

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 141 Parenting and Time-Sharing of a Minor Child for a Convicted Parent

**SPONSOR(S):** Judiciary Committee, Leek

**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/CS/SB 932

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**FINAL HOUSE FLOOR ACTION:** 116 Y's      0 N's            **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 141 passed the House on April 1, 2021, and subsequently passed the Senate on April 14, 2021.

The interest of parents in the care, custody, and control of their children is a recognized fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This fundamental liberty interest is rooted in the fundamental right of privacy from interference in making important decisions relating to marriage, family relationships, child rearing, and education. At the state level, the Florida Supreme Court has recognized that under Art. I., s. 23 of the Florida Constitution, parents have a fundamental liberty interest in determining the care and upbringing of their children.

Currently, there is no blanket provision in Florida law prohibiting a person who has committed a sexual crime from exercising time-sharing with his or her minor child. Moreover, current law presumes that parental responsibility should be shared by both parents, unless the court finds that "shared parental responsibility would be detrimental to the child." Accordingly, in a proceeding under the Florida dissolution of marriage and time-sharing statutes, a judge has wide discretion to decide parenting and time-sharing matters relating to a minor child. A judge must consider the best interests of the child while balancing the rights of parents. In establishing a time-sharing plan, the court must evaluate all factors affecting the welfare and interests of the child and the circumstances of the family, including (but not limited to) mental health, physical health, moral fitness of the parents, and evidence of domestic abuse or sexual violence.

Although current law requires the court to acknowledge in writing when it considers evidence of sexual violence in evaluating the best interests of the child, it is possible to have been convicted of a sexual crime, and thus to be classified as a sexual offender, without having committed a violent sexual act. Therefore, under current law, such person may still be entitled to time-sharing with a minor child.

The bill creates a rebuttable presumption against parental responsibility and time-sharing for parents who are convicted of or have had adjudication withheld for a specified sexual offense if at the time of the offense:

- The parent was 18 years of age or older; and
- The victim was under 18 years of age or the parent believed the victim to be under 18 years of age.

However, the presumption against time-sharing may be rebutted if the court makes a specific finding in writing that the parent poses no significant risk of harm to the child and that time-sharing is in the best interest of the child. The bill also clarifies that if the presumption is rebutted, the court must consider all time-sharing factors set forth in statute.

The bill does not appear to have a fiscal impact on state or local government.

The bill was approved by the Governor on June 21, 2021, ch. 2021-139, L.O.F., and will become effective on July 1, 2021.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### Sexual Crimes

Chapter 943, F.S., specifies various sexual crimes that generally require registration as a sexual offender upon conviction, including:

- Sexual misconduct with an individual with a developmental disability;<sup>1</sup>
- Sexual misconduct with a mental health patient by an employee;<sup>2</sup>
- Kidnapping or false imprisonment, where the victim is a minor and there is a sexual component to the crime;<sup>3</sup>
- Luring or enticing a child, with a prior sexual conviction;<sup>4</sup>
- Human trafficking;<sup>5</sup>
- Sexual battery;<sup>6</sup>
- Unlawful sexual activity with minors;<sup>7</sup>
- Lewd or lascivious battery, molestation, conduct, or exhibition;<sup>8</sup>
- Video voyeurism with prior video voyeurism conviction;<sup>9</sup>
- Lewd or lascivious offense on an elderly person;<sup>10</sup>
- Sexual performance by a child;<sup>11</sup>
- Providing obscene materials to a minor;<sup>12</sup>
- Computer pornography involving minors;<sup>13</sup>
- Soliciting a minor over the internet;<sup>14</sup>
- Traveling to meet minors;<sup>15</sup>
- Lewd or lascivious exhibition over the internet;<sup>16</sup>
- Transmission of child pornography by electronic device or equipment;<sup>17</sup>
- Transmission of material harmful to minors;<sup>18</sup>
- Selling or buying minors to engage in sexually explicit conduct;<sup>19</sup>
- Racketeering with written findings that the racketeering involved at least one sexual offense;<sup>20</sup>
- Sexual misconduct with a forensic client;<sup>21</sup> and
- Sexual misconduct by an employee on a juvenile offender.<sup>22</sup>

Qualifying delinquency adjudications for sexual offender designation include:

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<sup>1</sup> S. 393.135(2), F.S.

<sup>2</sup> S. 394.4593(2), F.S.

<sup>3</sup> Ss. 787.01 and 787.02, F.S.

<sup>4</sup> S. 787.025(2), F.S.

<sup>5</sup> Ss. 787.06(3)(b), (d), (f), or (g), F.S.

<sup>6</sup> S. 794.011, excluding s. 794.011(10), F.S.

<sup>7</sup> S. 794.05, F.S.

<sup>8</sup> S. 800.04, F.S.

<sup>9</sup> S. 810.145(8), F.S.

<sup>10</sup> S. 825.1025, F.S.

<sup>11</sup> S. 827.071, F.S.

<sup>12</sup> S. 847.0133, F.S.

<sup>13</sup> S. 847.0135(2), F.S.

<sup>14</sup> S. 847.0135(3), F.S.

<sup>15</sup> S. 847.0135(4), F.S.

<sup>16</sup> S. 847.0135(5), F.S.

<sup>17</sup> S. 847.0137, F.S.

<sup>18</sup> S. 847.0138, F.S.

<sup>19</sup> S. 847.0145, F.S.

<sup>20</sup> S. 895.03, F.S.

<sup>21</sup> S. 916.1075(2), F.S.

<sup>22</sup> S. 985.701(1), F.S.

- Sexual battery;<sup>23</sup>
- Lewd or lascivious battery by encouraging, forcing, or enticing any person under 16 years old to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity,<sup>24</sup> if either:
  - The victim is under 12 years old; or
  - The court finds sexual activity by the use of force or coercion;
- Lewd or lascivious molestation against a victim less than 12 years old,<sup>25</sup> if the court finds molestation involving unclothed genitals;
- Lewd or lascivious molestation against a victim at least 12 years old but less than 16 years old,<sup>26</sup> if the court finds both:
  - Use of force or coercion; and
  - Unclothed genitals.

### *Conditions of Probation*

Current law recognizes standard conditions of probation when a person is convicted of certain offenses involving children.<sup>27</sup> When a person is placed under supervision for violation of chapter 794,<sup>28</sup> s. 800.04,<sup>29</sup> s. 827.071,<sup>30</sup> s. 847.0135(5),<sup>31</sup> or s. 847.0145,<sup>32</sup> the court must impose the following conditions in addition to all other standard and special conditions imposed:

- A mandatory curfew.
- If the victim was under the age of 18, a prohibition of living within 1,000 feet of a school, child care facility, park, playground, or other place where children regularly congregate.
- Participation and successful completion of a sex offender treatment program.
- A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the victim, a qualified practitioner in the sexual offender treatment program, and the sentencing court.
- If the victim was under the age of 18, a prohibition on working for pay or as a volunteer at any place where children regularly congregate, including, but not limited to, schools, child care facilities, parks, playgrounds, pet stores, libraries, zoos, theme parks, and malls.
- If the victim was under the age of 18, a prohibition on contact with a child under the age of 18. The court may approve supervised contact with a child if the approval is based on a recommendation by a qualified practitioner who is basing the recommendation on a risk assessment. Additionally, the sex offender must be currently enrolled in or have successfully completed a sex offender therapy program. The court may deny supervised contact with a child at any time. The court must consider certain factors when considering whether to approve supervised contact with a child.

### *Recidivism Rates*

The United States Department of Justice, Office of Justice Programs followed a cohort of 9,691 male sex offenders, including 4,295 child sex offenders, for 3 years after release from prison to provide a comprehensive assessment of their behavior after release.<sup>33</sup> Of the 4,295 child sex offenders who were imprisoned, 60% of victims were age 13 or younger.<sup>34</sup> The study found that child sex offenders were

<sup>23</sup> S. 794.011, F.S.

<sup>24</sup> S. 800.04(4)(a)2., F.S.

<sup>25</sup> S. 800.04(5)(c)1., F.S.

<sup>26</sup> S. 800.04(5)(d), F.S.

<sup>27</sup> S. 948.30, F.S.

<sup>28</sup> Sexual battery.

<sup>29</sup> Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

<sup>30</sup> Sexual performance by a child.

<sup>31</sup> Lewd or lascivious exhibition over the internet.

<sup>32</sup> Selling or buying minors to engage in sexually explicit conduct.

<sup>33</sup> U.S. Department of Justice, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994*, <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> (last visited May 4, 2021).

<sup>34</sup> *Id.* at 1.

more likely to be rearrested for a child sex offense. Within the first 3 years following release from prison, 3.3% (or 141 of 4,295) were rearrested for another sex crime against a child.<sup>35</sup> The rate for all 9,692 sex offenders (a category that includes the 4,295 child sex offenders) was 2.2% (or 209 of 9,691).<sup>36</sup> Further, the study found that released child sex offenders with more than one prior arrest for a child sex offense were more likely to be rearrested for a child sex offense (7.3%).<sup>37</sup>

## Parental Rights

The interest of parents in the care, custody, and control of their children is a recognized fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This fundamental liberty interest is rooted in the fundamental right of privacy from interference in making important decisions relating to marriage, family relationships, child rearing, and education. The Florida Supreme Court has recognized that under Art. I., s. 23 of the Florida Constitution, parents have a fundamental liberty interest in determining the care and upbringing of their children. However, this right is not absolute, and the state may intervene in to protect children when parental decision-making is harmful to the child.

### *Parental Time-Sharing*

Parental time-sharing is the time, including overnights and holidays, which a minor child spends with each parent.<sup>38</sup> The Florida Supreme Court has recognized that a parent's right to time-sharing is not absolute, and the Legislature may enact time-sharing policy when it affects the best interest of the child.<sup>39</sup> Under s. 61.13(2), F.S., judges have wide discretion in determining matters related to parenting and time-sharing of minor children in actions under ch. 61, F.S., in accordance with the best interests of the child, while balancing the rights of parents.

In establishing time-sharing, the court must evaluate all factors affecting the welfare and interests of the child<sup>40</sup> and the circumstances of the family, including, but not limited to the:

- Demonstrated capacity and disposition of each parent to facilitate and encourage a continuing parent-child relationship, honor the time-sharing schedule, and accommodate necessary changes.
- Anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.
- Demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child.
- Length of time the child has lived in a stable environment and the desirability of maintaining continuity.
- Geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan.
- Mental health, physical health, and moral fitness of the parents.
- Home, school, and community record of the child.
- Reasonable preference of the child.
- Demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, the child's friends, teachers, and daily activities.
- Demonstrated capacity and disposition of each parent to:
  - Provide a consistent routine; and

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2.

<sup>38</sup> S. 61.046(23), F.S.

<sup>39</sup> *C.E.S. v. State, Dept. of Health and Rehabilitative Services*, 462 So. 2d 1160 (Fla. 2d DCA 1984); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

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

- Communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.
- Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, or that either parent has ever knowingly provided false information about such matters.
- Particular parenting tasks customarily performed by each parent, including the extent to which parenting responsibilities were undertaken by third parties.
- Demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities.
- Demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.
- Capacity and disposition of each parent to protect the child from the ongoing litigation regarding child custody.
- Developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs.

Currently, there is no blanket provision in Florida law prohibiting a person convicted of a sexual crime from exercising time-sharing with his or her minor child. Although current law requires the court to acknowledge in writing when it considers evidence of sexual violence in evaluating the best interests of the child, it is possible to be classified as a sexual offender without committing a violent sexual act. Therefore, under current law, a sexual offender who has not committed a violent sexual act may still be entitled to time-sharing with a minor child.

### *Parental Responsibility*

Parental responsibility refers to the responsibility and right to make important decisions about a child's welfare, such as education and medical care. Section 61.13, F.S., provides guidelines to assist courts in determining matters related to parental responsibility in addition to time-sharing of minor children. As a threshold consideration, the Legislature has declared that:

It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. There is no presumption for or against the father or mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child.<sup>41</sup>

To that end, current law presumes<sup>42</sup> that parental responsibility should be shared by both parents, unless shared responsibility would be detrimental to the child.<sup>43</sup>

### *Termination of Parental Rights*

Under chapter 39, F.S., the Department of Children and Families (DCF) may file a petition for termination of parental rights (TPR) against both parents when they fail to remedy the family problems that brought a child into the dependency system.<sup>44</sup> Alternatively, DCF may move to terminate only one of the parent's rights if it can prove certain grounds, such as incarceration, egregious conduct, chronic

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<sup>41</sup> S. 61.13(2)(c)1., F.S.

<sup>42</sup> A presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established. S. 90.301, F.S.

<sup>43</sup> S. 61.13(2)(c)2., F.S. ("Evidence that a parent has been convicted of a misdemeanor of the first degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child").

<sup>44</sup> S. 39.8055, F.S.

substance abuse, the conception of the child as a result of sexual battery, or a conviction requiring the parent to register as a sexual predator.<sup>45</sup>

### **Effect of the Bill**

The bill amends s. 61.13, F.S., to create a rebuttable presumption against parental responsibility and time-sharing for parents who are convicted of or have had adjudication withheld for an offense enumerated in s. 943.0435(1)(h)1.a., if at the time of the offense:

- The parent was 18 years of age or older; and
- The victim was under 18 years of age or the parent believed the victim to be under 18 years of age.

However, the presumption against time-sharing may be rebutted if the court makes a specific finding in writing that the parent poses no significant risk of harm to the child and that time-sharing is in the best interest of the child. The bill also clarifies that if the presumption is rebutted, the court must consider all time-sharing factors set forth in statute.

The bill provides an effective date of July 1, 2021.

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

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

1. Revenues:

None.

2. Expenditures:

None.

### **A. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **C. FISCAL COMMENTS:**

None.

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<sup>45</sup> S. 39.806, F.S.