



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Safeguard Individual Liberty:** The bill allows a biological father's parental rights to be terminated regarding a child conceived as a result of sexual battery.

**Empower Families:** The bill substantially changes Florida's termination of parental rights standard to include harm not done to the child but towards the victim of sexual battery if a pregnancy results because of that sexual battery.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation:**

##### **Termination of Parental Rights Generally**

Florida courts have long recognized that parents have a "fundamental liberty interest in determining the care and upbringing of their children free from the heavy hand of government paternalism."<sup>1</sup> The right of parental privilege is not absolute, but is limited only by the principle that the welfare or "best interest" of the child is paramount.<sup>2</sup>

Although a parent's interest in maintaining parental ties is essential, a child's entitlement to a safe environment is more so.<sup>3</sup> Because the State has a compelling interest in protecting its children, it may permanently and involuntarily terminate parental rights, but only after showing by clear and convincing evidence that the parent poses a "substantial risk of significant harm to the child."<sup>4</sup> In addition, because termination of parental rights implicates a fundamental liberty interest, termination must be the least restrictive means of protecting the child.<sup>5</sup>

Recognizing these constitutional principles, the framework for terminating parental rights in Florida requires the State to establish with clear and convincing evidence (1) the existence of statutory grounds; (2) that termination is in the child's best interest; and (3) that termination is the least restrictive means of protecting the child.<sup>6</sup>

##### **Grounds for Termination of Parental Rights in Florida**

A proceeding to terminate parental rights may be initiated by the Department of Children and Family Services (the department), the guardian ad litem or any other interested person.<sup>7</sup> The petition for termination must include allegations that one of the grounds for termination has been met, that the parents were informed of their right to counsel, and that termination is in the best interest of the child.<sup>8</sup>

Unless certain exceptions apply, the department is mandated to file a petition to terminate parental rights if:

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<sup>1</sup> *Padgett v. Department of Health and Rehabilitative Services*, 577 So.2d 565, 570 (Fla. 1991). See also, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>2</sup> *Padgett*, 577 So.2d at 570 (Fla. 1991).

<sup>3</sup> *Id.* at 571.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *T.C. v. Department of Children and Families*, 961 So.2d 1060, 1061 (Fla. 4th DCA 2007). See also, s. 39.809 (1), F.S.

<sup>7</sup> Section 39.802(1), F.S.

<sup>8</sup> Section 39.802(4), F.S.

- At the time of the 12-month judicial review hearing, a child is not returned to the physical custody of the parents;
- A child has been in out-of-home care under the responsibility of the state for 15 of the most recent 22 months;
- A parent has been convicted of murder or manslaughter of the other parent, or of a felony battery that resulted in serious bodily injury to the child or to any other child of the parent; or
- A court determines that reasonable efforts to reunify the child and parent are not required.<sup>9</sup>

Pursuant to s. 39.806(1), F.S., the following are grounds for the termination of parental rights in Florida:

- (a) Voluntary surrender;
- (b) Abandonment;
- (c) Conduct that demonstrates that the continuing involvement in the parent-child relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the child, irrespective of the provision of services;
- (d) Incarceration (under certain circumstances);<sup>10</sup>
- (e) Failure to comply with the case plan;
- (f) Egregious conduct that threatens the life, safety, or health of the child or the child's sibling;
- (g) Aggravated child abuse, sexual battery or sexual abuse, or chronic abuse of the child;
- (h) Murder, voluntary manslaughter, or felony assault of the child or another child;
- (i) Parental rights to a sibling have been terminated involuntarily.

Reasonable efforts to preserve and reunify families are not required if a court determines that any of the events described in paragraphs (1)(e)-(i) has occurred.<sup>11</sup>

In determining the best interests of the child, the court must consider and evaluate all relevant factors, including the parents' ability to provide and care for the child, the mental and physical health needs of the child, and the emotional ties between the parents and child.<sup>12</sup>

<sup>9</sup> Section 39.8055, F.S.

<sup>10</sup> The circumstances include: 1. 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; 2. The incarcerated parent has been determined by the court to be a violent career criminal as defined in s. [775.084](#), a habitual violent felony offender as defined in s. [775.084](#), or a sexual predator as defined in s. [775.21](#); has been convicted of first degree or second degree murder in violation of s. [782.04](#) or a sexual battery that constitutes a capital, life, or first degree felony violation of s. [794.011](#); or has been convicted of an offense in another jurisdiction which is substantially similar to one of the offenses listed in this paragraph. As used in this section, the term "substantially similar offense" means any offense that is substantially similar in elements and penalties to one of those listed in this subparagraph, and that is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction; or 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.

<sup>11</sup> Section 39.806(2), F.S.

<sup>12</sup> Section 39.810, F.S., identifies the following factors to be considered by a court in determining the manifest best interest of the child: (1) availability of a permanent custody arrangement with a relative of the child; (2) ability of the parent to provide for the child; (3) capacity of the parent to care for the child; (4) mental and physical health needs of the child; (5) love, affection, and other

Section 39.811(6), F.S., provides that the parental rights of one parent may be severed without severing the parental rights of the other parent only under certain, specified circumstances, one of which is if the parent whose rights are being terminated meets any of the grounds specified in s. 39.806 (1)(d) and (f)-(i), F.S.<sup>13</sup>

### **Grounds for Termination of Parental Rights in Other States:**

At least eleven other states, including Connecticut, Idaho, Louisiana, Missouri, Montana, Maine, Oklahoma, Pennsylvania, Texas, Wisconsin, and Washington, allow for the termination of parental rights in cases where the parent is the father of a child conceived as a result of rape, sexual assault or incest.<sup>14</sup>

In Nevada and New Jersey, a person convicted of sexual assault has no right to custody or visitation with a child who is born because of the assault.<sup>15</sup>

At least one court has considered the constitutional implications of terminating parental rights to a child born as the result of illegal sexual intercourse. In *Pena v. Mattox*, the United States Court of Appeal for the Seventh Circuit, Illinois, considered the argument made by a biological father who conceived a child during statutory rape that he had a constitutionally protected right to parent the child. The court noted that the Constitution does indeed forbid a state from depriving parents of their children without good reason, but stated further that:

[A] state has discretion to decide whether it is better to encourage the kind of conduct in which the plaintiff engaged by giving him parental rights or discourage it by refusing to bestow legal protection on the relationship between father and child. The interest asserted by the plaintiff is not so compelling as to warrant our overriding the state's choice in the name of the Constitution.<sup>16</sup>

We find only two published decisions in which parental rights have been granted to a male statutory rapist, and in both he was offering to support the child and thus, unlike this case, shoulder the burdens as well as seeking the benefits of his wrongdoing. [\*In re Craig "V"\*, 116 A.D.2d 130, 500 N.Y.S.2d 568 \(1986\)](#); [\*In re Paternity Petition of LaCroix v. Deyo\*, 108 Misc.2d 382, 437 N.Y.S.2d 517 \(Fam.Ct.1981\)](#). These decisions emphasize the value to the child of the father's offer of support.<sup>17</sup>

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emotional ties existing between the child and the parent; (6) likelihood of an older child remaining in long-term foster care upon termination; (7) 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; (8) length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (9) depth of the relationship existing between the child and the present custodian; (10) reasonable preferences and wishes of the child; and (11) recommendations for the child provided by the child's guardian ad litem or legal representative.

<sup>13</sup> The parental rights of one parent may be severed without severing the parental rights of the other parent only under the following circumstances:

- (a) If the child has only one surviving parent;
- (b) If the identity of a prospective parent has been established as unknown after sworn testimony;
- (c) If the parent whose rights are being terminated became a parent through a single-parent adoption;
- (d) If the protection of the child demands termination of the rights of a single parent; or
- (e) If the parent whose rights are being terminated meets any of the criteria specified in s. [39.806](#)(1)(d) and (f)-(i).

<sup>14</sup> Conn. Gen. Stat. s. 17a-112(j)(G) (2007); Idaho Code Ann. s. 16-2005(2)(a) (2007); La. Child. Code Ann. art. 1015 (2007); Me. Rev. Stat. Ann. tit. 19-A, s. 1658 (2007); Mo. Ann. Stat. s. 211.447 (2007); Mont. Code Ann. s. 41-3-609 (2007); Okla. Stat. Ann. tit. 10, s. 7006-1.1 (2007); Pa. Cons. Stat. Ann. s.2511(a)(7) (2007); Tex. Fam. Code Ann. s. 161.007 (2007); Wash Rev. Code Ann. s. 13.34.132 (2007); Wis. Stat. Ann. s. 48.415(9)(a) (2007).

<sup>15</sup> Nev. Rev. Stat. s. 125C.210 (2005); N.J. Stat. Ann. 9:2-4.1 (2007).

<sup>16</sup> *Pena v. Mattox*, 84 F.3d 894, 899-902 (7th Cir. 1996). *See also*, *In re A.F.M.*, 15 P.3d 265 (Alaska, 2001).

<sup>17</sup> *Id.*

The circumstances of Pena are different than what is proposed in HB 271 in that it applied to statutory rape<sup>18</sup> and not sexual battery.<sup>19</sup>

### **Sexual Battery**

Section 794.011(1)(h), F.S., defines sexual battery as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . .”

Section 794.011, F.S., provides various levels of penalties for the commission of sexual battery, depending on the age of the victim and the circumstances of the offense.

Section 794.05, F.S., provides that a person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree. If an offense under this section directly results in the victim giving birth to a child, and paternity is confirmed, the offender must pay child support pursuant to the child support guidelines.

In 2006, there were 11,567 forcible sex offenses in Florida, including 6,471 forcible rapes.<sup>20</sup> It is estimated that between 1 and 5 percent of all sexual assaults result in pregnancy.<sup>21</sup> It is not known what number of sexual assault-related pregnancies results in the birth of a child.

Recidivism rates for sexual offenses over a 15-year period are estimated to be as follows:<sup>22</sup>

- All sexual offenders 24%
- Rapists 24%
- Incestuous Child Molesters 13%
- Child Molesters of Girl Victims 16%
- Child Molesters of Boy Victims 35%

### **Restitution:**

Unless it finds clear and compelling reasons not to order restitution, the court in a criminal proceeding must order the defendant to make restitution to a victim.<sup>23</sup>

Section 775.089, F.S., currently authorizes a court in a criminal case to order that a defendant pay restitution for “damage or loss caused directly or indirectly by the defendant’s offense” or for the “damage or loss related to the defendant’s criminal episode”. Currently, no statute expressly authorizes restitution in the form of payments that amount to child support.

The term “victim” as used in the provisions of law relating to restitution means “each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of

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<sup>18</sup> Section 800.04(6), F.S., LEWD OR LASCIVIOUS CONDUCT.-- (a) A person who: 1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or 2. Solicits a person under 16 years of age to commit a lewd or lascivious act commits lewd or lascivious conduct. (b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). (c) An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

<sup>19</sup> Section 794.011(1)(h), F.S., defines sexual battery as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . .”

<sup>20</sup> *Total Sex Offenses for Florida, 1989-2006*, [http://www.fdle.state.fl.us/FSAC/Crime\\_Trends/sex\\_offenses/index.asp](http://www.fdle.state.fl.us/FSAC/Crime_Trends/sex_offenses/index.asp) (last visited January 16, 2008).

<sup>21</sup> American Civil Liberties Union, Fact Sheet, *Availability of Emergency Contraception for Sexual Assault Patients in Florida Emergency Care Facilities*.

<sup>22</sup> Andrew J. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question* (2003-2004), available at [http://ww2.pssp.gc.ca/publications/corrections/pdf/200403-2\\_e.pdf](http://ww2.pssp.gc.ca/publications/corrections/pdf/200403-2_e.pdf) (last visited January 16, 2008).

<sup>23</sup> Section 775.089(1)(a), F.S.

the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense."<sup>24</sup>

The court may require that the defendant make restitution within a specified period or in specified installments, but the end of the specified period or the last installment cannot be later than:

- The end of the period of probation, if probation is ordered;
- Five years after the end of the term of imprisonment, if the court does not order probation; or
- Five years after the date of sentencing in any other case.<sup>25</sup>

If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered must be a condition of the probation or parole. The court may revoke probation, and the Parole Commission may revoke parole, if the defendant fails to comply with the restitution order.<sup>26</sup>

### **Child Support**

The Department of Revenue (DOR) Child Support Enforcement Program (CSE) obtains court orders for child support, using guidelines provided in s. 61.30, F.S., to establish the amount of the obligation.

The child support guidelines are based on the number of children and the combined income of the parents. The child support obligation is divided between the parents in direct proportion to their income or earning capacity. The parent with whom the child lives most of the time (the custodial parent) is paid the established support by the other parent (the non-custodial parent).

The court may deviate from the guidelines, plus or minus 5 percent, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent.<sup>27</sup>

### **Restitution and Child Support in Other States**

The state of Washington provides that restitution for the crime of rape of a child in which the child becomes pregnant shall include (1) all medical expenses associated with the rape and the pregnancy and (2) child support for the child born as a result of the rape, as ordered pursuant to a separate child support order.<sup>28</sup>

The Washington statute requires that restitution payments made in these circumstances be processed through the state's child support registry and that identifying information about the victim and the victim's child shall not be included in the order.<sup>29</sup>

The statute provides that the offender shall remain under the criminal court's jurisdiction until the child support obligation is satisfied or for 25 years, whichever is longer.<sup>30</sup>

In Delaware, if a child is born as the result of a third degree felony rape, the court is required to order that the defendant, as a condition of probation, pay child support as ordered by the Family Court.<sup>31</sup>

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<sup>24</sup> Section 775.089(1)(c), F.S.

<sup>25</sup> Section 775.089(3), F.S.

<sup>26</sup> Section 775.089(4), F.S.

<sup>27</sup> Section 61.30 (1)(a), F.S.

<sup>28</sup> Wash. Rev. Code Ann. ss. 9.94A.753(6) and 9.94A.760(4) (2007).

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Del. Code Ann tit. 11, s. 771(c) (2007).

### **Effect of Bill:**

The bill substantially changes Florida's termination of parental rights standard to include harm not done to the child as stated in s. 39.806(1) F.S., but towards the victim's mother, as a result of a sexual battery that resulted in a pregnancy.

Specifically, the bill creates s. 39.806(1)(j), F.S., which provides a new ground for termination of parental rights when a parent has pled guilty or nolo contendere to, or has been convicted of, a sexual battery as defined in section 794.011, F.S., or of an act committed outside Florida which would be a sexual battery if committed in this state, which results in the victim giving birth to a child.

The creation of the new standard appears to allow the termination of parental rights for prospective abuse, rather than to abuse of the child who is the subject of the proceeding.

The issue in prospective abuse cases is whether future behavior adversely affecting the child can be "clearly and certainly predicted."<sup>32</sup> Florida courts have specifically held that there must be a nexus between the past act and the prospect of future acts in cases where the grounds alleged are "egregious conduct" pursuant to s. 39.806(f), F.S.,<sup>33</sup> murder, manslaughter or felony assault on a child pursuant to s. 39.806(h), F.S.<sup>34</sup> or termination of rights to a sibling pursuant to s. 39.806(i), F.S.<sup>35</sup>

The bill also creates s. 794.057, F.S., regarding restitution for sexual battery. It provides that if a child is conceived as the result of a sexual battery, the court may order the defendant to pay restitution to the victim for child support expenses. If restitution is ordered, the court is required to give consideration to the child support guidelines in section 61.30, F.S., when determining the amount of restitution. The payments are required to be remitted to the clerk of the court where the conviction was entered and paid by the clerk to the State Disbursement Unit (SDU). The SDU is required to distribute the payment in the same manner as a child support payment and without regard to termination of the obligor's parental rights. The bill further provides that the amount may not be reduced due to the offender's inability to pay.

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

Section 1: Amends s. 39.806, F.S., relating to grounds for terminating parental rights based on a sexual battery.

Section 2: Creates s.794.057, F.S., relating to restitution for sexual battery.

Section 3: Provides an effective date of July 1, 2008.

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

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

#### **1. Revenues:**

None.

#### **2. Expenditures:**

According to the Department of Revenue, the cost to set up a distribution system to disburse the awarded restitution is as follows:

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<sup>32</sup> *T.M. v. Department of Children and Families*, 2008 WL 110185, \*3 (Fla. 4th DCA 2008). *See also, Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) ("...a State cannot terminate parental rights based upon a presumption that a class of parents is unfit without affording individual parents an opportunity to rebut the presumption.").

<sup>33</sup> *See A.W. v. DCF*, 962 So.2d 953 (Fla. 2nd DCA 2007).

<sup>34</sup> *See J.F. v. DCF*, 890 So.2d 434 (Fla. 4th DCA 2004).

<sup>35</sup> *See DCF v. F.L.*, 880 So.2d 602 (Fla. 2004).

- \$106,559 in fiscal year 08-09.
- \$77,322 in fiscal year 09-10.
- \$88,983 in fiscal year 10-11.
- \$100,644 in fiscal year 11-12.

Also, this bill will have a minimal fiscal impact to the State Courts System by requiring the courts to consider and evaluate all relevant factors when awarding restitution.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

3. This bill will have a fiscal impact to the clerks of courts requiring them to remit payments to the State Disbursement Unit.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

This bill will have an indeterminate fiscal impact to the individual based on the court ordered restitution amount.

**D. FISCAL COMMENTS:**

The Department of Revenue's technical analysis recommends removing the requirement for these restitution payments to be sent to the State Disbursement Unit for disbursing to the victim. The current process for processing payments is found in s.775.089, F.S., and allows the court to order either the Clerk of Court or the Department of Corrections to collect and dispense restitution payments. By utilizing the current restitution payment processing within these entities, the State could avoid additional costs and avoid delaying payments to victims by requiring payments to be sent to another entity prior to being sent to the victim.

According to the Department of Revenue, utilizing the State Disbursement Unit would create a conflict with federal law requirements as to the intent and operation of the State Disbursement Unit, as provided in 42 U.S.C. s. 654(27).

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.



2. Other:

The bill potentially implicates Article 1, Section 23, of the Florida Constitution relating to privacy rights.<sup>36</sup> Parents have a right to raise their children free from governmental intrusion, unless the state can show harm to the child.

The issue related to prospective abuse cases is whether future behavior adversely affecting the child can be “clearly and certainly predicted.”<sup>37</sup> Florida courts have specifically held that there must be a nexus between the past act and the prospect of future acts in cases where the grounds alleged are “egregious conduct” pursuant to s. 39.806(f), F.S.<sup>38</sup>

The termination of parental rights implicates a fundamental liberty interest, which must be the least restrictive means of protecting the child.<sup>39</sup> Query whether prohibiting visitation through Chapter 61, F.S., would be considered by a court as a least restrictive means of protecting the child.<sup>40</sup>

The bill creates the obligation to pay child support on a child to whom the parent has no rights because those rights have been terminated. This may implicate Article 1, Section 9, of the due process clause of the Florida Constitution.<sup>41</sup>

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rule making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**The Office of the State Court Administrator provided the following:**

The legislative intent is not entirely clear from the wording of the bill. If the bill is intended to provide for termination of parental rights regarding children who are conceived and born as the result of a sexual battery as defined in § 794.011, Florida Statutes, the bill should be amended to make such provision. Instead, the bill is worded more generally. The bill might still have a problem by permitting terminating parental rights in the absence of a nexus between the parent’s conduct and harm to the child. (See below.)

If the bill is intended to permit termination of the defendant’s rights as to a child other than the one being conceived as a result of the sexual battery, the bill lacks a causal nexus between the defendant’s conduct and the child who is the subject of the termination of parental rights action. For example, the defendant might already have a teenage child at the time of he committed the sexual battery. There would be no nexus between the sexual battery by the defendant and termination of the defendant’s rights to the teenage child, which could present problems in individual cases for termination of parental rights. See A.W., Jr., 962 So. 2d 953 (Fla. 2nd DCA 2007)(termination of parental rights reversed

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<sup>36</sup> Article 1, Section 23 of the Florida Constitution provides that 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.

<sup>37</sup> *T.M. v. Department of Children and Families*, 2008 WL 110185, \*3 (Fla. 4<sup>th</sup> DCA 2008). See also, *Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) (“...a State cannot terminate parental rights based upon a presumption that a class of parents is unfit without affording individual parents an opportunity to rebut the presumption.”).

<sup>38</sup> See *A.W. v. DCF*, 962 So.2d 953 (Fla. 2<sup>nd</sup> DCA 2007).

<sup>39</sup> *Padgett*, 577 So.2d at 571 (Fla. 1991).

<sup>40</sup> Section 61.13 (2), F.S., 2007.

<sup>41</sup> Article 1, Section 9. Due process.--No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself. *J.L. v. G.L.*, 429 (Fla. 4<sup>th</sup> DCA 2004) states that because the father's rights were terminated, he no longer qualifies as a parent and thus no longer has the legal obligation to pay child support.

because there was no nexus between the father's murder of the mother and neglect, abuse, or harm to the child). "To terminate parental rights on the ground of egregious conduct, 'there must be a nexus between the conduct and the abuse, neglect, or specific harm to the child.'" D.P. v. Department of Children and Family Services, 930 So. 2d 798, 801 (Fla. 3rd DCA 2006)(*quoting C.B. v. Department of Children and Families*, 874 So. 2d 1246, 1254 (Fla. 4th DCA 2004)(additional citation omitted). Furthermore, the bill is worded to apply to situations which result "in the victim giving birth to a child."

However, if by virtue of the bill, the Legislature is deeming violations of section 794.011, Florida Statutes to be sufficiently egregious to warrant termination of parental rights as to pre-existing children, the question is raised whether the conduct is any less egregious if the victim does not give birth. In other words, the ground to terminate parental rights as to the existing child is predicated *not* upon the sexual battery itself nor even upon the sexual battery resulting in a pregnancy but rather in it resulting in birth of a child. Thus, a defendant can avoid termination of his parental rights to an existing child due to birth control, infertility, abortion, or miscarriage. This may well be the intent of the bill but it should be clarified.

Because the bill does not amend § 39.806(2), Florida Statutes, the new ground for termination of parental rights would not appear to be an "expedited" ground for termination and a case plan would be required to be offered to the parent prior to termination of parental rights. If the intent of the bill is to provide for termination of parental rights without a case plan being offered, the bill should amend § 39.806(2), Florida Statutes to include the new ground. Likewise, to the extent that the bill would be applied to terminate only the rights of the parent who has committed a sexual battery but not to terminate the rights of the mother, the bill should amend § 39.811(6)(e) to include the ground among the situations permitting termination of the rights of only one parent, particularly if the bill is intended to apply to a child who is conceived as a result of a sexual battery in violation of section 794.011, Florida Statutes.

According to OSCA Court Services, which referred to the OBTS database, in FY 05-06 there were 659 defendants who were convicted or plead guilty or *nolo* to section 794.011. Likewise, in FY 06-07, there were 676 such defendants. What is not known is how many of those defendants had children who would be affected by the bill's language, under either construction discussed above.

### **The Department of Children and Families provided the following:**

In order to terminate a parent's rights to his child, there are criteria that must be satisfied in addition to any statutory authorization for the termination. Specifically, TPR must be the least restrictive means of protecting a child (see W.R. v. Department of Children and Families, 928 So. 2d 414 (Fla. 1<sup>st</sup> DCA 2006)), and within the best interest of the child. (see In re J.B., 923 So. 2d 1201 (Fla. 2d DCA 2006)). These considerations could limit the use of the authority granted by the bill, even where it is clear that a child is the product of a sexual battery.

It is debatable whether the cost of supporting a child born from sexual battery could be included within the existing definition of damage or loss under section 775.089, F.S.

#### D. STATEMENT OF THE SPONSOR

No statement submitted.

### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**