

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 321 De Facto Custody of a Child  
**SPONSOR(S):** Anderson and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 510

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>_____</u>	<u>Lammers</u>	<u>Billmeier</u>
2) <u>Future of Florida's Families Committee</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
3) <u>Justice Appropriations Committee</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4) <u>Justice Council</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5) <u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

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### SUMMARY ANALYSIS

HB 321 amends s. 751.011, F.S., to create a definition for a “de facto custodian,” “parent,” “relative,” and creates a new section establishing a procedure by which a de facto custodian may petition for a determination of de facto custody of a minor child. An order granting de facto custody requires the trial court to make specific factual findings based on clear and convincing evidence that granting the petition would be in the best interests of the child. The order granting de facto custody may grant visitation rights to the parents but may not include an order for payment of child support unless the issue of support was properly raised in the petition and determined at the hearing. A de facto custodian awarded de facto custody shall have legal custody of the child under the laws of this state. An order awarding such custody may be terminated at any time upon the consent of the parties or upon a finding that the parent is a fit parent.

The bill appears to have no significant fiscal impact on state or local government.

The bill takes effect July 1, 2005.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Empower families—This bill will give more authority to the person who is actually caring for the child, by authorizing that person to make decisions on the child's behalf without having to gain approval from the child's official, legal guardian each time a decision needs to be made. This bill may require a parent to participate in an adversarial legal proceeding to gain custody of his or her child.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Law

Chapter 751, F.S., addresses the issue of temporary child custody by extended family members. The purpose of this chapter is to provide temporary legal custody to a family member or putative father who has physical custody of the child, in order to allow that person to consent to medical and dental care for the child, obtain copies of the child's records, enroll the child in school, and grant or withhold consent for a child to be placed in special school programs.<sup>1</sup> Because these children receive care from their extended family members, they are not considered dependent children, as defined in s. 39.01(14), F.S.<sup>2</sup> Section 751.011(1), F.S., defines "extended family" as "relative of the child who is the child's brother, sister, grandparent, aunt, uncle, or cousin." Section 751.011(2) defines a putative father as a man who believes he is the biological father of the minor child but is unable to prove paternity due to the absence of the child's mother.

An extended family member or putative father may petition for temporary custody of the minor child,<sup>3</sup> although a putative father must petition for permanent custody unless he is unable to perfect service of process against the mother.<sup>4</sup>

A petition for temporary child custody must contain:

- The name, date of birth, and current address of the child
- The names and current addresses of the child's parents
- The names and current addresses of persons with whom the child has lived for the past 5 years
- The places where the child has lived for the last 5 years
- Information regarding any other custody proceedings in any state involving the child
- The petitioner's contact information
- The petitioner's relationship to the child, and for a putative father, the reasons for his belief that he is the natural father

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<sup>1</sup> Section 751.01(3), F.S.

<sup>2</sup> *Id.* at (1); a dependent child is defined in s. 39.01(14), F.S., as:  
a child who, pursuant to this chapter, is found by the court:

(a) To have been abandoned, abused, or neglected by the child's parent or parents or legal custodians;

(b) To have been surrendered to the department, the former Department of Health and Rehabilitative Services, or a licensed child-placing agency for purpose of adoption;

(c) To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, an adult relative, the department, or the former Department of Health and Rehabilitative Services, after which placement, under the requirements of this chapter, a case plan has expired and the parent or parents or legal custodians have failed to substantially comply with the requirements of the plan;

(d) To have been voluntarily placed with a licensed child-placing agency for the purposes of subsequent adoption, and a parent or parents have signed a consent pursuant to the Florida Rules of Juvenile Procedure;

(e) To have no parent or legal custodians capable of providing supervision and care; or

(f) To be at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians.

<sup>3</sup> Section 751.02, F.S.

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

- The parents' consent or the factual situation of the child's current living situation with the petitioner
- The length of time that the petitioner is requesting temporary custody, with a statement of reasons supporting the request<sup>5</sup>

Parents of the minor child must be given reasonable notice, by personal or constructive service of process, and an opportunity to be heard.<sup>6</sup> At the hearing, the court must consider the evidence of the minor child's need for care by the petitioner, all other matters considered in the petition, and any objections or testimony presented by the child's parents.<sup>7</sup> If the parents do not object, the court must award temporary custody of the child to the petitioner when doing so is in the best interests of the child.<sup>8</sup> If a parent objects, the court may only award temporary custody after finding by clear and convincing evidence that the parent or parents are unfit, i.e., that the parent has abused, abandoned, or neglected the child, as defined in chapter 39.<sup>9</sup> The temporary custody order may grant visitation rights to the parent or parents if it is in the child's best interest to do so.<sup>10</sup> The order may not contain child support provisions unless the parent has received personal or substitute service process, the petition requested child support, and there is evidence that the parent has the ability to pay.<sup>11</sup> A parent or both parents may petition the court at any time to terminate the temporary custody order, based upon either the consent of the parties or a finding that the parent is a fit parent.<sup>12</sup>

An order granting temporary custody to a putative father may not also determine paternity of the child.<sup>13</sup>

Under the current version of chapter 751, an extended family member may file a petition to establish that they are caring for the child and the biological parents are unfit. If the court finds that both parents are unfit, the court may grant the extended family member temporary custody under the statute. Thus, the statute allows an extended family member to bypass chapter 39. Currently, chapter 751 only allows a child's brother, sister, grandparent, aunt, uncle, or cousin to request temporary custody and does not allow any non-family member to request temporary custody.

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The bill requests that the title of chapter 751, F.S., be changed to "Custody of Minor Children by Extended Family and De Facto Custodians."

The bill defines a "de facto custodian" as any person who has been the primary caregiver for a child in the twenty-four months immediately preceding the filing of the petition, when the child has resided with the person without a parent present and with a lack of "demonstrated consistent participation by a parent" for six or more nonconsecutive months, if the child is younger than age 3, or twelve or more nonconsecutive months, if the child is older than age 3. A de facto custodian does not include a person who is caring for a child pursuant to a custody consent decree, a court order, or a voluntary placement or adoption under chapter 61.

"Lack of demonstrated consistent participation by a parent" is defined as refusing or neglecting to meet the responsibilities of a parent in a parent-child relationship, including but not limited to the responsibilities of providing the child with food, clothing, shelter, health care, education, a nurturing relationship, and other care necessary for the child's physical, mental, or emotional health and development.

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<sup>5</sup> Section 751.03, F.S.

<sup>6</sup> Section 751.04, F.S.

<sup>7</sup> Section 751.05(1), F.S.

<sup>8</sup> *Id.* at (2).

<sup>9</sup> *Id.* at (3).

<sup>10</sup> *Id.* at (4).

<sup>11</sup> *Id.* at (5).

<sup>12</sup> *Id.* at (7).

<sup>13</sup> *Id.* at (6).

The bill defines "other person responsible for a child's welfare" the same way the term is defined in s. 39.01(47), F.S.<sup>14</sup> The bill defines "parent" and "relative" by reference to s. 39.01(49)<sup>15</sup> and (60),<sup>16</sup> respectively.

The bill creates s. 751.10, F.S., on de facto custodians, and states that any person who has the signed, notarized consent of the child's legal parents, or any person with whom the child is currently living, may bring a proceeding to determine the de facto custody of the child. The bill establishes the venue where such an action may be filed.<sup>17</sup> A petition for de facto custody must contain a statement, to the best of the petitioner's knowledge and belief, setting forth:

- The name, date of birth, and current address of the child
- The names and current addresses of the child's parents
- The length of time the child has lived with the petitioner
- The locations where the child has lived in the past five years and names and current addresses of the persons with whom the child was living
- The current legal custody status of the child and the child's custodial history, if known
- Information concerning any pending custody proceedings, in any state, with regard to the child
- A statement of the petitioner's relationship to and care for the child
- The consent of the child's parents, if any, or the circumstances of the child's current living situation with the petitioner
- Any temporary or permanent child support, attorney's fees, costs, and disbursements
- Whether a protective order has been entered with respect to the child or any other party, and by what court
- A statement that it is in the child's best interest for the petitioner to have de facto custody

Before a court makes a decision on a petition for de facto custody, the parents, relatives, and other persons responsible for the welfare of the minor child must be given notice and an opportunity to be heard. If the child is an Indian child, the child's tribe must also be given notice and an opportunity to be heard. Notice must be by personal or constructive service of process.

Prior to entering an order granting de facto custody, the court must consider all evidence relating to the child's need for care by the petitioner, all matters set forth in the petition, and any objections or testimony from the child's parents, relatives, or other persons responsible for the child's welfare. Unless the parents object, the court must grant the petition for de facto custody if it is in the child's best interest to do so. However, if a parent objects, the court may only grant the petition after finding by clear and convincing evidence that the child's parent or parents lack demonstrated consistent participation in the care of the child. The determination of a lack of consistent participation requires the court to find that the parent or "another" has abused, abandoned, or neglected the child, as defined in chapter 39. The court is required to make detailed factual findings supporting its conclusion and determination of the child's best interests. The order awarding de facto custody may also grant visitation rights to the child's parent or parents, if it is in the child's best interests to do so. The order may not include an order for child support unless the petition requested child support, the parent has received personal or substitute service of process, and there is evidence of the parent's ability to pay the ordered support.

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<sup>14</sup> Section 39.01(47) defines such a person as "the child's legal guardian, legal custodian, or foster parent; an employee of a private school, public or private child day care center, residential home, institution, facility, or agency; or any other person legally responsible for the child's welfare in a residential setting; and also includes an adult sitter or relative entrusted with a child's care."

<sup>15</sup> A parent is a woman who gives birth to a child or a man whose consent to the adoption of the child would be required under s. 63.062(1). For a legally adopted child, the term "parent" means the adoptive mother or father of the child.

<sup>16</sup> A relative is "a grandparent, great-grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, niece, or nephew, whether related by the whole or half blood, by affinity, or by adoption. The term does not include a stepparent."

<sup>17</sup> This includes filing the petition in the county where the child permanently resides, the county where the child is found, or where an earlier custody order was entered.

An award of custody to the de facto custodian is an award of legal custody of the child under the laws of this state. An order of de facto custody may be terminated at any time upon the consent of the parties or by a finding that the parent requesting termination is a fit parent.

The bill takes effect July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Requesting that the title of chapter 751, F.S., be changed to "Custody of Minor Children by Extended Family and De Facto Custodians."

Section 2. Amends s. 751.011, F.S., adding a definition for a "de facto custodian," adding a definition for "lack of demonstrated consistent participation by a parent," incorporating the definitions of "parent" and "other person responsible for a child's welfare," as stated in ss. 39.01(49) and (47), respectively. Replaces the word "is" with "means" in the definitions for "extended family" and "putative father."

Section 3. Creates s. 751.10, F.S., "De Facto Custodians."

Section 4. Provides an effective date of July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill will result in an unquantifiable increase in costs for court hearings and related matters.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

A parent has a constitutional right to legal representation in a dependency action,<sup>18</sup> or in action for termination of parental rights, because this is considered an infringement upon a fundamental liberty interest—the right to raise and care for one’s own children.<sup>19</sup> If a parent cannot afford private counsel, counsel must be appointed for the parent.<sup>20</sup> The constitutional right to counsel in a dependency case is based upon factors such as the potential length of the parent-child separation, the restrictions on parental visitation, “the presence or absence of parental consent, the presence or absence of disputed facts, and the complexity of the proceeding.”<sup>21</sup>

Because chapter 751 does not provide for legal counsel to represent the parents, it may raise constitutional concerns, particularly because this bill extends the right to bring a petition under chapter 751 to persons not related to the child, thus making this proceeding more similar in nature to a chapter 39 dependency proceeding, although without the same procedural safeguards. Furthermore, chapter 751 references chapter 39 and requires the court to make findings that would support an adjudication of dependency if the temporary custody petition is contested. It does not appear that the lack of appointed counsel in chapter 751 proceedings is necessarily a violation of a constitutional right, because the constitutional right to counsel only clearly extends to cases where the parent faces a permanent loss of parental rights.<sup>22</sup> However, it is possible that the facts giving rise to a temporary loss of parental rights through an award of de facto custodianship may later form the basis for a petition to terminate parental rights.<sup>23</sup>

B. RULE-MAKING AUTHORITY:

This bill does not establish rule-making authority in any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A.

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<sup>18</sup> Section 39.013(1), F.S.

<sup>19</sup> *S.B. v. Dep’t of Children & Families*, 851 So. 2d 689, 691 (Fla. 2003); *In Interest of D.B.*, 385 So. 2d 83, 90 (Fla. 1980).

<sup>20</sup> Section 39.013(1).

<sup>21</sup> *S.B.*, 851 So. 2d at 692 (citing *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975)).

<sup>22</sup> *S.B.*, 851 So. 2d 693-94.

<sup>23</sup> See s. 39.806, F.S., grounds for termination of parental rights.