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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FAMILY LAW & CHILDREN
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 1111

RELATING TO: Termination of Parental Rights

SPONSOR(S): Committee on Family Law and Children and Representative Lynn

STATUTE(S) AFFECTED: ss. 39.464, 39.469, 39.471, 61.13, Florida Statutes

COMPANION BILL(S): SB 0248 (similar)

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

- (1) FAMILY LAW & CHILDREN YEAS 7 NAYS 0
- (2) CHILDREN & FAMILY EMPOWERMENT
- (3)
- (4)
- (5)

I. SUMMARY:

The bill adds to the grounds for termination of parental rights the incarceration of a parent when:

- (1)the period of time for which the parent is expected to be incarcerated constitutes a substantial portion of the period of time before the child will attain the age of 18 years; and
- (2)the incarcerated parent has been determined by the court to be a violent career criminal, a habitual violent felony offender, a habitual felony offender, or a sexual predator, or has been convicted of first-degree or second-degree murder or of a sexual battery that constitutes a capital, life, or first degree felony, or has been convicted of an offense in another jurisdiction which is substantially similar to one of these offenses; and
- (3)the court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interest of the child.

The bill expands the options available to the court after the termination of parental rights to include placing the child in the custody of the sole remaining parent or in the custody of another care giver. It sets forth the circumstances when a child may be placed with one parent or with another care giver, provides for the powers of the custodian when the custodian is not a parent, and describes the circumstances under which a modification of the custodial order may be sought.

The bill also adds the fact that a parent meets these criteria to the list of factors leading to a rebuttable presumption of detriment to a child when the court in considering shared parental responsibility in an action for dissolution of marriage.

The bill is expected to have little or no fiscal impact.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Termination of Parental Rights

Subsection 39.01(1) defines "abandoned" in the context of child dependency and termination of parental rights proceedings. This definition includes a statement that "the incarceration of a parent, legal custodian, or person responsible for a child's welfare does not constitute a bar to a finding of abandonment."

Section 39.464 allows petitions for the termination of parental rights to be filed by the Department of Children and Families (DCF), a guardian ad litem, a licensed child-placing agency, or any person who has knowledge of the facts alleged or who is informed of these facts and believes that they are true.

This section also sets forth the grounds on which a petition for termination of parental rights may be filed, as follows:

- (1)when the parent or parents have voluntarily executed a written surrender of the child giving custody of the child to DCF or to a licensed child-placing agency for adoption; or
- (2)when the identity or location of the parent or parents is unknown and a diligent search has been conducted; or
- (3)when the parent or parents have engaged in conduct toward the child or toward other children that could threaten the life or well-being of the child if the parent-child relationship continues; or
- (4)when the parent or parents engaged in egregious conduct that endangers the life, health, or safety of the child or the child's sibling or had the opportunity and capability to prevent egregious conduct that threatened the life, health, or safety of the child or the child's sibling and failed to do so; or
- (5)when the child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abused, neglected, or abandoned by the parent or parents.

Subsection 39.4611(1) sets forth the elements of the petition for termination of parental rights. A petition for the termination of parent rights must contain facts supporting the following allegations:

- (6)that at least one of the grounds listed in s. 39.464 has been met, and
- (7)that the parents of the child were informed of their right to counsel at all hearings that they attended and that a dispositional order adjudicating the child dependent was entered in any prior dependency proceeding relied upon in offering a parent a case plan as described in s. 39.464; and
- (8)that the manifest best interests of the child, in accordance with s. 39.4612, would be served by the granting of the petition.

Section 39.4612 sets forth the factors to be considered by the court in determining the manifest best interests of the child, as follows;

- (9)any suitable permanent custody arrangement with a relative of the child.

- (10)the ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law instead of medical care, and other material needs of the child.
- (11)the capacity of the parent or parents to care for the child to the extent that the child's health and well-being will not be endangered upon the child's return home.
- (12)the present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
- (13)the love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree of harm to the child that would arise from the termination of parental rights and duties.
- (14)the likelihood of an older child remaining in long-term foster care upon termination of parental rights, due to emotional or behavioral problems or any special needs of the child.
- (15)the child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.
- (16)the length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (17)the depth of the relationship existing between the child and the present custodian.
- (18)the reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (19)the recommendations for the child provided by the child's guardian ad litem or legal representative.

Subsection 39.469(2) provides that if the court finds that the grounds for termination of parental rights have been established by clear and convincing evidence, the court must place the child in the custody of DCF or of a licensed child-placing agency for the purpose of adoption. The statutes do not provide for allowing the child to remain with one parent when the parental rights of the other parent are terminated.

Subsection 39.469(4) provides that the parental rights of one parent may be severed without severing the parental rights of the other parent only if:

- (20)the child has only one surviving parent; or
- (21)the identity of a prospective parent has been established as unknown after sworn testimony; or
- (22)the parent whose rights are being terminated became a parent through a single-parent adoption; or
- (23)the protection of the child demands termination of the rights of a single parent.

Subsection 39.01(53) defines "prospective parent" as a person who claims to be, or has been identified as, a person who may be the mother or father of a child.

Florida courts have consistently ruled that incarceration, in and of itself, does not constitute abandonment, see *B.W. v. HRS*, 498 So.2d 946 (Fla. 1986). This principle has been upheld even when the incarceration is the result of a life sentence, *Harden v. Thomas*, 498 So.2d 389 (Fla.1st DCA 1976). However, in *Turner v. Turner*, 352 So.2d 957 (Fla. 1st DCA), the court affirmed the termination of parental rights of an

incarcerated parent, distinguishing from *B.W.* and *Harden* based on the facts that the father contesting the termination had murdered the mother and had shown no interest in even a minimal relationship with the child.

Dissolution of Marriage; Shared Parental Responsibility

In child custody cases arising from a dissolution of marriage action, both parents are to be granted shared responsibility for their minor child unless the court finds that this arrangement would be detrimental to the child, s. 61.13(2)(b)2, F.S. In making this finding, the court must consider the rebuttable presumption of detriment arising when a parent has been convicted of a felony of the second degree or higher involving domestic violence.

Guardianship of a Minor

Section 744.3021 provides for the appointment of a guardian for a minor. No adjudication is necessary, and the powers of the guardian are plenary. The minor is not required to attend the hearing unless otherwise directed by court. The court is authorized to appoint an attorney to represent the interests of the minor if needed.

Constitutional Issues

The Supreme Court of Florida has recognized that the interest of parents in determining the care and upbringing of their children free from governmental interference is a "longstanding and fundamental liberty interest," *Beagle v. Beagle*, 678 So.2d 1271, 1275 (Fla. 1996), quoting *Padgett v. Department of HRS*, 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. The court added that in Florida this protection stems from the privacy provision that was added to the state constitution in 1980, which has been interpreted as providing a right "much broader in scope than that of the Federal Constitution," *Beagle* at 1271, quoting *Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544, 548 (Fla. 1985). In *Winfield*, the court announced that the standard of review for determining whether a state's intrusion into a citizen's private life is whether the challenged law serves a compelling state interest and whether it accomplishes its goal through the use of the least intrusive means. The court in *Beagle* applied this standard in holding that the state may not intrude upon the fundamental right of parents to raise their children except in cases where the children are threatened with harm, at 1276.

In *Padgett*, the Florida Supreme Court addressed the constitutional issues involved in prospective abuse cases and concluded that "before parental rights in a child can be permanently and involuntarily severed, the state must show by clear and convincing evidence that reunification with the parent poses as substantial risk of significant harm to the child," at 571. The court added, "while we are loath to sanction government interference in the sacrosanct parent-child relationship, we are more reluctant still to forsake the welfare of our youth," at 571.

Florida courts have also recognized that "prospective abuse," or abuse which can be reasonably predicted, can be the basis for the termination of parental rights. In *Palmer v. Department of HRS*, 547 So.2d 981 (Fla. 5th DCA 1989), for example, the court found

that the father's diagnosed pedophilia, which had not been treated and had no prospects of successful treatment was sufficient to support the termination of his parental rights. The court added that the issue in prospective neglect or abuse cases for termination of parental rights is whether future behavior which will adversely affect the child can be clearly and certainly predicted and "if the parent is so afflicted that no reasonable basis exists for improvement," at 984. The case of *In the interest of DJS and JSG*, 563 So.2d 655 (Fla. 1st DCA 1990) contains a review of the case law on this issue. That court remarked, "we do not hold that long-term incarceration for conviction of a crime in and of itself works an automatic forfeiture of parental rights. An imprisoned parent, however, is not relieved of all parental responsibilities because of imprisonment," at 666. In this case, the incarcerated father was seeking to avoid the termination of parental rights so that he could continue to visit the child. He was unable to predict when, if ever, he "would be able to either assume parental responsibilities or to relinquish parental rights so that the child can at last have a permanent home," at 676. The court affirmed the termination of parental rights, concluding:

It is a matter of human knowledge that every day in the life of a small child is important to his physical, mental, and emotional development. The Legislature has expressly recognized the need for prompt disposition of matters involving children in foster care and made clear its intent that in matters of permanent placement, "the best interests of the child's moral, emotional, mental, and physical welfare" is of paramount concern. The order of the trial court comports with this expression of public policy, is supported by the record, and is not unreasonable as a matter of law.

Both the federal and state constitutions prohibit the passage of *ex post facto* laws. An *ex post facto* law is one which is passed after the occurrence of some fact or deed, and which retrospectively changes the legal consequences or relations of such act or deed, *Black's Law Dictionary*, 6th edition (1990). The question as to whether this bill can be applied to persons who might fall under its provisions as the result of acts or convictions incurred prior to its passage requires consideration of the *ex post facto* prohibition.

Since the time of the decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the courts have limited the application of the *ex post facto* prohibition to criminal offenses. In light of a long series of cases, a law is *ex post facto* if it punishes an act which when committed was not illegal, makes the punishment for a crime more burdensome than it was when committed, or takes away a defense which was available at the time a crime was committed. Generally speaking, the courts have interpreted laws which adversely affect persons convicted of a criminal offense to not be prohibited by the *ex post facto* clause if the law was passed with a non-punitive intent and that intent was not negated by serious penal effects. In *Manocchio v. Sullivan*, 768 F. Supp 814 (1991) *aff'd* 961 F.2d 19539 (1992), for example, a federal district court in Florida found that a statute that excluded a doctor from participating in the Medicare program, enacted after his misdemeanor sentence of probation and fines, was constitutional.

Other States

According to DCF, nine states other than Florida have enacted legislation using the extended incarceration of a parent as the basis for the termination of parental rights. These states are Alabama, Arizona, California, Colorado, Georgia, Iowa, Louisiana, Michigan, and Wyoming.

B. EFFECT OF PROPOSED CHANGES:

The bill adds to the grounds for termination of parental rights the incarceration of a parent when:

- (1)the period of time for which the parent is expected to be incarcerated constitutes a substantial portion of the period of time before the child will attain the age of 18 years; and
- (2)the incarcerated parent has been determined by the court to be a violent career criminal, a habitual violent felony offender, a habitual felony offender, or a sexual predator, or has been convicted of first-degree or second-degree murder or of a sexual battery that constitutes a capital, life, or first degree felony, or has been convicted of an offense in another jurisdiction which is substantially similar to one of the offenses described in this paragraph; and
- (3)the court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child and, for this reason, that termination of the parental rights of the incarcerated parent is in the best interest of the child.

The bill allows termination of the rights of one parent under the same circumstances as described above. It expands the options available to the court after the termination of parental rights to include placing the child in the custody of the sole remaining parent, or in the custody of another care giver.

If the child is placed with someone other than the parent or DCF, the court must make specific findings that based on evidence presented that placement with the parent whose rights have not been terminated would be harmful to the child. In doing so, the court must determine the suitability of the proposed placement. Suitability of the placement includes the fitness of the intended placement, with primary consideration being given to the welfare of the child, the fitness and capabilities of the proposed custodian to function as the primary caretaker for a particular child; and the compatibility of the child with the home in which the child is intended to be placed. If the court orders the child placed with a custodian, the court must appoint the custodian as guardian for the child as provided in s. 744.3021. The court may modify the order placing the child in the custody of the custodian and revoke the guardianship if it subsequently finds that a party to the proceeding other than the parent whose rights have been terminated has shown a material change in circumstances which causes the custodial placement to be no longer in the best interest of the child.

The bill allows the circumstances described above to be added to the list of factors leading to a rebuttable presumption of detriment to a child in considering shared parental responsibility.

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:

No 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?

Not applicable.

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

Not applicable.

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

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No

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

No

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

No

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

No

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

No

3. Personal Responsibility:

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

No

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

No

4. Individual Freedom:

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

The bill increases the ability of former partners of incarcerated persons to gain sole parental custody of their children. It also gives an additional ground for termination of parental rights when one parent is likely to be incarcerated for a substantial portion of the time before a child reaches the age of 18 years.

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

No

5. Family Empowerment:

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

The bill does not provide services to families or children.

(1) Who evaluates the family's needs?

Not applicable

(2) Who makes the decisions?

Not applicable

(3) Are private alternatives permitted?

Not applicable

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

Not applicable

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

Not applicable

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:

The bill does not create or change a program providing services to families or children.

(1) parents and guardians?

Not applicable

(2) service providers?

Not applicable

(3) government employees/agencies?

Not applicable

D. SECTION-BY-SECTION RESEARCH:

This section need be completed only in the discretion of the Committee.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

None

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

None

D. FISCAL COMMENTS:

While DCF predicts that this bill may result in a slightly increased number of petitions for termination of parental rights being filed, it also projects that any associated costs will be offset by the shorter periods in foster care which will result from application of the bill.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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 state tax shared with counties or municipalities.

V. COMMENTS:

The bill does not define "substantial portion" of the period of time before a child reaches the age of 18 years, since the amount of time which constitutes a "substantial portion" will vary depending on the current age of the child.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 27, 1997, the Family Law and Children Committee adopted six amendments to the bill and then voted to make it a committee substitute. The amendments:

- a.clarified the language concerning the length of time an incarcerated parent is expected to be incarcerated,
- b.removed the language "or potentially harmful" in the sections dealing with the best interests of a child,
- c.clarified the circumstances when a child might be placed with someone other than a parent and the role of that alternative custodian,
- d.removed language relating to consent for adoption, and
- e.modified the effective date language to make clear that the bill is intended to apply to persons already incarcerated who meet its provisions as well as those who are sentenced in the future.

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VII. SIGNATURES:

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