

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Criminal Justice Committee

**BILL:** CS/SB 638

**INTRODUCER:** Committee on Children, Families and Elder Affairs and Senators Jones and Gaetz

**SUBJECT:** Termination of Parental Rights/Sexual Battery

**DATE:** April 2, 2008      **REVISED:** 04/08/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Jameson	CF	Fav/CS
2.	Cellon	Cannon	CJ	Fav/2 amendments
3.			JU	
4.			JA	
5.				
6.				

**Please see Section VIII. for Additional Information:**

- A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes
- B. AMENDMENTS.....  Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

**I. Summary:**

Committee Substitute for Senate Bill 638 amends ch. 39, F.S., making it possible to permanently and involuntarily terminate the parental rights of the father of a child conceived and born as the result of an act of sexual battery.

The bill provides that if a child is born as the result of an act of sexual battery, the criminal court may order restitution to the victim for the monetary expenses related to supporting the child.

The bill provides an effective date of July 1, 2008.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 39.806, 39.811, 775.089 and 794.057.

**II. 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 principals, 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>

In prospective abuse cases, the Department of Children and Families (DCF or the department) must prove a connection between past acts of abuse and the prospect that abuse will occur again. The issue in prospective abuse cases is whether future behavior adversely affecting the child can be “clearly and certainly predicted.”<sup>7</sup>

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

A proceeding to terminate parental rights may be initiated by the department, the guardian ad litem or any other interested person.<sup>8</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>9</sup>

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

- At the time of the 12-month judicial review hearing, a child is not returned to the physical custody of the parents;

<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. App. 4 Dist. 2007). *See also, s. 39.809 (1), F.S.*

<sup>7</sup> *T.M. v. Department of Children and Families*, 2008 WL 110185, \*3 (Fla.App. 4 Dist. 2008). *See also, Hodgson v. Minnesota*, 497 U.S. 417, 484 (“...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.”). 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. (*See A.W. v. DCF*, 962 So.2d 953 (2d DCA 2007)), murder, manslaughter or felony assault on a child pursuant to s. 39.806(h), F.S. (*See J.F. v. DCF*, 890 So.2d 434 (4<sup>th</sup> DCA 2004)), or termination of rights to a sibling pursuant to s. 39.806(i), F.S. (*See DCF v. F.L.*, 880 So.2d 602 (Fla. 2004)). No court has imposed such a requirement in cases alleging termination on the grounds that the parent sexually battered or sexually abused the child pursuant to s. 39.806(g), F.S.

<sup>8</sup> Section 39.802(1), F.S.

<sup>9</sup> Section 39.802(4), F.S.

- 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>10</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);
- (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;
- (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>

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.

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<sup>10</sup> Section 39.8055, F.S.

<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: (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 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; (11) recommendations for the child provided by the child's guardian ad litem or legal representative.

### 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>13</sup>

In other states, consent to adoption is not required from a biological father if the child who is the subject of the adoption proceeding was conceived as the result of criminal sexual assault or abuse.<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>

The Uniform Putative and Unknown Fathers Act provides that in making a decision to preserve or terminate parental rights, a court shall consider, *inter alia*, the “circumstances of the child’s conception, including whether the child was conceived as a result of incest or forcible rape.”<sup>16</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 Appeals for the Seventh Circuit 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,

It is not the brute biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim (citation omitted).. . .

[N]o court has gone so far as to hold that the mere fact of fatherhood, consequent upon a criminal act. . .creates an interest that the Constitution protects in the name of liberty.. . .The criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants. Pregnancy is an aggravating circumstance of a sexual offense, not a mitigating circumstance. The criminal should not be rewarded for having committed the aggravated form of the offense by receiving parental rights which he may be able to swap for the agreement of the victim’s family not to press criminal charges.. . .

<sup>13</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>14</sup> 750 Ill. Comp. Stat. 50/8 (a)(5) (2007); Ind. Code 31-19-9-8(a)(4) (2007); N.Y. Domestic Relations Law s. 111-1 (2007); S.C. Code Ann. s. 20-7-1734 (2007).

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

<sup>16</sup> Unif. Putative & Unknown Fathers Act s. 5, 9B U.L.A. 91 (1999).

The Constitution does not forbid the states to penalize the father's illicit and harmful conduct by refusing to grant him parental rights that he can use to block an adoption or simply enjoy as the fruit of his crime. . . .

The maxim that a wrongdoer shall not profit from his wrong is deeply inscribed in the Anglo-American legal tradition (citation omitted). . . .

[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>17</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.

In 2006, there were 11,567 forcible sex offenses in Florida, including 6,471 forcible rapes.<sup>18</sup> It is estimated that between 1 and 5 percent of all sexual assaults result in pregnancy.<sup>19</sup> It is not known what number of sexual assault-related pregnancies results in the birth of a child.

### **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 for:

- Damage or loss caused directly or indirectly by the defendant's offense; and
- Damage or loss related to the defendant's criminal episode.<sup>20</sup>

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 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>21</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:

<sup>17</sup> *Pena v. Mattox*, 84 F.3d 894, 899-902 (7<sup>th</sup> Cir. 1996). See also, *In re A.F.M.*, 15 P.3d 265 (2001).

<sup>18</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>19</sup> American Civil Liberties Union, Fact Sheet, *Availability of Emergency Contraception for Sexual Assault Patients in Florida Emergency Care Facilities*.

<sup>20</sup> Section 775.089(1)(a), F.S.

<sup>21</sup> Section 775.089(1)(c), F.S.

- 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>22</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>23</sup>

Pursuant to s. 775.089(11), F.S., the court may order the clerk of the court or the Department of Corrections to collect and disburse restitution payments. In addition, an order of restitution may be enforced by the state or by a victim in the same manner as a judgment in a civil action.<sup>24</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>25</sup>

In most cases, a child support obligation continues until a child reaches the age of majority (age 18).<sup>26</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>27</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>28</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>29</sup>

<sup>22</sup> Section 775.089(3), F.S.

<sup>23</sup> Section 775.089(4), F.S.

<sup>24</sup> Section 775.089(5), F.S.

<sup>25</sup> Section 61.30 (1)(a), F.S.

<sup>26</sup> Section 743.07, F.S.

<sup>27</sup> Wash. Rev. Code Ann. ss. 9.94A.753(6) and 9.94A.760(4) (2007).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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>30</sup>

### III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 638 amends s. 39.806, F.S., making an addition to the list of possible grounds for the termination of parental rights. The bill provides that grounds for termination may be established if the parent has pled guilty or *nolo contendere* to, or has been convicted of, a sexual battery which results in the victim giving birth to a child. The bill defines sexual battery with reference to s. 794.011, F.S.

The bill amends s. 39.806(2), F.S., to provide that the new ground for termination of parental rights will be included among the grounds that do not require reasonable efforts to preserve and reunify families.

Similarly, the bill amends s. 39.811(6), F.S., to provide that the new ground for termination of parental rights will be included among the grounds that may be the basis for severing the parental rights of one parent (the biological father) without severing the rights of the other.

The bill creates s. 794.057, F.S., to provide that if a child is born as the result of a sexual battery, the court may order restitution, pursuant to s. 775.809, F.S., to the victim for the monetary expenses related to the support of the child, unless the victim's parental rights to the child have been terminated. The bill clarifies that the court is not precluded from ordering any other restitution to which the victim of a sexual battery may be entitled.

The bill provides that the amount of restitution is to be established with reference to the child support guidelines provided in s. 61.30, F.S., and that the amount ordered may not be reduced due to the offender's inability to pay.

The bill amends s. 775.089(3), F.S., to provide that a criminal court shall retain jurisdiction as required to enforce an order of restitution for the support of a child born as the result of the offense of sexual battery.

The bill provides an effective date of July 1, 2008.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

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<sup>30</sup> Del. Code Ann tit. 11, s. 771(c) (2007).

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Because the bill implicates the fundamental right to parent a child, it may be subject to constitutional scrutiny, particularly to the extent it may require courts to address issues related to prospective abuse. However, because there is a risk of recidivism in cases of sexual battery, the State would likely assert that the offending parent poses a “substantial risk of significant harm” to the child in response to such a challenge.

In addition, as discussed in *Pena v. Mattox*, “[t]he Constitution does not forbid the states to penalize [a] father’s illicit and harmful conduct by refusing to grant him parental rights that he can use to block an adoption or simply enjoy as the fruit of his crime.”<sup>31</sup>

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Children and Families notes that the bill may result in an increase in the number of termination of parental rights proceedings and appeals, but the number would not likely be significant or have significant fiscal or operational impact.<sup>32</sup>

The Association of Court Clerks indicated that the bill would have little or no operational or fiscal impact on the Clerks.<sup>33</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>31</sup> *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996).

<sup>32</sup> Department of Children and Families, Staff Analysis and Economic Impact, Senate Bill Number 638 (December 12, 2007).

<sup>33</sup> E-mail from Beth Allman, Florida Association of Court Clerks and Comptrollers (January 11, 2008) (on file with the Senate Committee on Children, Families and Elder Affairs).



**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families and Elder Affairs on January 23, 2008:**

Provides that reunification efforts with the biological father are not required when a child is born as a result of a sexual battery. Provides that the parental rights of one parent may be severed without severing the parental rights of the other parent, when a child is born as a result of a sexual battery. Clarifies that the victim is entitled to restitution for support of the child in addition to any other restitution available under current law, and only if her parental rights to the child have not been terminated. Requires the criminal court to retain jurisdiction to enforce the restitution order. Allows the restitution payments proposed by this bill to be processed through the regular criminal restitution process rather than through the child support enforcement program, in order to avoid additional costs and delays.

- B. **Amendments:**

**Barcode 231214 by Criminal Justice on April 8, 2008:**

Adds the offense of lewd or lascivious battery to the sexual battery offense already covered by the provisions of the bill because that offense may result in a pregnancy as well.

**Barcode 922076 by Criminal Justice on April 8, 2008:**

Relocates the restitution provisions in the bill to the Restitution statute, s. 775.089, F.S. Additionally, the amendment lists lewd or lascivious battery as an offense for which the victim may be granted restitution.