



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill has the potential to increase the workload of the courts and the Department of Revenue (DOR or department). The bill changes the requirement for legal fathers to be able to file a petition for paternity disestablishment and as a result the courts may see more of these types of cases filed. If more mothers and their children lose court ordered support as a result of a determination of paternity being set aside, they may have to rely on public assistance in increased numbers until the actual father can be located (if he can be found).

**Promote personal responsibility** – An increasing number of mothers and their children may be at risk of losing court ordered support as a result of this bill which may result in an increase in the numbers of families seeking public assistance.

**Empower families** – The bill has the potential of increasing the numbers of mothers and their children dependent upon public assistance. It also has the potential to adversely affect relationships between family members and decrease family stability. Provisions of the bill could also diminish the sense of security, care and nurturing felt by children.

### B. EFFECT OF PROPOSED CHANGES:

#### Background

A child born during a valid marriage is presumed to be the legitimate and legal child of the husband and wife.<sup>1</sup> Paternity is defined as "the state or condition of being a father."<sup>2</sup> In order to establish paternity for children born out of wedlock, s. 742.10, Florida Statutes, sets forth the criteria. A determination of paternity must be established by clear and convincing evidence.<sup>3</sup> In any proceeding to establish paternity, the court may on its own motion require the child, the mother, and the alleged father to submit to scientific tests generally relied upon for establishing paternity.<sup>4</sup> A woman who is pregnant or who has a child, any man who has reason to believe he is the father of a child, or any child may bring a proceeding to determine the paternity of the child when the paternity has not otherwise been established.<sup>5</sup>

A male can acknowledge paternity by a notarized voluntary acknowledgement or a voluntary acknowledgement signed under penalty of perjury in the presence of two witnesses. These acknowledgements create a rebuttable presumption of paternity, subject to the right of rescission within 60 days of the date of signing the acknowledgement.<sup>6</sup> After the expiration of the 60-day period, the signed voluntary acknowledgement of paternity constitutes an establishment of paternity and is only subject to challenge in court on the basis of fraud, duress, or material mistake of fact. However, the challenger to the determination of paternity is still responsible for his legal responsibilities, including child support, during the pendency of the challenge, except upon a finding of good cause by the court.<sup>7</sup>

Until 2006, there was no Florida law authorizing a male who has been determined to be the father of a child to challenge that determination and be relieved of the responsibility of making child support payments. In order for a man determined to be the father of a child to be relieved of his child support

<sup>1</sup> Section 382.013(2)(a), F.S.; Dep't of Revenue v. Cummings, 871 So. 2d 1055, 1059 (Fla. 2d DCA 2004) .

<sup>2</sup> Black's Law Dictionary, 1163 (rev. 8th ed. 2004)

<sup>3</sup> Section 742.031, Florida Statutes.; T.J. v. Dep't of Children & Families, 860 So. 2d 517, 518 (Fla. 4th DCA 2003).

<sup>4</sup> Section 742.12(1), Florida Statutes.

<sup>5</sup> Section 742.011, Florida Statutes.

<sup>6</sup> Section 742.10(1), Florida Statutes.

<sup>7</sup> Section 742.10(4), Florida Statutes.

obligation, he had to bring an action pursuant to Florida Rules of Civil Procedure 12.540 and 1.540. Once paternity had been adjudicated, unless there was a showing of fraud upon the court, "a paternity order is res judicata on the issue of paternity, and relitigation of the paternity issues is unauthorized in connection with any subsequently-filed motion for contempt for failure to pay court-ordered child support."<sup>8</sup> A final judgment of dissolution of marriage that established a child support obligation for a former husband was a final determination of paternity, and any subsequent paternity challenge had to be brought pursuant to rule 1.540.<sup>9</sup>

In other words, the key section of the above rule under which a petitioner could seek relief from an order of paternity was Rule 1.540(b)(3) (the fraud provision). A petition would be required to demonstrate fraud, either extrinsic or intrinsic, within the one year time limitation imposed by the rule.

In 2006, the Florida Legislature enacted s. 742.18, Florida Statutes, which establishes circumstances under which a male may disestablish paternity or terminate a child support obligation when the male is not the biological father of the child anytime up until the child turns 18 years of age.<sup>10</sup> Currently, in order to disestablish paternity or terminate a child support obligation, the male must file a petition in the circuit court having jurisdiction over the child support obligation and the petition must be served on the mother or other legal guardian or custodian of the child.<sup>11</sup> The petition must include:

- An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation.
- The results of scientific tests that are generally acceptable within the scientific community to show a probability of paternity, administered within 90 days prior to the filing of such petition, which results indicate that the male ordered to pay such child support cannot be the father of the child for whom support is required, or an affidavit executed by the petitioner stating that he did not have access to the child to have scientific testing performed prior to the filing of the petition. A male who suspects he is not the father but does not have access to the child to have scientific testing performed may file a petition requesting the court to order the child to be tested.
- An affidavit executed by the petitioner stating that the petitioner is current on all child support payments for the child for whom relief is sought or that he has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.<sup>12</sup>

The court is required to grant relief on a petition upon a finding by the court of all of a number of specified factors, including a finding that the male ordered to pay child support is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due.<sup>13</sup>

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<sup>8</sup> Dep't of Revenue v. Clark, 866 So. 2d 129 (Fla. 4th DCA 2004)(quoting Dep't of Revenue v. Gouldbourne, 648 So. 2d 856 (Fla. 4th DCA 1995)).

<sup>9</sup> D.F. v. Dep't of Revenue, 823 So. 2d 97, 100 (Fla. 2002).

<sup>10</sup> See Chapter 2006-265, Laws of Florida.

<sup>11</sup> See s. 742.18(1), Florida Statutes. If the child support obligation was determined administratively and has not been ratified by a court, then the petition must be filed in the circuit court where the mother or legal guardian or custodian resides. Such a petition must be served on the Department of Revenue and on the mother or legal guardian or custodian. If the mother or legal guardian or custodian no longer resides in the state, the petition may be filed in the circuit court in the county where the petitioner resides.

<sup>12</sup> See s. 742.18(1)(a), (b), and (c), Florida Statutes.

<sup>13</sup> See s. 742.18(2), Florida Statutes.

Current law also provides that a court shall not set aside the paternity determination or child support order if the male engaged in certain specified conduct after learning that he is not the biological father of the child or in the event the petitioner fails to make the requisite showing required by s. 742.18, Florida Statutes.<sup>14</sup>

If the court grants relief, it must be limited to the issues of prospective child support payments and termination of parental rights, custody, and visitation rights. While the petition is pending, the duty to pay child support and other legal obligations for the child remain in effect and may not be suspended unless good cause is shown. The court may order child support payments to be held in the court registry until the final determination of paternity has been made.<sup>15</sup>

Current law also authorizes a process for issuing a new birth certificate if relief is granted on a filed petition and provides that the granting of a petition does not affect the legitimacy of a child born during a lawful marriage.<sup>16</sup>

## **The Bill**

The bill makes a number of changes related to disestablishment of paternity, including deleting the purpose statement and removing the requirement that an affidavit signed by the petitioner states that he is current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due. The bill also:

- Removes the requirement that in order to grant relief on a filed petition the court must include a finding that the male is current on all child support payments for the child or that any delinquency is the result of an inability to pay;
- Removes the requirement that the petition be served on the mother or other legal guardian or custodian of the child unless the child support obligation was determined administratively;
- Expands relief to include consideration of all past due child support obligations; and
- Provides changes to the Department of Health's procedures for issuing a new birth certificate if paternity is disestablished.

### **C. SECTION DIRECTORY:**

**Section 1.** Amends s. 742.18, Florida Statutes, relating to disestablishment of paternity or termination of child support award.

**Section 2.** Provides for an effective date of July 1, 2008.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>14</sup> See S. 742.18(3) and (4), Florida Statutes.

<sup>15</sup> See S. 742.18(5) and (6), Florida Statutes.

<sup>16</sup> See S. 742.18(8) and (9), Florida Statutes.

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may increase the number of men ordered to pay child support for children who are not their biological children who are relieved of that financial obligation and it also may lead to an increase in the number of children who cease to receive child support payments which will impact them financially. Additionally, since the bill requires that if relief is granted, the court must address past due child support payments. If the court relieves the petitioner of the responsibility for an arrearage, this will impact the financial status of those children.

D. FISCAL COMMENTS:

The bill has the potential to have a fiscal impact on DOR, as the department would no longer be able to seek reimbursement for services provided to the mother from the male formerly determined to be the father. This bill may also have a fiscal impact on the department, as it would expend resources to locate the "new" father if there is a judicial determination on a petition to set aside a paternity that the original male who was required to pay child support payments is not the "father" of the child. Also, loss of child support payments to a mother and her child(ren) may result in that family having to receive public assistance.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

- Use of the term “reputed father” in the bill (for example, on lines 23, 43, 48, and others) is problematic because it appears to refer to a presumed or alleged father and not a legal father. The term “legal father” would be more accurate because only legal fathers may petition to disestablish paternity.
- On lines 53-60 and lines 70-77 of the bill, removing the requirement related to the male being current on all child support payments for the applicable child or that the male ordered to pay child support has substantially complied with his child support obligation for the applicable child and that any delinquency in his child support obligation for that child arose from his inability for just cause to pay the delinquent child support when the delinquent child support became due, would appear to increase the number of men eligible to petition for disestablishment of paternity under s. 742.18, Florida Statutes.
- Lines 110-112 of the bill, provide that if relief is granted, it must address past due child support payments in addition to the prospective payments that current law requires. It does not clarify whether these payments are owed and provides the court with unlimited discretion and no standards upon which to base a decision.

The establishment of paternity is usually accompanied by the creation of a child support obligation. Likewise, since paternity and support issues are connected, an attempt to disestablish paternity is generally accompanied by an effort to end current and future support obligations. Thus, once the court has decided that disestablishment is appropriate under state law, it will likely address the disestablished father’s obligation to pay current and future support and relief from these support obligations is likely to be granted.<sup>17</sup>

Forgiveness of arrears that have accrued presents a more difficult legal issue for state courts and legislatures. This is because the elimination of arrears can be seen as a violation of the “Bradley Amendment,” which has been a part of federal law for more than 16 years.<sup>18</sup> The Bradley Amendment requires states to enact laws under which every installment of support is a judgment due and owing on the date it is to be paid and not subject to retroactive modification. Failure to enact such laws makes a state ineligible for federal funding for its child support enforcement and welfare programs.<sup>19</sup> As a result, every state has adopted a ban on retroactive modification. Forgiveness of arrears would appear to be inconsistent with current Florida law which provides:

- When support payments are made through the local depository or through the State Disbursement Unit, any payment or installment of support which becomes due and is unpaid under any support order is delinquent; and this unpaid payment or installment, and all other costs and fees herein provided for, become, after notice to the obligor and the time for response as set forth in this subsection, a final judgment by operation of law, which has the full force, effect, and attributes of a judgment entered by a court in this state for which execution may issue...
- The judgment under this paragraph is a final judgment as to any unpaid payment or installment of support which has accrued up to the time either party files a motion with the court to alter or modify the support order, and such judgment may not be modified by the court. The court may modify such judgment as to any unpaid payment or installment of support which accrues after the date of the filing of the motion to alter or modify the support order. This subparagraph does not prohibit the court from providing relief from the judgment pursuant to Rule 1.540, Florida Rules of Civil Procedure.<sup>20</sup>

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<sup>17</sup> Roberts. P., Truth and Consequences: Part III Who Pays When Paternity is Disestablished? Center for Law and Social Policy. April 2003 (with updates in 2004, 2005, and 2006).

<sup>18</sup> 42 USCA 666(a)(9)(West Supp. 2002). This law was enacted in 1986 and is referred to as the “Bradley Amendment” after its chief sponsor, former Senator Bill Bradley of New Jersey.

<sup>19</sup> 42 USCA 654.

<sup>20</sup> See s. 61.14(6), Florida Statutes.

According to the Center for Law and Social Policy there are also public policy reasons to avoid relieving responsibility for arrears. One would be to encourage respect for the judgments issued by courts and administrative agencies. Once a paternity determination and support order are in effect, they are judgments and should be followed. If litigants believe they have been wronged, their remedy is through the appeal process. Secondly, another reason to be cautious about eliminating arrears is to encourage people to act as quickly as possible. If an individual believes he/she can disestablish paternity at any time and obtain retroactive relief from the support obligation there is less reason for that person to act quickly. Such delay leaves the child unable to collect support from the obligated parent, while at the same time unable to pursue the biological father.<sup>21</sup> To the contrary, there is also a sense that it is unfair to require support payments from a person who has been declared not to be a child's father. This line of reasoning applies to past-due payments as well as current and future support. The tension between these two viewpoints continues to be addressed state legislatures and court.

- There is no provision in the bill for considering the best interests of the child, nor is there any requirement that the court consider appointing a guardian ad litem for the child.

#### D. STATEMENT OF THE SPONSOR

No statement provided.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

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<sup>21</sup> Roberts. P., Truth and Consequences: Part III Who Pays When Paternity is Disestablished? Center for Law and Social Policy. April 2003 (with updates in 2004, 2005, and 2006).