

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 757 w/CS Adoption
SPONSOR(S): Rich
TIED BILLS: **IDEN./SIM. BILLS:** SB 2046

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Children's Services (Sub)	5 Y, 0 N	Preston	Liem
2) Future of Florida's Families	16 Y, 0 N	Preston	Liem
3) Judiciary	18 Y, 0 N w/CS	Birtman	Havlicak
4) Human Services Appropriations (Sub)			
5) Appropriations			

SUMMARY ANALYSIS

The bill amends s. 39.812, Florida Statutes, related to post disposition relief and adoption petitions for dependent children, to provide that when a foster parent or legal custodian of a dependent child who has lived with that foster parent or custodian for at least six months, applies to adopt that child and the application to adopt is not granted by the Department of Children and Family Services, the department may not remove the child from the home without a court order except under certain specified circumstances. The bill also provides an exception to the statutory requirement that a departmental consent be attached to a petition for adoption and amends s. 63.062, Florida Statutes, to provide for a waiver of departmental consent to an adoption if the court determines such consent is being withheld unreasonably, provided that the petitioner has filed with the court a favorable preliminary adoptive home study.

The bill does not appear to have a fiscal impact.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0757d.ju.doc
DATE: March 23, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

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

B. EFFECT OF PROPOSED CHANGES:

Removal of children from foster care - A child may be voluntarily placed in foster care by his or her parents or custodians or involuntarily placed when the court has found the child dependent, pursuant to chapter 39, Florida Statutes.¹ Children whose parents have had their parental rights terminated and who are in the custody of the department will continue their placement with the department for the purpose of adoption.² Both Florida and federal law require a permanency plan for the child no later than 12 months after the date that the child was placed in shelter care.³

There are numerous factors that must be considered by the department in evaluating applicants for adoption.⁴ It is the policy of the state and of the department that adoption placements must be made consistent with the best interest of the child. The role of good judgment in assessing the best interest of the child cannot be replaced by rote policy decrees.⁵ If the foster parent or other custodian applies to adopt the child, the application must be evaluated to determine suitability through an adoptive home study, which must consider attachment to the foster parent, kinship, and permanence.⁶

Currently, s. 39.812, Florida Statutes, provides for the jurisdiction of the court for children whose parent's parental rights have been terminated to continue until the child is adopted. The bill amends

¹ See also ss. 409.145(2) and 409.165(3), Florida Statutes and Operating Procedure No. 175-34, Removal and Placement of Children, which statutes give the Department of Children and Family Services the responsibility to protect, care for, guide, and supervise dependent children and the authority to place such children under conditions as are determined to be for the best interests or the welfare of the child.

² See s. 39.811, Florida Statutes.

³ See s. 39.701(8)(f), F.S., and 45 CFR s. 1356.21(b)(2) (Title IV-E requires the states to comply with numerous provisions in order to be eligible for federal funding for foster care payments.)

⁴ See Rule 65C-16.002, Florida Administrative Code, which provides that the exercise of judgment must be shaped by a number of considerations, including current custodian priority. The current custodians of the child, including foster parents, may wish to adopt, are to be considered as potential adoptive families, and are encouraged to adopt if they are interested. Rule 65C-16.005, Florida Administrative Code, requires the department to consider the following criteria in determining which applications for adoption should be approved: the child's choice; the ability and willingness of the adoptive family to adopt all or some of a sibling group; the commitment of the applicant to value and respect the child's ethnic and racial heritage; the family's child-rearing experience; marital status; residence; income; housing and neighborhood; health; other children in the family; working parents; affidavit of good moral character; background screening; and references.

⁵ See Rule 65C-6.005, Florida Administrative Code.

⁶ See Rule 65C-16.002 and Rule 65C-16.005, Florida Administrative Code. The home study must assess, among other things, the length of time the child has lived in a stable, satisfactory environment and the depth of the relationship existing between the child and the custodian. It should be recognized that individuals who might not be considered the placement of choice for children not known to them, can be the placement of choice for children with whom they have an existing stable relationship.

s. 39.812, Florida Statutes, to prohibit the department from removing a foster child who has resided at the foster home for at least 6 months when the foster parent has applied for adoption and the application for adoption has been denied, unless there is a court order for such removal. Exceptions are provided for when the child is believed to be at imminent risk of abuse or neglect, 30 days have expired since the foster parent received written notice of the denial and no formal challenge has been filed,⁷ or the foster parent agrees to the child's removal.

Waiver of consent to adoption – Section 63.062, Florida Statutes, currently provides that if parental rights to a child have been terminated, the adoption entity⁸ with which the child has been placed for adoption may provide consent to the adoption and that in such cases, no other consent is required. Current law allows the court to waive the consent of individuals;⁹ however, a court has determined that the department is not an individual whose consent may be waived.¹⁰ While the court has the ability to review the appropriateness of the adoptive placement of the child, such continuing jurisdiction may only be exercised for good cause shown by the guardian ad litem for the child.¹¹ In the circumstance where a judge finds that the department's potential adoptive placement of the child is not appropriate, the law still requires the department to consent to any subsequent adoption,¹² thus creating a potential stand off between the department and the foster parents.

This bill allows the court to waive the consent of the department if the court determines that such consent is being unreasonably withheld,¹³ provided that the petitioner has filed with the court a favorable preliminary home study performed by a licensed child-placing agency, a child-caring agency registered under s. 409.176, F.S.,¹⁴ or a licensed professional or agency described in s. 61.20(2), F.S.¹⁵

C. SECTION DIRECTORY:

Section 1. Amends s. 39.812, Florida Statutes, related to post disposition relief and adoption petitions for dependent children, to provide that when a foster parent or legal custodian of a dependent child who has lived with that foster parent or custodian for at least six months, applies to adopt that child and the application to adopt is not granted by the Department of Children and Family Services, the department may not remove the child from the home without a court order except under certain specified circumstances. The section also provides an exception to the statutory requirement that a departmental consent be attached to a petition for adoption.

⁷ See Rules 65C-16.008 and 65C-16.005(9), Florida Administrative Code, which provide that an adoptive applicant that is adversely affected by a decision or action taken by the department may have the decision reviewed through the Adoption Review Committee process. Applicants have the option of participating in an administrative hearing pursuant to the Administrative Procedures Act, but do not have the right to appeal the department's decision on the selection of and adoptive home for a particular child. It has been reported that this rule is currently being challenged.

⁸ See s. 63.032(3), F.S., which defines 'adoption entity' as the department, an agency, a child-caring agency registered under s. 409.176, Florida Statutes, an intermediary, or a child-placing agency licensed in another state which is qualified by the department to place children in the State of Florida.

⁹ See s. 63.064, F.S., which allows the court to waive consent of a parent who has deserted a child; a parent whose parental rights have been terminated; a parent who has been judicially declared incompetent; a legal guardian who has failed to respond or is found to be withholding consent unreasonably; and the spouse of the person to be adopted under specified circumstances.

¹⁰ See C.S. and J.S. v. S.H. and K.H., 671 So.2d 260 (Fla. 4th DCA 1996).

¹¹ See s. 39.812, F.S.

¹² See s. 63.062(7), F.S.

¹³ The Court has held that the department has the discretion to withhold its consent based on the inability to conduct a final home study. See Department of Children and Family Services v. B.Y., 863 So.2d 418 (Fla. 4th DCA 2003).

¹⁴ Section 409.176, F.S., requires residential child-caring agencies or family foster homes to register with an association that is certified by a Florida statewide child care association which was in existence on January 1, 1984, and which publishes and requires compliance with its standards.

¹⁵ Section 61.20(2), F.S., provides for a social investigation and study to be conducted by qualified staff of the court; a child-placing agency licensed pursuant to s. 409.175, F.S.; a psychologist licensed pursuant to chapter 490; or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to chapter 491.

Section 2. Amends s. 63.062, Florida Statutes, related to persons required to consent to an adoption, to provide for a waiver of departmental consent to an adoption if the court determines such consent is being withheld unreasonably.

Section 3. Provides for an effective date upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Children and Family Services did not provide fiscal analysis for the bill, however it is not anticipated that the bill will have a fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not affect county or municipal government.

2. Other:

Separation of Powers – Article II, section 3 of the State Constitution provides that “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The separation of powers doctrine prevents the courts from interfering with day-to-day functions and decision making within the executive branch. The Fourth District Court of Appeal has held that the decision to grant consent to adoption of children in custody of the department is firmly reposed in the department and may not generally be intruded upon by the

judiciary.¹⁶ An argument might be made that allowing the court to waive the department's consent allows the judiciary to unconstitutionally intrude upon the department's executive powers. Because trial courts retain jurisdiction over children placed in the custody of the department until the child is adopted, and provides for continuing jurisdiction so that the court may review the appropriateness of the adoptive placement of the child,¹⁷ it would appear that this bill does not unconstitutionally allow the judicial branch to interfere with executive decisions.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comments by the Committee on the Future of Florida's Families: While the Department of Children and Family Services did not provide an analysis for this bill, they reportedly have concerns with the bill's provisions. In prior years when similar legislation has been proposed, the department has raised concerns related to the restriction on the department's ability to move a child from a foster home to a prospective adoptive home in those cases in which the current foster parent's application for adoption has been denied. The department asserts that this restriction potentially delays the department's statutory obligation to achieve permanency for the child. Nonetheless, the bill does not permanently restrict the department's ability to move a child, but only until a court order is obtained. At the same time the restriction may serve to minimize the negative effects on children residing in foster homes for 6 months or more, when their foster parents have been denied adoption, by scenarios where there is an unexpected, sudden or unexplained removal from foster parents with whom a child has bonded and there was an expectation of permanency.

Even though the Florida Administrative Code clearly provides that it is the policy of the state and of the department that adoption placements must be made consistent with the best interest of the child and that the role of good judgment in assessing the best interest of the child cannot be replaced by rote policy decrees, anecdotal evidence appears to support the fact that this policy is not always carried out.

Occasionally a child whose parent's parental rights have been terminated and for whom there is a plan for foster parent adoption, has relatives who indicate an interest in adopting after the termination process is completed. A number of factors must be considered in making a decision that represents the best interest of the child in this situation, including attachment. Consideration must be given to:

- The quality and length of the attachment to the foster parent.
- The age of the child at placement and the current age of the child.
- The ease with which the child attached to the current family and any indications of attachment difficulty in the child's history.
- The number of moves the child has experienced as an indicator of the likelihood that the child will form a healthy attachment to the relative.
- The quality of the relationship with the relative; some children will already know and trust the relative seeking to adopt and, if not, the willingness of the relative to participate in pre-placement activities to promote the development of a relationship must be considered.
- The capacity of the relative and the foster parent to meet the child's need for permanence.¹⁸

¹⁶ See DCFS v. B.Y., 863 So.2d 418 (Fla. 4th DCA 2003). In this case, the department selected an adoptive parent but did not conduct a final home study. Because the home study was not completed, the department had not consented to the adoption. The court held that the department had the authority to consent, withhold its consent, and do so based on an inability to conduct a final home study, and reversed and remanded a finalized adoption for compliance with the required home study.

¹⁷ See s. 39.812, F.S., and DCFS v. Interest of J.C., 847 So.2d 487 (Fla. 3rd DCA 2002).

¹⁸ See Rule 65C-16.002 and Rule 65C-16.005, Florida Administrative Code.

It would appear to follow that the same or similar considerations should be applied when moving a child from the home of foster parents whose application to adopt has not been granted.

There have been reports indicating that the issues surrounding the removal of foster children from the homes of foster parents when their applications for adoption have been denied may be broader than the bill addresses. Concerns have been expressed as to the reasons for denial of some applications for adoptions by the department, lack of provisions of opportunities to remedy issues identified that resulted in denied applications, as well as the need to consider the attachment of the child to the foster parents or prospective adoptive parents when the adoption is being considered or is denied. All of these issues deal with the decision to remove children after long standing relationships have developed which is the focus of the amendment to §39.812, Florida Statutes, provided by this bill.

Comments by the Judiciary Committee: Current law allows a child to be placed with a relative or a step-parent without a preliminary home study.¹⁹ If the department's consent is waived, and the child is placed with a relative or step-parent, it would appear that a foster child might be placed in a home that has not been scrutinized. Consider allowing the court to waive the consent of the department only if a favorable preliminary home study has been performed on the adoptive placement.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Judiciary Committee adopted an amendment at the meeting held on March 23, 2004, that only allows the court to waive the consent of the department if the petitioner has filed with the court a favorable preliminary adoptive home study performed by a licensed child-placing agency, a child-caring agency registered under s. 409.176, or a licensed professional or agency described in s. 61.20(2). This analysis is to the bill as amended.

¹⁹ See s. 63.092(3), F.S.