HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 159 Parental Rights
SPONSOR(S): Murman and Cantens
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	13 Y, 5 N w/CS	Birtman	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This joint resolution creates Article I, section 26 of the State Constitution to:

- Provide that parents have a fundamental right to raise, educate, and care for their children.
- Require the Legislature to protect parental rights by appropriate legislation, notwithstanding Article 1, Section 23 of the State Constitution (the Privacy Clause) as it relates to the privacy of minors.
- Clarify that this section of the Constitution does not apply to emancipated minors, or to laws protecting minors from abuse, neglect, or criminal wrongdoing.

Pursuant to Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment shall then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, pursuant to Article XI, section 5.

This joint resolution appears to have minimal fiscal impact on the state.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[]	No[]	N/A[x]
5. Empower families?	Yes[x]	No[]	N/A[]

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

Because this joint resolution authorizes a future Legislature to protect parental rights by appropriate legislation, it is unknown how these principles will be affected by future legislation.

This legislation does not specifically create new parental rights, but expressly recognizes parental rights that are currently implied under the Florida Constitution. Accordingly, any new applications of parental rights would be a matter for consideration by a future legislature. Such legislation could not limit or reduce rights guaranteed to minors under the federal Constitution, including federal privacy rights. However, the amendment does establish that in conflicts with their parents, minors do not have any special or additional rights under Article I, section 23 of the State Constitution. Thus, to the extent that the amendment would bar the use of the state privacy provision by children against their parents, it would expand the potential scope or application of parental rights in Florida.

B. EFFECT OF PROPOSED CHANGES:

Parental Rights Under the Federal Constitution Parental rights are not expressly protected under either the Federal or State Constitutions, but are considered rights that are derivative or implied from the U.S. and State Constitutions. Both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution have been interpreted to protect decisions concerning family life and child rearing, which generally fall within the right to privacy.[1] The United States Supreme Court has held that one of the guaranteed liberty interests protected by the Fourteenth Amendment is the right to bring up children,[2] and that the custody, care, and nurture of the child first reside in the parents[3]. The U.S. Supreme Court has held the right of privacy to be a fundamental right, subject to strict scrutiny.[4] The right to "raise," "educate," and "care" for one's children is recognized as part of this fundamental right.[5] Fundamental parental rights are not absolute, however, and are subject to the over-riding principle that the ultimate welfare or best interests of the child must prevail.[6]

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[1] The 14th Amendment to the U.S. Constitution provides in pertinent part: "..nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." If the government denies everyone a fundamental right, the denial results in a substantive due process problem. Conversely, if the government denies a fundamental right to some but not others, an equal protection problem arises.
[2] See *Meyer v. Nebraska, 43 S.Ct. 625 (1923)* and *Pierce v. Society of Sisters, 45 S.Ct. 571 (1925).*
[3] See *Prince v. Massachusetts, 64 S.Ct. 438 (1944)*.
[4] See *Roe v. Wade, 410 U.S. 113 (1972).*
[5] See *Meyer v. Nebraska, 43 S.Ct. 625 (1923)* and *Pierce v. Society of Sisters, 45 S.Ct. 571 (1925).*
[6] See *In re Camm, 294 So.2d 318, 320 (Fla. 1974)* ("Although parents have the 'God-given right' to the care, custody, and companionship of their children, the right is not absolute but is subject to the overriding principle that it is the ultimate welfare of best interests of the children which must prevail."); *Hopkins v. Hopkins, 94 So. 157 (Fla. 1922)* (the rights of parents to the custody and care of their children is subject to an adjudication of the courts as the welfare of the children may require).

Several states have protected parental rights through statutory enactments[7], and both Colorado and Virginia have made unsuccessful attempts at constitutional amendments that would protect parental rights. Should this Joint Resolution be enacted and approved by the voters, Florida would be the first state to expressly protect parental rights in the state constitution.

Parental Rights Under the Florida Constitution: Parental rights are not expressly protected under the Florida Constitution; however the Florida Supreme Court has found that the State Constitution's right to privacy indirectly protects the fundamental right of parents to raise their children, absent a showing of harm.[8]

Article I, section 23 of the State Constitution reads:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

No parallel right is enunciated within the text of the federal constitution, as privacy rights are generally considered as part of the 'penumbra' of other rights enumerated by the Bill of Rights,[9] which have emerged through case law.

Florida courts have construed Florida's right to privacy as stronger than the corresponding federal right,[10] and determined that "the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."[11] Consequently, the Florida Supreme Court has interpreted Florida's right to privacy as fundamental, worthy of the highest level of protection.[12]

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[7] See Tex. Fam.Code Ann. S.151.001 (Vernon 2004) (enumerates rights of parents, and that they are subject to specified limitations); Tex. Fam. Code Ann. 151.003(Vernon 2004) (a state agency may not take action that violates a parents fundamental right to direct the upbringing of their child); OR. Rev. Stat. s. 419B.090 (2004) (recognizes as state policy that both children and parents have enumerated rights in juvenile court matters); Utah Code Ann. s. 62A-4a-201(2004) (recognizes a parent's fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children who are in their custody, and also recognizes that children have the right to protection from abuse and neglect); Kan. Stat. Ann. s. 38-141(2004) (public policy of the state that parents shall retain the fundamental right to exercise primary control over the care and upbringing of their children in their charge; further the public policy that children have the right to protection from abuse and neglect).

[8] *Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996)* (Florida Supreme Court struck statute which allowed grandparent visitation over the objection of the parents in an intact family. This is the first in a long line of cases which hold the grandparent visitation statute unconstitutional as the statute does not require a showing of harm.); *Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991)* (Florida Supreme Court held that the State has a compelling interest in protecting a child against the clear threat of abuse, neglect, and death, which interest outweighs a parent's privacy interest. In this case, the Court upheld a statute which allowed parental rights to be terminated based on the prior termination of rights to another child.)

[9] See *Griswold v. Connecticut, 85 S.Ct. 1678 (1965).*

[10] The Florida Supreme Court has enumerated three rationales supporting this view: First, the Florida Constitution goes beyond the federal constitution to provide an express textual reference to the right to privacy. *In re T.W., a Minor, 551 So.2d 1186 (Fla. 1989)*. Second, the fact that the right to privacy was added to the Florida Constitution following the United States Supreme Court's decision in *Roe v. Wade, 410 U.S. 113 (1973)*, indicates that persons voting for the Florida amendment believed that federal protections were inadequate. *T.W., 551 So.2d at 1191*. Third, the drafters of the right to privacy amendment rejected the use of the phrases "unwarranted governmental intrusion" or "unreasonable governmental intrusion" in order to make the provision as strong as possible. *Id. at 1191-92*.

[11] *Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985).*

[12] When reviewing the validity of legislative enactments, Florida courts will apply one of three levels of scrutiny: 1) ordinary scrutiny presumes the legislation is constitutional. The challenging party must prove that the legislation does not bear a reasonable relationship to a legitimate state interest. 2)Mid-level scrutiny applies to certain types of speech and classifications. Under mid-level scrutiny the legislation is presumed unconstitutional; the state must prove that the legislation is substantially related to an important government interest. 3) Strict scrutiny applies to fundamental rights and

Florida courts use a 'strict scrutiny' analysis when evaluating government intrusions into fundamental privacy rights: Legislation which affects fundamental rights is presumed unconstitutional.[13] To intrude, the government must show: 1) that is has a compelling state interest, and 2) that it has used the least intrusive means to further that interest. This test shifts the burden of proof to the state to justify the intrusion.[14]

Using a strict scrutiny analysis, Florida courts have repeatedly found that Florida's right to privacy insulates personal decisions from interference by the government as follows:

- Parental consent – In 1989, the Florida Supreme Court held that the right to privacy regarding abortion applies to minors and struck down a statute which placed restrictions upon a minor's right to obtain an abortion. The law in question mandated parental consent and the appointment of a guardian ad litem, or alternatively required the minor to petition for a court order.[15]
- Parental notice - Recently, the Florida Supreme Court struck down a statute which required a minor to notify her parents prior to undergoing an abortion, or convince a court that she is sufficiently mature to make the decision herself, or that if she is immature, that the abortion is nevertheless in her best interests.[16]

Under the rulings of the Florida Supreme Court, minors in Florida have privacy rights that go beyond those protected under the federal Constitution.

Thus constitutional tension is created when the privacy rights of parents to raise their children conflicts with the privacy rights of minors. This joint resolution resolves the conflict in favor of parents by expressly establishing an independent and fundamental right of parents to raise, educate, and care for their children. The joint resolution further enumerates the legislature's authority to enact legislation protecting parental rights, notwithstanding a minor's privacy rights pursuant to Article I, Section 23 of the State Constitution. Because the Legislature is required to protect parental rights "by appropriate legislation," there is no binding requirement that the Legislature pass any particular legislation.[17] Lastly, the joint resolution clarifies that this section of the State Constitution does not apply to emancipated minors, nor to laws protecting minors from abuse, neglect, or criminal wrongdoing.

Regardless of the state provisions, the federal protections for both minors and parents cannot be nullified or reduced by state constitutional provisions, nor by general state law.[18]

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suspect classifications. Under a strict scrutiny analysis legislation is presumed unconstitutional; the state must prove that the legislation furthers a compelling state interest through the least intrusive means. *North Florida Women's Health and Counseling Services, Inc. v. State, 2003 WL 21546546 (Fla. 2003).*

[13] *Harris v. McRae, 448 U.S. 297, 312 (1980)*.

[14] *Chiles v. State Employees Attorneys Guild, 734 So.2d 1030 (Fla. 1999).*

[15] *In re T.W., 551 So.2d 1186 (Fla. 1989).*

[16] See *North Florida Women's Health and Counseling Services, Inc. v. State, 2003 WL 21546546 (Fla. 2003)*. In the opinion for the Court, Justice Shaw opines that the law failed to further a compelling state interest in light of the fact that since In re T.W. was decided, virtually nothing had changed in the statutory provisions authorizing less restrictive treatment for other comparable procedures and practices. Justice Lewis, who concurred in result only, wrote that the effect of the majority opinion is to prohibit the state from ever acting to protect the health and welfare of minors through involvement of parents in the reproductive arena.

[17] See Section 5 of the 14th Amendment to the U.S. Constitution, gives Congress the power to enforce, by appropriate legislation, the provisions of the 14th Amendment (requiring due process and equal protection). Appropriate legislation requires that there be a congruence and proportionality between the injury to be prevented and the means adopted to that end. For Congress to invoke section five, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislation to remedy such conduct. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199 at 2207 (1999)*. It is unknown whether the Florida courts would adopt this federal analysis of "appropriate legislation".

[18] See Article VI, clause 2 of the U.S. Constitution (the Supremacy Clause) which provides that the U.S. Constitution and the laws of the United States made in pursuance thereof…. shall be the supreme law of the land.

C. SECTION DIRECTORY:

See “Effect of Proposed Changes” above.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The State Constitution requires that a proposed amendment to the constitution be published in one newspaper of general circulation in each county in which a newspaper is published, once in the tenth week and once in the sixth week immediately preceding the week in which the election is held.[19] The Division of Elections estimates that the cost of compliance would be approximately $35,000.[20]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This joint resolution does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority to raise revenues; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Accuracy of the ballot summary: The ballot summary must be sufficient to provide fair notice of the contents and effect of the amendment.[21] Further, the ballot summary must fully advise the electorate of all consequences of the proposal;[22] and cannot be misleading or ambiguous.[23]

[19] See Article XI, section (5)(c) of the State Constitution.
[20] Estimate based on 2002 advertising rates.
[21] See *Advisory Opinion to the Attorney General re: Stop Early Release of Prisoners, 642 So.2d 724 (Fla. 1994).*
[22] See *Armstrong v. Harris, 773 So.2d 7 (Fla. 2000).*

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 17, 2004, the Judiciary Committee adopted a strike-all amendment that created Section 26 of Article I of the State Constitution, popularly known as the Parental Rights Amendment. This analysis is to the joint resolution as amended.

[23] See *Smith v. American Airlines, Inc., 606 So.2d 618 (Fla. 1992).*