

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB HHSC 15-03 Conscience Protection for Private Child-Placing Agencies

**SPONSOR(S):** Health & Human Services Committee; Brodeur

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	12 Y, 6 N	Tuszynski	Calamas

### SUMMARY ANALYSIS

Conscience protection laws prevent individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. These statutes have historically related to abortion, sterilization, and contraception, but conscience protection legislation was recently enacted in relation to adoption services. Two states have enacted legislation that permits private child-placing agencies to refuse to perform adoption services if a proposed placement would violate the agency's written religious or moral convictions or policies.

PCB HHSC 15-03 creates adoption services conscience protection within s. 409.175, F.S., to allow private child-placing agencies to object to performing, assisting in, recommending, consenting to, or participating in the placement of a child if a placement violates the agency's written religious or moral convictions or policies.

The bill also protects the licensure, grants, contracts, and ability to participate in government programs for those agencies that object to performing adoption services required for the placement of a child if that placement violates the agency's written religious or moral convictions or policies.

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

The bill provides an effective date of July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Adoptions

Adoption is the legal procedure by which a child becomes, through court action, part of a family other than that of his or her birth parents.<sup>1</sup> Adoption services are performed by all community-based lead agencies throughout the state<sup>2</sup> as well as private child-placing agencies. All child-placing agencies must be licensed by the Department of Children and Families (DCF), and include any person, corporation, or agency, public or private, other than a parent or legal guardian, that places or arranges for placement of a child in an adoptive home.<sup>3,4</sup> As of December 2014, Florida has 82 licensed private child-placing agencies that perform both public and private adoptions.<sup>5</sup> Licensure of these agencies require compliance with personnel requirements, written policies, financial reports, purpose statements, intake procedures, and record keeping.<sup>6</sup>

##### *Child Welfare System Adoptions*

Adoption is a method of achieving permanency for children who have suffered abuse, neglect, or abandonment and who are unable to be reunified with their parents. Research indicates that children generally have better outcomes through adoption than through placement in long-term foster care.<sup>7</sup>

In Florida, DCF provides child welfare services.<sup>8</sup> Statute requires child welfare services, including adoption services, to be delivered through community-based care (CBC) lead agencies contracted by DCF.<sup>9</sup> For example, CBC's provide pre- and post-adoption services and administer maintenance adoption subsidies which provide ongoing financial support for children adopted from the foster care system.

During Fiscal Year 2013-14, 3,415 adoptions of children within the child welfare system were finalized in Florida. Over the last 6 federal fiscal years, the number of finalized adoptions has ranged from 2,945 to 3,870 annually.<sup>10</sup>

The vast majority of children adopted in FY 2013-14 were adopted by either relatives (50.29%) or foster parents (27.25%). Recruited parents comprised 22.47% of adoptions.

##### *Private Adoptions*

Private adoptions are adoptions that occur outside of the child welfare system. Licensed child-placing agencies act as intermediaries between natural and potential adoptive parents providing adoption services. These services include home studies, counseling, education, legal services, and post-

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<sup>1</sup> The Florida Bar, *Adoption in Florida*, available at <http://www.floridabar.org/tfb/tfbconsum.nsf/#ConsumerPamphlets> (last visited March 16, 2015).

<sup>2</sup> S. 409.986(1), F.S.

<sup>3</sup> S. 409.175, F.S.

<sup>4</sup> Rule 65C-15, F.A.C.

<sup>5</sup> Email from Nicole Stookey, Deputy Director of Legislative Affairs, Department of Children and Families RE: Adoptions, licensure numbers (March 16, 2015).

<sup>6</sup> Supra. at FN 4.

<sup>7</sup> Evan B. Donaldson Adoption Institute, *Keeping the Promise: Critical Need for Post-Adoption Services to Enable Children and Families to Succeed*, Oct. 2010, p. 8.

<sup>8</sup> S. 20.19(4)(a)3., F.S.

<sup>9</sup> Supra. at FN 2.

<sup>10</sup> U.S. Department of Health and Human Services, Administration on Children, Youth, and Families, 2013. *Adoption of Children with Public Child Welfare Agency Involvement by State, FY 2003 through 2013*, available at [http://www.acf.hhs.gov/sites/default/files/cb/children\\_adopted.pdf](http://www.acf.hhs.gov/sites/default/files/cb/children_adopted.pdf). (last visited Feb.16, 2015).

placement services.<sup>11</sup> These adoptions are arranged by licensed child-placing agencies and require judicial action, but are not otherwise tracked by the state.<sup>12</sup>

## Conscience Protections

### *Healthcare*

Historically, conscience protections grant health care providers the ability to refuse to perform services related to abortion, sterilization, and more recently contraception, if those services are contrary to the provider's religious beliefs. In 1973, the Church<sup>13</sup> Amendment became the first conscience clause enacted into law. It was passed in response to the United States Supreme Court's decision in *Roe v. Wade*<sup>14</sup> and stated that public officials may not require individuals or entities who receive public funds to perform medical procedures, or make facilities available for procedures, that are "contrary to [the individual or entity's] religious beliefs or moral convictions."<sup>15</sup>

By 1978 almost all states had conscience protection legislation related to abortion.<sup>16</sup> Today, every state but West Virginia has conscience protection statutes for individual providers in relation to abortion.<sup>17</sup> Section 390.0111(8), F.S., grants conscience protection for hospitals, physicians, or any person who refuses to participate in the termination of a pregnancy in Florida.<sup>18</sup> In addition to these state statutes there are federal statutes providing conscience protections for health care providers related to abortion.<sup>19</sup>

Similarly, 17 states have conscience protection statutes for individual providers related to sterilization, and 10 states have conscience protection statutes for individual providers related to contraception.<sup>20</sup> Florida does not have specific conscience protection for sterilization, but has conscience protection for physicians or other persons for refusing to furnish contraception.<sup>21</sup>

### *Education*

Conscience protection has also emerged in education. In 2011, Missouri amended its Constitution to include, "no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs."<sup>22</sup> Although most do not amend their constitutions, the vast majority of states have adopted legislation allowing parents to opt their children out of educational curriculum that they contend conflicts with their religious beliefs.<sup>23</sup> In 2013, the state of New Hampshire enacted a broad statutory provision allowing any parent to opt out of specific curricula based on any "objectionable" reason.<sup>24</sup>

### *Adoption Services*

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<sup>11</sup> The Florida Bar, *Adoption in Florida*, available at <http://www.floridabar.org/tfb/tfbconsum.nsf/#ConsumerPamphlets> (last visited March 16, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> Sen. Frank Church (R-ID).

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> 42 U.S.C. § 300a-7(b).

<sup>16</sup> Rachel Benson Gold, *Conscience Makes a Comeback In the Age of Managed Care, The Guttmacher Report on Public Policy* (Feb. 1998).

<sup>17</sup> Guttmacher Institute - State Policies in Brief, *Refusing to Provide Health Services* available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (last visited on March 15, 2015).

<sup>18</sup> S. 390.0111(8), F.S.

<sup>19</sup> 42 U.S.C. 2996f(b) (Prohibits federal funds to be used in litigation to procure abortion or to compel any individual to perform an abortion.); 20 U.S.C. §1688 (Provides neutrality with respect to abortion in Title IX.); 42 U.S.C. §238n (Prohibits discrimination by the Federal Government against any health care entity that does not provide, train in, or refer for abortions.); 42 U.S.C. §1395w-22(j)(3)(B) (Conscience protection for providers who accept Medicare.); 42 U.S.C. §1396u-2(b)(3) (Conscience protection for providers who accept Medicaid.); and Pub. L. No. 111-148 (Allows qualified health plans under the Patient Protection and Affordable Care Act to choose whether to cover abortions.).

<sup>20</sup> *Id.*

<sup>21</sup> S. 381.0051(5), F.S.

<sup>22</sup> Mo. Const. Art. 1 §5.

<sup>23</sup> Claire Marshall, *The Spread of Conscience Clause Legislation*, American Bar Association available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2013\\_vol\\_39/january\\_2013\\_no\\_2\\_religious\\_freedom/the\\_spread\\_of\\_conscience\\_clause\\_legislation.html](http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/the_spread_of_conscience_clause_legislation.html) (last viewed March 16, 2015).

<sup>24</sup> N.H. Rev. Stat. Ann. § 186.11

Two states have enacted adoption services conscience protection legislation: North Dakota in 2003,<sup>25</sup> and Virginia in 2012.<sup>26</sup> Both the North Dakota and Virginia adoption services conscience protection laws protect private child-placing agencies from:

- Being required to perform any duties related to the placement of a child for adoption if the proposed placement would violate the agency's written religious or moral convictions or policies.
- Denial of initial licensure, revocation of licensure, or failure to renew licensure based on the agency's objection to performing the duties required to place a child for adoption in violation of the agency's written religious or moral convictions or policies.
- Denial of grants, contracts, or participation in government programs based on the agency's objection to performing the duties required to place a child for adoption in violation of the agency's written religious or moral convictions or policies.

North Dakota's statute states that the agency's refusal to perform the duties required to place a child for adoption does not constitute a determination that the proposed adoption is not in the best interest of the child.<sup>27</sup> The Virginia statute is silent as to a best interest determination and states that the refusal to perform the duties required to place a child for adoption is limited to the extent allowed by federal law and shall not form a basis of any claim for damages.<sup>28</sup> Neither law has been challenged on constitutional grounds.

In 2006, Catholic Charities of Boston stopped providing adoption services based on a conflict between church teaching and state law. Like Florida, to participate in adoption placements in Massachusetts, whether or not the agency receives state funding, the child-placing agencies must be licensed.<sup>29</sup> However, Massachusetts law prohibits discrimination based on sexual orientation.<sup>30</sup> Catholic Charities Chair of the Board of Trustees explained, "In spite of much effort and analysis, Catholic Charities of Boston finds that it cannot reconcile the teaching of the Church, which guides our work, and the statutes and regulation of the Commonwealth."<sup>31</sup> The previous year, Catholic Charities had been responsible for over a third of all Boston area private adoptions.<sup>32</sup> Catholic Charities of San Francisco stopped providing adoption services for the same reasons that same year,<sup>33</sup> similar events occurred in Illinois in 2011.<sup>34</sup>

Private adoption service agencies in Florida already place children in homes that conform to their written religious beliefs and moral convictions. Florida Baptist Children's Homes state that they are "committed to providing forever, Christian families for children placed in our care, and . . . helping families answer God's call to adopt."<sup>35</sup> Jewish Adoption and Family Care Options state that they were created "to ensure that Jewish children who were being removed from their home due to abuse or neglect . . . would at least be able to take with them the one piece of their identity that comes from their connection with their Jewish heritage."<sup>36</sup>

### **Effect of Proposed Changes**

PCB HHSC 15-03 creates conscience protection in s. 409.175, F.S. The conscience protection addresses licensure, contracts, and liability of private child placing agencies.

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<sup>25</sup> N.D. Cent. Code §§ 50-12-03 and 50-12-07.1 (2003)

<sup>26</sup> Va. Code Ann. § 63.2-1709.3 (2012)

<sup>27</sup> Supra. at FN 12.

<sup>28</sup> Va. Code Ann. § 63.2-1709.3(D) (2012)

<sup>29</sup> Mass. Gen. Laws Ann. Ch. 15D, § 8.

<sup>30</sup> Mass. Gen. Laws Ann. Ch. 151b, § 4.

<sup>31</sup> J. Bryan Hehir & Mr. Jeffrey Kaneb, *Statement of Catholic Charities, Archdiocese of Boston, On Adoption Programs*, ARCHDIOCESE OF BOSTON NEWS/EVENTS, Mar. 10, 2006.

<sup>32</sup> Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, Duke J. Gender L. & Pol'y (2008).

<sup>33</sup> Cicero A. Estrella, *Catholic Charities Scaling Back Its Role in Adoption Services*, San Francisco Chronicle, August 3, 2006.

<sup>34</sup> Catholic Conference of Illinois, *Join Statement of the Bishops of Belleville, Joliet, and Springfield*, November 14, 2011 available at <http://www.ilcatholic.org/bishops-of-belleville-joliet-springfield-dioceses-drop-lawsuit-against-state/> (last viewed March 17, 2015).

<sup>35</sup> Florida Baptist Children's Homes, *Adoption*, available at <https://www.fbchomes.org/our-care/adoption/> (last viewed March 19, 2015).

<sup>36</sup> JAFCO, *Preserving our Jewish Heritage*, available at <https://www.jafco.org/who-we-are/preserving-our-jewish-heritage/> (last visited March 19, 2015).

The bill relieves any private child-placing agency from the requirement to participate in any placement of a child that would violate the agency's written religious or moral convictions or policies.

The bill creates licensure protection by barring the Department of Children and Families from denial or revocation of licensure because of a private child-placing agency's refusal to participate in a placement against the agency's written religious or moral convictions or policies.

The bill provides private contract protection by barring the state, local government, or community-based care lead agency from denial of any grant, contract, or participation in a government program because of a private child-placing agency's refusal to participate in a placement against the agency's written religious or moral convictions or policies.

The bill creates liability protection for private child-placing agencies for refusal to participate in a placement that would violate its written religious or moral convictions or policies.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 409.175, F.S., relating to licensure of child-placing agencies.

**Section 2:** Provides an effective date of July 1, 2015.

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

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

1. Revenues:

None.

2. Expenditures:

None.

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

## 2. Other:

The bill may implicate the equal protection clauses of the U.S. and Florida Constitutions.

The equal protection clause of the U.S. Constitution requires that no state shall deny any person within its jurisdiction "equal protection of the laws."<sup>37</sup> This clause is the basis for most of the U.S. Supreme Court's discrimination jurisprudence. Many, if not most, laws advantage or disadvantage one group or class of people. Physicians are able to practice medicine but not accountants; 20-year-olds are able to drive but not 12-year-olds; there are different rates of taxation for different people; etc. The Court has created a tiered system of scrutiny so that the U.S. Constitution does not interfere with normal state police powers, only stepping in when certain 'protected classes' experience discrimination.

The Court's response to a discrimination case depends on the class of people involved. The Court will analyze government action that discriminates against people according to race, ethnicity, religion, and national origin with the strictest scrutiny.<sup>38</sup> Under strict scrutiny, the government must show that a law with discriminatory effect advances a compelling state interest, is narrowly tailored, and is the least restrictive means for advancing that interest. In contrast, sex-based classifications<sup>39</sup> and sexual orientation<sup>40</sup> fall under intermediate scrutiny. Under intermediate scrutiny, the government must only show that a law with discriminatory effect advances an important government interest and is substantially related to that interest. Unless government action has a discriminatory effect against a religious group, race, ethnicity, or a person's national origin, the Court will give deference to the state.

## B. RULE-MAKING AUTHORITY:

Not Applicable.

## C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>37</sup> U.S. Const. amend XIV, §1.

<sup>38</sup> See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) and *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>39</sup> See *Craig v. Boren*, 429 U.S. 190 (1976), *Mississippi University for Women v. Hogan*, 45 U.S. 718 (1982), *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>40</sup> See *Windsor v. United States*, 570 U.S. \_\_\_\_ (2013) (Docket No. 12-307).