Both sections provide that incarceration of a parent can be the basis for a finding of abandonment, and thus support termination of the parental rights of the incarcerated parent when "[t]he period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years."³³

In 2004, the Florida Supreme Court construed s. 39.806(1)(d), F.S., in response to certified conflict among the circuit courts. Specifically, the Court addressed the issue of whether s. 39.806(1)(d), F.S., was "solely forward-looking" or instead contemplated the entire period of incarceration (i.e., the portion already served, as well as the portion yet to be served).³⁴

In response, the Court held that

[B]efore the parental rights of a parent incarcerated in a state or federal correctional institution may be terminated under section 39.806(1)(d)(1), the trial court must find by clear and convincing evidence that the time remaining in the parent's incarceration constitutes a substantial portion of the time remaining before the child or children attain the age of eighteen years. Because the starting point for a termination proceeding is a petition alleging grounds for termination, the trial court should measure the time of

³⁰ *Dep't of Revenue v. Cummings*, 930 So. 2d 604, 609 (Fla. 2006) (internal citations omitted).

³¹ Fla. Fam. L. R. P. 12.070(c).

³² Fla. Fam. L. R. P. 12.010(a).

³³ Section 63.089(4)(b), F.S.

³⁴ *B.C. v. Dep't of Children and Families*, 887 So. 2d 1046, 1051 (Fla. 2004).

remaining incarceration and minority from the date that the petition is filed.³⁵

The Court did not state what specific percentage of a child's life constitutes "substantial" for purposes of s. 39.806(1)(d), F.S.

III. Effect of Proposed Changes:

This bill substantially amends Florida law relating to adoption and the rights and responsibilities of unmarried biological fathers.

Section 1

The bill amends s. 39.812, F.S., adding to the documents that must accompany a petition for adoption pursuant to ch. 39, F.S., a statement signed by the prospective adoptive parent, acknowledging receipt of all information required to be disclosed in accordance with s. 63.085, F.S. This section also removes superfluous language.

Section 2

The bill amends s. 49.011, F.S., authorizing service of process by publication in ch. 63, F.S., termination of parental rights (TPR) actions.

Section 3

The bill amends some of the definitions found in ch. 63, F.S., as follows:

- The definition of "child" is amended to read "any unmarried person under the age of 18 years who has not been emancipated by court order."
- The reference to the definition of "parent" in s. 39.01, F.S., is deleted and the definition of "parent" in ch. 63, F.S., means "a woman who gives birth to a child or a man whose consent to the adoption of the child would be required under s. 63.062(1). If a child has been legally adopted, the term 'parent' means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated or an alleged or prospective parent."³⁶
- The term "primarily lives and works outside Florida" is amended to clarify that the definition includes military personnel and other citizens (not just State Department employees) who live and work outside Florida for *more than* six months (six months and one day) per year, and who designate a state other than Florida as their place of residence.
- The definition of "unmarried biological father" is amended to clarify that the definition includes a man who has not been adjudicated to be the legal father *before* the filing of the

³⁵ *Id.* at 1054-55.

³⁶ Under the bill, the definition of "parent" is consistent in ch. 39 and ch. 63, F.S. However, the definition of "parent" in s. 39.01(48), F.S., provides that a person whose parental rights have been terminated, or who is an alleged parent, is *not* a "parent" *unless* his or her parental status falls under ss. 39.503(1) or 63.062(1), F.S. The bill does not provide for this exception in the ch. 63, F.S., definition.

petition to terminate parental rights, or has not executed an affidavit pursuant to s. 382.013(2)(c), F.S.³⁷

The bill also removes the definition of “minor,” which appears to be incorporated in the amended definition of “child,” and it rearranges the section, placing the defined terms in alphabetical order.

Section 4

The bill amends s. 63.037, F.S., to clarify that adoption proceedings initiated under ch. 39, F.S., are not exempted from the new requirements proposed by the bill, under section 11, for disclosure to adoptive parents.

Section 5

Section 63.039, F.S., is amended to clarify that an adoption entity has an affirmative duty to provide an adoption disclosure statement to all persons whose consent to the adoption is required. The bill removes the language that defined specific situations when a waiver of venue must be obtained and replaced that language with the words “if applicable.”

Section 6

The bill amends the catch line of s. 63.0425, F.S., to conform it to the section, which provides that a grandparent with whom a child has lived for at least six months within the 24-month period prior to the filing of a petition for TPR is entitled to notice, but not necessarily entitled to adopt.

Section 7

Section 63.054, F.S., is amended to clarify that an unmarried biological father who fails to file a claim of paternity with Florida’s Putative Father Registry (Registry) before a petition for TPR is filed is also barred from filing a paternity claim pursuant to ch. 742, F.S.³⁸

The bill provides that an unmarried biological father is excepted from the time limitations for filing a claim for paternity with the Registry or pursuant to ch. 742, F.S., if:

- He has been identified by the mother; and
- He has been served with notice of the intended adoption plan, and the mandatory response date is later than the date the petition for TPR is filed.

Under those circumstances, the unmarried biological father must file with the Registry or file a ch. 742, F.S., paternity claim within the 30-day response date to the notice of the intended

³⁷ Section 382.013(2)(c), F.S., provides, in relevant part, “If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father.”

³⁸ Chapter 742, F.S., deals with the determination of parentage.

adoption plan. The bill precludes the Office of Vital Statistics from recording a claim of paternity 30 days after service of the notice of intended adoption plan.

If the unmarried biological father is excepted from the time limitations for filing a claim for paternity with the Registry or pursuant to ch. 742, F.S., the bill requires the petitioner to submit a copy of the notice of intended adoption plan and proof of service to the Office of Vital Statistics.

The bill provides that a person or adoption entity petitioning for TPR or adoption has no obligation to search for a putative father who changes his address without notice to the Registry, unless the individual has actual (not constructive) notice of the registrant's address and whereabouts.

The bill provides that a Registry search is required in any proceeding for TPR or adoption, including stepparent and relative adoptions, in which parental rights are terminated simultaneously with the entry of the final judgment of adoption.

Section 8

The bill amends s. 63.062, F.S., clarifying that notice must be served to the father if:

- He was married to the mother at the time of conception;
- He has adopted the child;
- The child was adjudicated to be his child *before* a petition for TPR was filed;
- He filed a paternity affidavit *before* a petition for TPR was filed; or
- He has complied with the requirements of the Registry.

The bill provides that an adoption entity must serve a notice of intended adoption plan on any *known and locatable* unmarried biological father who is identified to the adoption entity by the mother *by the date she signs her consent for adoption* or who is identified by a diligent search of the Registry. The notice of intended adoption plan does not have to be served on the unmarried biological father if he signs a consent for adoption or an affidavit of nonpaternity. The bill provides that such notice may be served any time before the birth or placement of the child.

The bill requires that the notice include instructions for submitting a claim to the Registry, and requires the court to enter a default against an unmarried biological father or entity who does not timely file a claim with the Registry and a response with the court. The bill sets out the following specific actions required by the unmarried biological father to avoid default:

- He must file a claim of paternity with the Registry;
- He must file a verified response with the court, pledging his commitment to the child; and
- He must provide support for the birth mother and child.

An entity wishing to avoid default must file a verified response setting forth a legal basis for contesting the intended adoption plan, specifically addressing the best interests of the child.

The bill amends the venue provision in s. 63.062, F.S., providing that a transfer of venue is governed by ch. 63 and ch. 47, F.S.

Section 9

The bill amends s. 63.063, F.S., adding the word “strict” to clarify that each parent of a child conceived or born out of marriage must strictly comply with the requirements of ch. 63, F.S., thereby eliminating any suggestion that “substantial compliance” is sufficient.

Section 10

Section 63.082, F.S., is amended to provide that the notice and consent provisions of the chapter do not apply to cases in which a child is conceived as the result of a violation of certain criminal laws of this state *or another state*, and adding to the list of applicable criminal laws sexual activity with certain minors under s. 794.05, F.S..³⁹

The bill deletes provisions allowing a parent to revoke or rescind his or her consent to the adoption of a child who is older than six months at any time prior to placement of the minor with the prospective adoptive parents. The bill limits the revocation period to three business days.

The bill further amends s. 63.082, F.S., to provide that if an adoption entity receives timely,⁴⁰ written notice of an individual’s desire to withdraw consent to the adoption of a child older than six months who has been placed with prospective adoptive parents, the adoption entity must arrange to regain custody of the minor or file a motion for emergency hearing. If the court finds that placement of the child with the person who had custody immediately before adoption may endanger the child, or that the person seeking to withdraw consent is not required to consent, has abandoned the child, or has waived consent, the court shall order continuing the placement with the prospective adoptive parents. If the prospective adoptive parents do not desire continued placement, the court shall determine the placement that is in the child’s best interest.

Section 11

Section 63.085, F.S., is amended by adding required language to the adoption disclosure, which must be provided to parents and prospective adoptive parents. The additional language includes detailed information about the Registry and about the consequences of failure to respond as required.

The bill also requires adoption entities that identify prospective parents and supervise placement to provide prospective adoptive parents with information concerning the child’s background, if and when such information is disclosed to the adoption entity. The bill requires individuals and entities to release requested records to the adoption entity without requiring a subpoena or court

³⁹ Section 794.05, F.S., provides, in relevant part, “A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree ... If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61.”

⁴⁰ To be timely under the bill, notice must be given within three business days after execution of the consent.

order. The bill specifies that the following information, if available, must be disclosed to the prospective adoptive parents by the date of the final hearing:

- Family social and medical history;
- Biological mother's medical records documenting her prenatal care and the birth and delivery of the child;
- Child's medical records;
- Child's mental health, psychological, and psychiatric records, reports, and evaluations;
- Child's educational records;
- Records documenting all incidents that required the department to provide services; and
- Information concerning availability of adoption subsidies.

The adoption entity must redact information identifying the child's parents, foster families, siblings, relatives, and perpetrators of crimes against the child or involving the child.

The bill also requires the adoption entity to obtain written acknowledgment of the receipt of the disclosures required under this section of the statute.

Section 12

The bill amends s. 63.087, F.S., clarifying that venue lies in the county where the child lives or the adoption entity is located and that the court may transfer venue, in accordance with s. 47.122, F.S.,⁴¹ at the request of a parent whose consent is required.

The bill clarifies that in relative, adult, and stepchildren adoptions, the petitioner may file a joint petition for TPR and adoption, and the joint petition will be governed by ch. 63, F.S., unless otherwise provided.

The bill provides that an answer *and* an appearance are required in response to a petition for TPR, and the failure to respond or appear at the hearing may constitute grounds for TPR.⁴²

The bill specifies that the answer must be filed in accordance with Florida Family Law Rules of Procedure rather than with the Florida Rules of Civil Procedure.⁴³ The bill deletes the requirement that the petitioner provide notice of the final hearing, which is already required by the rules.⁴⁴

⁴¹ Section 47.122, F.S., provides that “[f]or the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.”

⁴² At least one Florida court has interpreted a similar provision in ch. 39, F.S., to require that, even after entering a default following a respondent's failure to appear, the trial court must receive evidence to support the grounds for TPR alleged in the petition. *See S.S. v. Dep't of Children and Family Servs.*, 2008 WL 239023, *1 (Fla. 3rd DCA 2008).

⁴³ Rule 12.020 of the Florida Family Law Rules of Procedure provides, in part, that “[t]he Florida Rules of Civil Procedure are applicable in all family law matters except as otherwise provided in these rules. These rules shall govern in cases where a conflict with the Florida Rules of Civil Procedure may occur.”

⁴⁴ *See generally* Fla. R. Civ. P. 1.080.

Section 13

The bill amends s. 63.088, F.S., providing that if a mother fails to identify an unmarried biological father to the adoption entity by the date she signs her consent for adoption, an unmarried biological father's claim that he did not receive notice is not a defense to the TPR. The bill also changes the mandatory language of the "Notice of Petition and Hearing to Terminate Parental Rights Pending Adoption" to clarify that the respondent must file an answer and must appear at the hearing.

The bill specifies that the court must conduct an inquiry into the identity of, among others:

- Any man who filed an affidavit of paternity before the petition for TPR was filed;
- Any man who was adjudicated to be the father before the petition for TPR was filed; and
- Any man whom the mother identified to the adoption entity as a potential biological father before she signed the consent for adoption.

The bill deletes "regulatory agencies" as a required source of information for a diligent search, and adds language to the diligent search section, stating that anyone who is contacted by a petitioner or adoption entity must release requested records, except when prohibited by law, without necessity of subpoena or court order. The bill does not provide for any penalty for failure to comply.

The bill provides that a TPR judgment approving a diligent search that fails to locate a person is valid and not subject to direct or collateral attack because the mother failed to provide the adoption entity with sufficient information to locate the person.

Section 14

The bill amends s. 63.089, F.S., providing that waiver of service in a TPR pending adoption proceeding can be demonstrated by executing and filing an affidavit of nonpaternity, consent for adoption, or other document which affirmatively waives service.

The bill amends the criteria for determining whether a child has been abandoned for purposes of establishing TPR when a parent is incarcerated. The bill requires the court to consider whether the period of time for which the parent *has been* or is expected to be incarcerated constitutes a significant (rather than substantial) portion of the child's minority.⁴⁵ The bill specifies that the time period for consideration begins on the date the parent becomes incarcerated.

The bill also provides that a judgment terminating parental rights pending adoption:

- Frees the child for adoption;
- Adjudicates the child's status;
- May not be challenged by a person claiming parental status who did not establish parental rights prior to the filing of the petition for TPR; and

⁴⁵ The bill does not specify what a "significant" portion of a child's minority means.

- May not be challenged by an unmarried biological father who the mother did not identify before she signed a consent for adoption or who was not located because the mother failed or refused to provide information to locate him. (See **Related Issues** section below.)

The bill confirms that all records pertaining to a TPR pending adoption proceeding are confidential and specifically provides that an unmarried biological father does not have standing to seek the court case number or access to the court file if the mother did not identify him before she signed a consent for adoption.

Section 15

The bill amends s. 63.092, F.S., to clarify that a report to the court regarding the intended placement of a minor by an adoption entity must be made two business days (rather than 48 hours) before the placement occurs.

Section 16

Section 63.102, F.S., is amended to clarify that the name by which the child was previously known may not be disclosed in a petition for adoption, notice of hearing, judgment of adoption, or court docket, unless it is a joint petition for the adoption of a stepchild, relative, or adult.

The bill provides that the petition for adoption must be filed in the county where the TPR petition was filed or granted or where the adoption entity is located. The court shall retain jurisdiction until a final judgment within or outside the state is entered.

Section 17

The bill amends s. 63.122, F.S., adding “privacy” to the reasons why the petitioner, a child, *or a parent’s* name may be deleted from a notice of adoption. According to the Department of Children and Families, this may make it difficult to match adult adoptees with their adoption records as part of the Florida Adoption Reunion Registry.⁴⁶

Section 18

The bill provides that the section regarding affidavit of expenses does not apply to the finalization of an adoption of a child whose parents’ rights were terminated pursuant to ch. 39, F.S., or to the domestication of a foreign adoption decree.

⁴⁶ Julie Mayo, *Department of Children and Families Staff Analysis and Economic Impact, SB 1084*, 5 (Jan. 28, 2008) (on file with the Senate Committee on Judiciary).

Section 19

The bill amends s. 63.135, F.S., to provide that the petitioner or adoption entity must file an affidavit under the Uniform Child Custody Jurisdiction and Enforcement Act, and deletes the description of the details required in the affidavit.

Section 20

Section 63.142, F.S., is amended to delete the provision requiring the court to determine who will have custody of the child if a petition for adoption is dismissed, and providing instead that any further proceedings regarding the minor must be filed in a separate custody action, dependency action, or paternity action.

Section 21

The bill amends s. 63.192, F.S., clarifying that a foreign judgment or decree, within or without the United States, terminating a parental relationship is recognized in this state and no further proceedings are required before the adoption can be finalized.

Section 22

The bill amends s. 63.212, F.S., deleting the provision that makes it unlawful to knowingly make an improper venue choice.

Section 23

The bill provides that petitions for termination of parental rights filed before July 1, 2008, will be governed by the law in effect at the time of filing.

Section 24

Section 742.021, F.S., is amended to require that the clerk of court provide each man who files a paternity action with a disclosure advising him of the requirement to file with the Registry.

Section 25

The bill amends s. 742.10, F.S., to clarify that the section, which describes the procedures to establish paternity of children born out of wedlock, is subject to any exceptions provided in ch. 39 and ch. 63, F.S.

Section 26

The bill provides an effective date of July 1, 2008.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Section 18(a), Art. VII of the State Constitution provides that a city or county is not bound by any general law requiring the city or county to spend funds or to take an action to expend funds unless the Legislature has determined that the law fulfills an important state interest and unless, for purposes relevant to this bill, the law is approved by two-thirds of the membership of each house of the Legislature. Section 18(d), Art. VII of the State Constitution provides that a law having an insignificant fiscal impact is exempt from the requirements of Section 18, Art. VII of the State Constitution.

This bill requires the counties (particularly the clerk of the court) to supply a new form relating to the claim of paternity and to provide notice when an adoption petition is filed. The clerks association has indicated that these new duties can be supported within the existing budgets, since the statewide fiscal impact on the counties is estimated to be insignificant. Thus, this bill appears to be exempt from the requirements of Section 18, Art. VII of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:**Fundamental Rights**

The application of the Putative Father Registry implicates the constitutional right of an unmarried biological father to parent his child. This fundamental right requires the strictest scrutiny. This means that the burden is on the state to show why its conduct is justified by providing a compelling state interest and that the conduct is a substantially effective method for achieving that purpose.⁴⁷ The state must also show that the intrusion will accomplish the state's goal in the least intrusive way.⁴⁸ However, the United States Supreme Court has upheld the constitutionality of putative father registries, holding that an unmarried biological father does not have an absolute constitutional right to his biological child and that his rights are protected by the due process clause only if he takes some responsibility for the child.⁴⁹ The Florida Supreme Court has recognized this rationale as well.⁵⁰

⁴⁷ Russell W. Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 638 (1992).

⁴⁸ *Id.*

⁴⁹ *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁵⁰ *Matter of Adoption of Doe*, 543 So. 2d 741, 748-49 (Fla. 1989); *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966-67 (Fla. 1995).

The bill amends the criteria for determining whether a child has been abandoned for purposes of establishing termination of parental rights when a parent is incarcerated. The bill requires the court to consider whether the period of time for which the parent *has been* or is expected to be incarcerated constitutes a significant (rather than substantial) portion of the child's minority. This provision of the bill may implicate state and federal constitutional provisions relating to the fundamental liberty interest of a parent.⁵¹

In 2004, the Florida Supreme Court held that s. 39.806(1)(d)1., F.S., which is identical to s. 63.089(4)(b)1., F.S., is forward-looking and that a court should not evaluate whether the time a parent *has been incarcerated* is a substantial portion of the child's life.⁵² The Court made its decision, in part, through statutory construction and found that "the terms 'is expected to be incarcerated,' 'will constitute,' and 'will attain,' make the provision entirely forward-looking."⁵³ If this were the end of the Court's analysis, the bill could be construed as following the Court's implicit instructions that in order to consider past incarceration, the statutory language must be changed.

However, the Court also found that its construction was consistent with the constitutional principle that statutes affecting fundamental rights must be narrowly construed. The Court stated, "construing section 39.806(1)(d)(1) to *require* consideration of past incarceration in making the termination decision would be inconsistent with the constitutionally mandated narrow construction of the statutory language and the constitutionally required focus on future harm to the child."⁵⁴ As noted in the bill, the period of time for which a parent *has been* or is expected to be incarcerated may be looked at to determine abandonment. Due to the fundamental liberty interests involved, it is unclear whether a court may determine that the statute, as amended by the bill, provides the least restrictive means of protecting the child from harm.

Access to Courts

The bill provides that an unmarried biological father does not have standing⁵⁵ to seek relief from a judgment terminating parental rights if the mother did not identify him or refused to provide information to locate him prior to signing a consent for adoption. Additionally, the bill provides that an unmarried biological father does not have standing to seek the court case number or access the court file if the mother did not identify him prior to signing the consent for adoption.

These provisions may implicate the right of access to the courts as constitutionally protected under Article I, s. 21 of the Florida Constitution. Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). Essentially, if a right of action has

⁵¹ See *B.C. v. Dep't of Children and Families*, 887 So. 2d 1046 (Fla. 2004).

⁵² *Id.* at 1052 (emphasis in original).

⁵³ *Id.*

⁵⁴ *Id.* (emphasis in original).

⁵⁵ The Legislature may not constitutionally determine whether a party has standing in a particular cause, but it may affect standing through substantive regulation of the rights or interests at issue. See *Rogers & Ford Const. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993).

been provided, the Legislature cannot abolish it without providing a reasonable alternative or if the Legislature can show an overpowering public necessity for the abolishment, and no alternative method can be shown.⁵⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the bill streamlines the adoption process, the private sector may save the costs of litigation.

According to the Department of Health (DOH), the bill will require the Office of Vital Statistics (Office) to become more than the records repository it is now, by requiring the Office to analyze documents and compute timeframes to determine whether it must accept a claim of paternity. This increased decision-making may result in determinations which are adverse to individuals and which, in turn, may compel DOH to extend administrative hearing rights to substantially affected parties. Such proceedings may create delays, as well as conflicts between the judicial and executive branches. Also, because DOH will be receiving, generating, and maintaining more confidential documents, there may be an increase in litigation to defend the confidential status of the records.⁵⁷

C. Government Sector Impact:

Although the bill imposes additional responsibilities on the clerks, the Florida Association of Court Clerks and Comptrollers does not expect the bill to have a significant fiscal impact.⁵⁸

According to Department of Health (DOH or department), the implementation of this bill will require additional staffing of one OPS position for the following reasons:

- When the Putative Father Registry (Registry) was originally enacted, no resources were provided to perform Registry functions;
- In 2007, 6,800 Florida adoptions were processed and 4,811 searches (at \$9 per search for total revenue of \$43,299) of the Registry were performed;
- The time-sensitive notices of intended adoption plans and proof of service of notice on the potential biological father must be processed and monitored; and

⁵⁶ *Kluger*, 281 So. 2d at 4.

⁵⁷ Department of Health, *Bill Analysis, Economic Statement and Fiscal Note*, 8 (March 10, 2008) (on file with the Senate Committee on Judiciary).

⁵⁸ Correspondence from Beth Allman, Communications Director, Florida Association of Court Clerks and Comptrollers, to the Senate Committee on Judiciary, March 26, 2008 (on file with the Senate Committee on Judiciary).

- The additional information submitted must be reviewed, researched, indexed, and tracked regarding the 30-day limitation to ensure the claim for paternity is in compliance with the provisions of s. 63.054, F.S.⁵⁹

The department estimates expenditures of \$24,335 in the first fiscal year and \$19,969 in subsequent years.⁶⁰ However, according to the department, it does not need actual funding, only budget authority to fill the OPS position. The department expects to absorb the cost of the OPS position with the revenue generated by conducting Registry searches.⁶¹

VI. Technical Deficiencies:

According to the Department of Health (DOH or department), paternity may be established by ss. 382.013(2)(c), F.S. (which allows for establishing paternity at the time of birth), and 382.016(1)(b), F.S. (which allows for establishing paternity after the record has been registered), as well as pursuant to ch. 742, F.S. The bill precludes an unmarried biological father from filing a paternity claim pursuant to ch. 742, F.S., if he has failed to file a claim of paternity before the date a petition for termination of parental rights has been filed. The department suggests that the unmarried biological father should also be specifically precluded from filing a paternity claim pursuant to ss. 382.013(2)(c) and 382.016(1)(b), F.S., if he has not done so before the petition for termination of parental rights has been filed.⁶²

Currently, s. 39.806(1)(d)1., F.S., and s. 63.089(4)(b)1., F.S., both describe the same circumstances under which length of incarceration may be a factor in terminating parental rights. This bill amends the provision in s. 63.089, F.S., but not in s. 39.806, F.S., which will cause the provisions to significantly diverge, creating a situation in which an incarcerated parent might have his parental rights terminated for one child and not another, based solely on whether the child has been found to be a dependent child under ch. 39, F.S.

VII. Related Issues:

The process of adoption involves a balancing of the interests of the child, the birth parents, and the adoptive parents. The emphasis on whose interest should be protected and at what cost to the interests of the other parties often changes depending on the policy being determined. On lines 1278-1282, the bill appears to allow a biological mother to purposefully withhold information about the identity of an unmarried biological father. However, current Florida law provides:

- The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;⁶³ and
- The Legislature finds that the interests of the state, the mother, the child, and the adoptive parents described in this chapter outweigh the interest of an unmarried biological father

⁵⁹ Department of Health, *supra* note 57, at 5.

⁶⁰ *Id.* at 6.

⁶¹ Conversation with Terry Davis, Dep't of Health (April 7, 2008).

⁶² Department of Health, *supra* note 57, at 9.

⁶³ Section 63.022(1), F.S.

who does not take action in a timely manner to establish and demonstrate a relationship with his child ... An unmarried biological father has the primary responsibility to protect his rights and is presumed to know that his child may be adopted without his consent unless he complies with the provisions of this chapter and demonstrates a prompt and full commitment to his parental responsibilities.⁶⁴

In 2003, the Florida Legislature created the Florida Putative Father Registry,⁶⁵ which has been the basis of much debate since its enactment. It has been stated:

While timely registration would preserve an unwed biological father's right to notice of any subsequent adoption proceeding, unwed biological fathers were not otherwise entitled to actual notice of the Registry or their legal obligation to register. In effect, Chapter 63 created a legal presumption that all unwed biological fathers in Florida had knowledge of their obligation to register absent actual notice. The failure to timely register served as a waiver of parental rights to which there was no legal defense.⁶⁶

The failure to provide unmarried biological fathers with actual notice in adoption proceedings would appear to be inconsistent with the notice provisions found in other areas of Florida law, such as dependency and child support proceedings. For example:

This case demonstrates that Florida has taken substantially different statutory approaches to the rights and responsibilities of biological fathers of children born to unmarried mothers depending upon the issue at stake. In cases of adoption, we wish to minimize unmarried biological fathers' rights. When the state seeks to declare a child dependent, the unmarried biological father's rights are guarded in the hopes the father will fulfill his parental obligations to the child. In cases of child support, especially when the state seeks reimbursement of welfare payments, we attempt to maximize the unmarried biological father's responsibilities. Whether Florida needs a unified policy for the rights of such biological fathers or whether varying policies can coexist is an interesting issue that is raised, but certainly not resolved, in this case.⁶⁷

In July 2007, the Florida Supreme Court ruled in favor of providing unmarried biological fathers with actual notice of the Florida Putative Father Registry and the legal obligations they must satisfy if they are to retain parental rights.⁶⁸ The Court determined that unmarried biological fathers are entitled to receive actual notice of the intended adoption plan related to their child and that they have 30 days to register with the Florida Putative Father Registry after having received this notice. While unmarried biological fathers may still be presumed to have knowledge of their

⁶⁴ Section 63.053(2), F.S.

⁶⁵ Section 63.054, F.S.

⁶⁶ Timothy L. Arcaro, *No More Secrets: Unwed Biological Fathers are now Entitled to Actual Notice of Intended Adoptions in Florida*, PUBLIC INTEREST LAW SECTION REPORTER, THE FLA. BAR, 1 (2007), available at [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/87BF477ED0D5865B852573B60055AF17/\\$FILE/PI1207-Web.Dec13.2007.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/87BF477ED0D5865B852573B60055AF17/$FILE/PI1207-Web.Dec13.2007.pdf?OpenElement) (last visited March 27, 2008).

⁶⁷ *In re Adoption of Baby A.*, 944 So. 2d 380, 395 fn. 21 (Fla. 2d DCA 2006), rev. den., 944 So. 2d 344 (Fla. 2006).

⁶⁸ See *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189 (Fla. 2007).

obligations as set forth in ch. 63, F.S., this presumption no longer serves to deny unmarried biological fathers actual notice of intended adoptions.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 8, 2008:

The committee substitute:

- Clarifies that an adoption entity must serve (instead of may serve) the notice of intended adoption plan on any known and locatable unmarried biological father, unless the unmarried biological father has signed a consent for adoption or an affidavit of nonpaternity;
- Clarifies that an adoption entity must obtain a written statement acknowledging receipt of the disclosures required under s. 63.085, F.S.;
- Changes the governing law date from July 1, 2009, to July 1, 2008; and
- Makes grammatical changes by inserting commas in a series.

CS by Children, Families, and Elder Affairs on March 12, 2008:

The committee substitute corrects some technical deficiencies, provides that the identity of foster families must be redacted from disclosures provided to adoptive families, and provides that adoption proceedings initiated under ch. 39, F.S., are not exempt from some of the bill's proposed disclosure requirements.

B. Amendments:

None.