

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>6 Y, 0 N, w/CS</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>

SUMMARY ANALYSIS

HB 321 amends s. 751.011, F.S, to change the definition of "extended family member" to include relatives to the third degree of relation, by blood or marriage, to a parent or stepparent, and who is caring full-time for the child as a substitute parent. Only an extended family member or a putative father may petition for temporary custody of a child pursuant to s. 751.02, F.S. A petition for temporary custody must include information concerning the fitness of the parents to raise the child, including information regarding abuse, abandonment, or neglect of the child by the parents; any temporary or permanent child support, attorney's fees, costs, and disbursements; whether an order of protection governing any of the parties and a minor child of the parties is in effect, and in what jurisdiction; and a statement that it is in the child's best interest for the petitioner to have custody. The parent or parents may seek to modify an order awarding temporary custody.

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.¹ 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.² 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,³ although a putative father must petition for permanent custody unless he is unable to perfect service of process against the mother.⁴

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

¹ Section 751.01(3), F.S.

² *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.

³ Section 751.02, F.S.

⁴ *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 request⁵

Parents of the minor child must be given reasonable notice, by personal or constructive service of process, and an opportunity to be heard.⁶ 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.⁷ 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.⁸ 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 39.⁹ 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.¹⁰ 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.¹¹ 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.¹²

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

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 putative father, brother, sister, grandparent, aunt, uncle, or cousin to request temporary custody, when that person already has physical custody of the child.¹⁴

HB 321

The bill defines "extended family member" as any person who is a relative within the third degree, by blood or marriage, to the parent or stepparent of a child and who is caring for the child full-time in the role of substitute parent. Previously, extended family only included a child's brother, sister, grandparent, aunt, uncle, or cousin; the new definition will include great-aunts, great-uncles, great-grandparents, and stepparents, who were specifically excluded before,¹⁵ along with step-family members within the third degree of blood or marital relationship to the stepparent.

The bill amends s. 751.03, F.S, regarding petitions for temporary custody, to require inclusion of:

- All information regarding the fitness of the parents to raise the child and information concerning whether the parent has abused, abandoned, or neglected the child
- Any request for temporary or permanent child support, attorney's fees, costs, and disbursements

⁵ Section 751.03, F.S.

⁶ Section 751.04, F.S.

⁷ Section 751.05(1), F.S.

⁸ *Id.* at (2).

⁹ *Id.* at (3).

¹⁰ *Id.* at (4).

¹¹ *Id.* at (5).

¹² *Id.* at (7).

¹³ *Id.* at (6).

¹⁴ Section 751.01(3), F.S.

¹⁵ Section 39.01(60), F.S.

- A statement of whether an order of protection governing the parties, or a party and a minor child of a party or the parties, is in effect, and if so, in what jurisdiction
- A statement that it is in the child's best interests for the petitioner to have custody of the child

The bill also amends s. 751.03 to provide that only an extended family member or putative father can file a petition under chapter 751.

The bill provides that the parent or parents may petition for modification, in addition to termination, of an order granting temporary custody.

The bill takes effect July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Amends s. 751.011, F.S., to change the definition of "extended family member," so that it includes relatives within the third-degree of either a parent or stepparent of a child.

Section 2. Amends s. 751.02, F.S., to provide that any extended family member may petition for temporary custody of a child.

Section 3. Amends s. 751.03, F.S., creating additional information to be included in a petition for temporary custody and providing that only a putative father or extended family member may petition for temporary custody.

Section 4. Amends s. 751.05(7), F.S., to provide that either or both of the child's parents may petition to modify, as well as to terminate, an order granting temporary custody.

Section 5. 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,¹⁶ 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.¹⁷ If a parent cannot afford private counsel, counsel must be appointed for the parent.¹⁸ 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.”¹⁹

Because chapter 751 does not provide for legal counsel to represent the parents, it may raise constitutional concerns because the proceeding is similar in nature to a chapter 39 dependency proceeding and requires the same sort of findings regarding parental fitness as dependency requires, although without the same procedural safeguards. Chapter 751 specifically 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.²⁰ However, it is possible that the facts giving rise to a temporary loss of parental rights through an award of temporary custody may later form the basis for a petition to terminate parental rights.²¹

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

On April 13, 2005, the Civil Justice Committee considered this bill and adopted a strike-all amendment extending the definition of extended family member to include step-family members and relatives to the third degree of blood or marital relation to the parent or stepparent, and to provide that any extended family member may petition for temporary custody. The original bill allowed extended family members and people unrelated to

¹⁶ Section 39.013(1), F.S.

¹⁷ *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).

¹⁸ Section 39.013(1).

¹⁹ *S.B.*, 851 So. 2d at 692 (citing *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975)).

²⁰ *S.B.*, 851 So. 2d 693-94.

²¹ See s. 39.806, F.S., grounds for termination of parental rights.

a child, but who had cared for the child for a specified period of time, to petition for custody of the child. The bill was reported favorably as a committee substitute.