

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Children and Families Committee

BILL: SB 408

INTRODUCER: Senator Campbell

SUBJECT: Adoption

DATE: January 18, 2006 REVISED: 01/24/06 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sanford</u>	<u>Whiddon</u>	<u>CF</u>	Fav/6 amendments
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

This bill makes changes to Florida’s adoption law. It largely refines and clarifies the provisions of the Florida Adoption Act (Chapter 2003-58, L.O.F). It also contains substantive changes to current adoption law. Among its many changes are:

- Expanding the definition of “adoption entity” to include an attorney licensed in another state who is placing a child from another state for adoption in Florida;
- Clarifying that certain grandparents are entitled to notice, not to preference to adopt;
- Clarifying that an adoption entity is the guardian of the person of a minor placed for adoption and that the court retains jurisdiction over the minor until the adoption is finalized, whether in Florida or elsewhere;
- Clarifying the duty to search for fathers who have registered with the Florida Putative Father Registry;
- Allowing any man, not just a putative father, to file an affidavit of nonpaternity;
- Clarifying the notice requirements for fathers of children conceived as the result of certain criminal offenses;
- Modifying the venue requirements for termination of parental rights and adoptions proceedings;

- Requiring persons contacted by adoption entities making diligent searches for parents whose identity or location is unknown to release information to the adoption entities without the necessity of subpoena or court order, unless specifically prohibited by law;
- Modifying the time requirements when incarceration is used as the basis for an abandonment allegation in a termination of parental rights petition;
- Clarifying the requirements for the authorization of release of the name of a birth parent;
- Requiring that any person seeking to set aside an adoption have a direct, financial, and immediate reason for this action and applying this restriction to all adoptions, whether or not a judgment of adoption has already been entered;
- Recognizing the validity of termination of parental rights proceedings and findings of abandonment or orphanage in foreign countries;
- Allowing out-of-state prospective adoptive parents to finalize the adoption of Florida children in their home state;
- Providing that only adoption agencies and intermediaries may charge or accept fees for referrals in connection with an adoption or for providing services related to an adoption;
- Amending the definition of “special needs child” to include a child who has been placed through an adoption intermediary and to exclude from the definition children of racially mixed heritage;
- Outlining prohibited fees and acts related to donor and gestational carrier arrangements and providing penalties for violations of the prohibitions.

This bill substantially amends ss. 63.022, 63.032, 63.039, 63.0423, 63.0425, 63.052, 63.053, 63.054, 63.062, 63.082, 63.085, 63.087, 63.088, 63.089, 63.092, 63.102, 63.112, 63.122, 63.132, 63.135, 63.142, 63.152, 63.162, 63.172, 63.182, 63.192, 63.207, 63.212, 63.213, 63.219, 409.166, 409.176, 742.14, 742.15, and 742.16, Florida Statutes, and creates ss. 63.236 and 742.18, Florida Statutes:

II. Present Situation:

The 2003 Florida Adoption Act:

The 2003 Florida Adoption Act (Chapter 2003-58, L.O.F.), substantially revised the 2001 Florida Adoption Law, with primary focus on the areas of biological fathers’ rights, notice and consent, statute of repose and grounds for challenges to termination of parental rights or adoption, statutory forms, venue, adoption fees and costs, and sanctions. A major change involved the creation of a Putative Father Registry within the Department of Health, Office of Vital Statistics, which requires unmarried biological fathers to register with the Putative Registry in order to preserve any right to notice and consent regarding his parental right to a child placed for adoption. The registry replaced existing constructive notice provisions as previously applied to fathers who could not be identified or located. The category of “fathers” for whom notice and consent may be required was revised to incorporate and conform to the new definition of “unmarried biological father.”

Specific changes made by the 2003 legislation included:

- Deleting the statutory duty of a mother placing a child to identify a potential unmarried biological father.
- Allowing for pre-birth execution of an affidavit of non-paternity.

- Broadening the criteria for abandonment to include evidence of little or no communication or lack of emotional support as basis for termination of parental rights.
- Expanding placement options to permit out-of-state or out-of-the-country adoption of a child.
- Revising venue provisions to include four primary venue options and waiver of venue.
- Revising a number of statutory timeframes including:
 - Reducing the statute of repose period from two years to one year for any challenge to an adoption or termination of parental rights,
 - Reducing in half the time period between the date of personal or constructive service and the date of a final hearing,
 - Extending the time period from seven to 14 days in which to make adoption disclosures to birth and prospective adoptive parents,
 - Extending from 24 hours to seven days in which to forward a judgment terminating parental rights from the clerk of the court to the Department of Children and Families (department or DCF), and
 - Changing the timeframe in which to file a final home investigation from 90 days after the petition is filed to 90 days after placement.
- Revising the statutory forms for consent to adoption, for adoption disclosure, for notice of service of process, for affidavits of non-paternity and for waiver of venue to conform to changes in the bill in those areas.
- Revising provisions relating to adoption fees for adoption entities by increasing recovery of pre-approved fees and allowing for flat fee representation and for birth mothers by expanding recovery of pre-birth and post-birth expenses.
- Deleting requirements that all proceedings for adoption be conducted by the same judge that conducted the termination of parental rights proceedings.
- Allowing private adoption entities to intervene in the adoptions of children in Department of Children and Families' custody.

In the time that has elapsed since the 2003 changes went into effect, practitioners have identified areas of the new adoption law which are in need of clarification. The recommended changes are reflected in the bill.

Relevant Court Decisions:

The Florida Supreme Court recently interpreted language in s. 39.806(1)(d), F.S., which is identical to language currently in s. 63.089(4)(b)1, F.S. This language allows incarceration of a parent to be the basis for a finding of abandonment of a child supporting the termination of the parental rights of the incarcerated parent when “the 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 (emphasis added).” In *B.C. vs. DCF*, 887 So.2d 1046 (Fla. 2004), the Court held that: (1) the statutes listing incarceration as a ground for termination of parental rights require the court to evaluate whether the time for which a parent is expected to be incarcerated **in the future** constitutes a substantial portion of the time before the child reaches the age of 18; (2) the father’s remaining sentence of four years did not constitute a substantial portion of time before his child reached the age of 18 (the child was four years old at the time of

the hearing);¹ (3) for purposes of terminating parental rights on the ground of incarceration, a trial court should measure the time of remaining incarceration and minority from the date the termination petition is filed. The Florida Supreme Court had previously ruled, and this decision reaffirmed, that incarceration alone does not, as a matter of law, authorize termination of parental rights on the basis of abandonment.² While the *B.C.* ruling was one of statutory interpretation, the Court based its interpretation on the long-established Constitutional principal that parental rights constitute a fundamental liberty interest. For this reason, at least when termination of parental rights is sought based on this ground in chapter 39, the State (petitioner) must, in order to prevail, establish that the termination is the least restrictive means of protecting the child from serious harm, *id* at 1053-1054.

The fundamental liberty interest in raising one's children has caused both the U.S. Supreme Court and the Florida Supreme Court to rule that when that when termination of parental rights is sought and the parent is indigent, the parent may be entitled to representation by appointed counsel.³

Chapter 63 currently contains no provision for the appointment of counsel for indigent parents.

Adoption of Special Needs Children:

Section 409.166, F.S., is entitled "Special needs children; subsidized adoption program." The first subsection of this section expresses the legislative intent of the section as follows:

It is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home. The Legislature intends to make available to prospective adoptive parents financial aid which will enable them **to adopt a child in foster care** who, because of his or her special needs, has proven difficult to place in an adoptive home. In providing subsidies for **children with special needs in foster care**, it is the intent of the Legislature to **reduce state expenditures for long-term foster care**. It is also the intent of the Legislature that placement without subsidy be the placement of choice unless it can be shown that such placement is not in the best interest of the child. (emphasis supplied).

Persons seeking to adopt a child defined as "special needs child" pursuant to this section may qualify both for special financial assistance in completing the adoption and for subsidies and services after the adoption, depending on the needs of the child and the family. Section 409.166, F.S., does not appear to limit the availability of these financial incentives to children placed by the department or its contracted agents. The placement of special needs children is currently limited to DCF and licensed child-placing agencies. An intermediary is defined as an attorney licensed to practice in Florida who places or intends to place a child for adoption, s. 63.032(11), F.S., (paraphrased).

¹ The District Court of Appeals court has ruled that a finding that a parent would be incarcerated for a period of eight years did not support the ruling that the father would be incarcerated for a substantial portion of the time before an eight-month-old child reached the age of 18, *J.H. vs. DCF*, 872 So.2d 924 (4th DCA 2004).

² *In re B.W.*, 498 So.2d 946 (Fla. 1986).

³ *S.B. v. Department of Children and Families*, 851 So.2d 689, 692 (Fla. 2003); see *Stanley v. Illinois*, 405 U.S. 645, 92 SCt 1208, 31 L.Ed2d 551 (1972).

The definition of “special needs child” in found at s. 409.166 (2)(a), F.S., is as follows:

“Special needs child” means a child whose permanent custody has been awarded to the department or to a licensed child-placing agency and

1. Who has established significant emotional ties with his or her foster parents; or
2. Is not likely to be adopted because he or she is:
 - a. Eight years of age or older;
 - b. Mentally retarded;
 - c. Physically or emotionally handicapped;
 - d. Of black or racially mixed parentage; or
 - e. A member of a sibling group of any age, provided two or more members of a sibling group remain together for purposes of adoption.

The adoptions subsidies paid to parents adopting special needs children are heavily federally subsidized. Federal law limits the use of federal dollars for this purpose to children who have been involuntarily removed from their homes, with very limited exceptions.⁴

Federal law, particularly the Adoptions and Safe Families Act (ASFA) and the Multi-Ethnic Placement Act (MEPA) require that children be placed for adoption without regard to race or ethnicity. According to DCF, during the period from April 1, 2005, through September 30, 2005, 1650 adoptions by DCF or DCF contractors were finalized. Of these, 1297 were of special needs children, and 318 were classified as special needs primarily based on race. Only 28 children were classified as mixed race children. In each instance that a child was identified as of racially mixed parentage, one of the races identified was black.

Section 409.167, F.S., requires that DCF establish a statewide adoption exchange, updated at least monthly, listing all children who are freed for adoption. This statute also requires that children who are available for adoption be registered with existing regional and national adoption exchanges. The list of children awaiting adoption is available through a website⁵ and is available to anyone who wishes to assist in finding permanent homes for these children, including intermediaries.

III. Effect of Proposed Changes:

Section 1 amends s. 63.022(4)(e), F.S., to clarify the legislative intent that a legal custodian of a child in the care of DCF, as well as a parent of the child, can participate in a private adoption plan with a qualified family.

Section 2 amends s. 63.032, F.S., to expand the definition of “adoption entity” to include an attorney licensed in another state who is placing a child from another state into Florida; to add individuals other than a parent to those who may enter into an adoption plan for a child, when those individuals have a legal right to the custody of the child; to redefine “legal custody;” and to

⁴ 8.2B.13 Title IV-E, Adoption Assistance Program, Eligibility, Voluntary Relinquishments; found at www.acf.dhhs.gov/programs/cb/laws/cwpm/policy_dsp_pdf.jsp.

⁵ <http://www.dcf.state.fl.us/adoption/search/indexnew.asp>.

clarify the definition of “parents,” “person,” “primarily lives and works in Florida,” and “primarily lives and works outside Florida.”

Section 3 amends s. 63.039(1), F.S., to conform to other changes in the bill.

Section 4 amends s. 63.0423(9), F.S., which provides special procedures for licensed child-placing agencies taking custody of infants abandoned at hospitals, emergency medical services stations, or fire stations pursuant to s. 383.50, F.S. The changes clarify both that the special procedures apply only to this group of infants and that only a person whose consent for adoption is required may petition the court to void a judgment of adoption. It removes, consistent with other changes in the bill, references to “birth parent,” replacing that language with “parent whose consent is required for adoption.”

Section 5 amends the title of s. 63.0425, F.S., to conform to current law providing that a grandparent with whom a child has lived for at least six months within the 24 months immediately preceding the filing of a petition for termination of parental rights is entitled to notice of the hearing on the petition to terminate parental rights unless certain exceptions apply.

Section 6 amends s. 63.052, F.S., to clarify that an adoption entity is the guardian of the person of a minor whenever the minor is placed for adoption with the entity and that the court retains jurisdiction over the minor who has been placed for adoption until the adoption is finalized either within Florida or elsewhere.

Section 7 amends s. 63.053, F.S., to make technical and conforming changes.

Section 8 amends s. 63.054, F.S., to require adoption entities to provide notice to the Department of Health when a petition for termination of parental rights is filed and to require the Department of Health to adopt by rule a form to be completed by the clerk of the court for notification of a filing of a petition for termination of parental rights. It also clarifies that the duty of the adoption entity to search for a registrant in the Putative Father Registry (Registry) is limited to the address provided in the registry unless the entity has actual notice of the registrant’s whereabouts from another source. The requirement for contacting the Registry upon filing a petition for termination of parental rights is limited to those instances when parental rights are being terminated simultaneously with entry of the final judgment of adoption. In other instances, the adoption entity is required to contact the Registry only once.

Section 9 amends s. 63.062, F.S., to require that an unmarried biological father demonstrate a full commitment to his parental responsibility either before the mother executes a consent for adoption or before a petition for termination of parental rights has been filed, whichever occurs first. It clarifies that an unmarried biological father who fails to comply with the requirements of law irrevocably waives his rights in relation to the child. It allows any man, not just a person whose consent is required for the adoption, to execute an irrevocable affidavit of nonpaternity. It removes the requirement of consent by an adult’s spouse, if any, when an adult is adopted, and makes other technical and conforming changes.

Section 10 amends s. 63.082, F.S., to expand the limitation of the notice requirement to legal fathers to include situations in which a child is conceived as the result of violation of the criminal

law in other states as well as Florida and to add unlawful sexual activity with certain minors under s. 794.05, F.S., as an offense which removes the requirement for notice to legal fathers. It removes the option of allowing the revocation period for consent to adoption for a minor more than six months of age to extend to the time of placement of the minor with the prospective adoptive parents, thus limiting the revocation period to three days. It requires adoption entities to produce monthly supervision reports to the court for children for whom DCF is not pursuing termination of parental rights or dependency only if required by the court. It clarifies the duty of the court regarding continued placement of a minor after consent for adoption is withdrawn. It authorizes the court to order scientific paternity testing only upon a showing that the testing is in compliance with state law.

Section 11 amends s. 63.085, F.S., to make technical and conforming changes.

Section 12 amends s. 63.087, F.S., to clarify provisions relating to venue for adoption proceedings. It clarifies that petitioners for adoptions for relatives, adult adoptions, or stepchild adoptions may file joint petitions for termination of parental rights and adoption but that all provisions of chapter 63 apply to these joint petitions unless otherwise provided by law. It provides that the failure to appear at a hearing for termination of parental rights constitutes grounds upon which parental rights may be terminated.

Section 13 amends s. 63.088, F.S., to clarify procedures to be used by adoption entities when the identity or location of a person whose consent to adoption is required. It specifically requires persons contacted by adoption entities under this section to release the information to the adoption entities without necessity of court order or subpoena, unless prohibited by law.

Section 14 amends s. 63.089, F.S., to provide that, when abandonment as a result of incarceration is alleged, the time period for which a person has been (as well as expected to be) incarcerated will constitute a significant (rather than substantial) portion of the child's minority. Advocates for the change in language expect that the change from "substantial" to "significant" will allow the courts more discretion in determining whether the period of incarceration will affect the best interests of a child. This change, however, may implicate state and federal Constitutional issues relating to the fundamental liberty interest invested in parenthood. This section also contains a requirement that paternity testing be in compliance with state law.

Section 15 amends s. 63.092, F.S., to clarify that the report required to be made by an adoption entity to the court when placing a child with non relatives for adoption must be made within two business days, rather than 48 hours. It also provides that the failure to timely file the report does not constitute grounds to deny the petition for termination of parental rights if the report is subsequently filed and no party is prejudiced by the failure to timely file the report. It also removes child caring agencies registered under s. 409.176, F.S., from the list of those who are authorized to conduct preliminary home studies for adoption.

Section 16 amends s. 63.102, F.S., to clarify the circumstances under which a petition for adoption may not be filed prior to the entry of a judgment terminating parental rights. It clarifies venue requirements for filing adoption petitions.

Sections 17 through 19 amend ss. 63.112(2), 63.122, and 63.125, F.S., to make technical and conforming changes.

Section 20 amends s. 63.132, F.S., to clarify that the affidavit of expenses and receipts is not required for adoptions when the termination of parental rights occurred pursuant to chapter 39, F.S., or when the child was adopted in a foreign country.

Section 21 amends s. 63.135, F.S., to require that the adoption entity or petitioner (rather than every party) must file the Uniform Child Custody Jurisdictional and Enforcement Act affidavit.

Section 22 amends s. 63.142, F.S., to provide that if a petition to adopt is dismissed, further proceedings, if any, regarding the subject child must be brought in a separate custody action under chapter 61, F.S., a dependency action under chapter 39, F.S., or a paternity action under chapter 742, F.S.

Section 23 amends s. 63.152, F.S., to clarify that the clerk of court must transmit a certified statement of the entry of a judgment of adoption to the state registrar of vital statistics in the state where the child was born on a form provided by the Florida registrar of vital statistics.

Section 24 amends s. 63.162, F.S., to require that the written authorization for release of the name of a birth parent be filed with the adoption entity, an adoption reunion registry, the department, or the court. It provides direction to the court and to the Department of Health regarding the release of birth records.

Section 25 amends s. 63.172, F.S., to make technical and conforming changes.

Section 26 amends s. 63.182, F.S., to require that any person seeking to set aside an adoption must have a direct, financial, and immediate reason. It applies this restriction to all adoptions, including those in which a judgment of adoption has already been entered.

Section 27 amends s. 63.192, F.S., to specifically recognize the validity of proceedings of termination of parental rights or findings of abandonment or orphanage in foreign countries.

Section 28 amends s. 63.207, F.S. to allow out-of-state prospective adoptive parents of Florida children to finalize the adoption in their home state.

Section 29 amends s. 63.212, F.S., to clarify that only adoption agencies and intermediaries may charge or accept fees for referrals in connection with an adoption or for providing services relating to an adoption.

Section 30 amends s. 63.213, F.S., to make technical and conforming changes.

Section 31 amends s. 63.219, F.S., to extend the sanctions for violations of this chapter to any person (rather than, as currently, only adoption entities) and to extend the sanctions for not allowing placement of a particular minor to include enjoining the entity or person from engaging in further adoption placement activities in this state.

Section 32 creates s. 63.236, F.S., to provide that adoptions petitions filed prior to July 1, 2006, will be governed by the law in effect at the time the petition was filed.

Section 33 amends s. 409.166, F.S., to include within the definition of “special needs child” a child who has been placed through an adoption intermediary and to exclude from the definition children of racially mixed parentage.

Section 34 amends s. 409.176, F.S., to add licensed child-placing agencies to the list of bodies exempted from continuing submission of standards to DCF once the initial standards have been approved, in the absence of substantial changes to the standards.

Section 35 amends s. 742.14, F.S., to include embryos in the provision presently relating to the donation of eggs, sperm and preembryos. This statutory section currently provides that any person donating eggs, sperm, or preembryos, other than the commissioning couple or a father who has executed a preplanned adoption agreement, “shall relinquish” all maternal and paternal rights and obligations with respect to the resulting children. The change specifies that this relinquishment occurs simultaneously with donation by operation of law.

Section 36 amends s. 742.15, F.S., to allow physicians licensed in another state to certify prerequisites for a gestational surrogate.

Section 37 amends s. 742.16, F.S., to make technical and conforming changes.

Section 38 creates s. 742.18, F.S., to outline prohibited fees and acts relating to donor and gestational carrier arrangements. These prohibited acts include: receiving compensation in advising or assisting in donor or gestational carrier arrangements; advertising or publicly seeking in any way donors; publishing advertisements except by individual parents, carriers, or donors; charging or accepting fees for making donor or carrier arrangements; holding funds in escrow related to donor or gestational carrier arrangements; or assisting in any of the prohibited activities. This section also provides penalties, including being enjoined from practice in Florida, being charged with a second-degree misdemeanor, and civil penalties, for violations of the prohibitions.

Section 39 establishes an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

If incarcerated parents whose parental rights are involuntarily terminated have a right to counsel as a result of the fundamental liberty interest in parenting, this class may be expected to be expanded as a result of this bill, resulting in additional costs associated with the appointment of counsel. Since the cost of appointed counsel generally falls to the counties, this cost would impact county governments.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Authorizing the consideration of periods of incarceration prior to the filing of a petition for termination of parental rights, as well as changing the time from “a substantial portion” to “a significant portion” of a child’s minority may implicate state and federal Constitutional provisions relating to the fundamental liberty interest to parent. The broader consideration of the impact of incarceration to offenses occurring prior to its enactment may impact the Constitutional prohibitions against *ex post facto* punishment, as well.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

If incarcerated parents whose parental rights are involuntarily terminated have a right to counsel as a result of the fundamental liberty interest in parenting, this class may be expected to be expanded as a result of this bill, resulting in additional costs associated with the appointment of counsel. Since the cost of appointed counsel generally falls to the counties, this cost would impact county governments.

Allowing intermediaries to place special needs children and thus to access the adoption subsidy funding associated with such children for their clients is likely to have a significant, though undetermined, fiscal effect, particularly since any such funding would likely be wholly general revenue rather than federally subsidized as is the case with current adoption subsidies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Currently, s. 39.806(1)(d), F.S., and s. 63.089(4)(b)1, F.S., both describing the circumstance under which length of incarceration may be a factor in terminating parental rights, are identical. This bill will cause the provisions to significantly diverge, creating a situation in which an

incarcerated parent might have his parental rights terminated to one child and not another, based solely on whether the child had been found to be a dependent child under chapter 39.

Since each child identified as a special needs child who met that qualification based on being of racially mixed parentage had as one of the identified races the category “black,” it is not clear what effect removing the “racially mixed” category will have.

This Senate staff analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

VIII. Summary of Amendments:

Barcode 384372 by Children and Families:

Removes the requirement in the bill that adoption entities notify the Department of Health when a petition for termination of parental rights is filed. Clarifies that the Department referred to in this section is the Department of Health, not the Department of Children and Families (DCF).

(WITH TITLE AMENDMENT)

Barcode 081272 by Children and Families:

Technical amendment clarifying that the entity which may require continuing reports to the court by an adoption entity when DCF is no longer pursuing the termination of parental rights or dependency proceedings is the court.

Barcode 984620 by Children and Families:

Technical amendment clarifying that appearance at a termination of parental rights hearing may be made before the court either personally or through counsel.

Barcode 490626 by Children and Families:

Technical amendment aligning the list of persons who may perform preliminary adoption home studies with the list provided in s.61.20, F.S.

Barcode 460274 by Children and Families:

Removes the section of the bill amending s. 409.166, F.S., which changed the definition of “special needs child.” This amendment restores current language. (WITH TITLE AMENDMENT)

Barcode 630114 by Children and Families:

Removes the amendments to s. 63.089, F.S., relating to termination of parental rights of incarcerated parents. This amendment restores current language.