



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Empower families** — The bill may provide more authority to a family member who is actually caring for a child by authorizing that family member to make certain types of decisions on the child's behalf without having to obtain approval from the child's legal guardian each time one of those decisions must be made. However, this bill may require a parent to participate in an adversarial legal proceeding to gain custody of his or her child.

#### **Comments by the Future of Florida's Families Committee**

**Provide limited government** – The bill may increase the number of petitions filed for temporary custody which would increase the number of court hearings.

**Empower families** – The bill may reduce the number of children who are declared dependent due to the increased number of extended family members that would be eligible to seek temporary custody and it would enable decisions affecting those children to be made by family members actually providing day to day care.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Current Law**

At times and for various reasons, a parent or parents of a minor child may be unable to provide care to that child. Chapter 751, F.S., provides that a relative or putative father who has the signed, notarized permission of the parents or who has physical custody of the child may be granted temporary legal custody of the child. Temporary custody is needed 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, grant or withhold consent for a child to be placed in special school programs, or to provide any necessary care to that child.<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. If a child is found dependent, the state is required to step in and take action to protect the child.

Section 751.011(1), F.S., defines "extended family" as a family consisting of the child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle, or cousin.<sup>2</sup> While currently any relative who has the signed, notarized permission of the parents or who has physical custody of the child may petition for temporary custody under ch. 751, F.S., a putative father may only do so if he is unable to perfect personal service of process upon the mother of the child. If a putative father is able to locate the mother of a child, he must petition for the establishment of paternity, custody, and other relief under ch. 742, F.S.<sup>3</sup> A petition for temporary 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;

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

<sup>2</sup> Section 751.02, F.S.

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

- The petitioner's relationship to the child, and for a putative father, the reasons for his belief that he is the natural father;
- The parents' consent or the factual situation of the child's current living situation with the petitioner; and
- The length of time that the petitioner is requesting temporary custody, with a statement of reasons supporting the request.<sup>4</sup>

Temporary custody of a child may be awarded to a relative or putative father with or without the consent of the child's parent(s). If the parents do not object, the court must award temporary custody of the child to the petitioner if it is in the best interest of the child.<sup>5</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 ch. 39, F.S.<sup>6</sup> Chapter 751, F.S., proceedings do not provide a parent the right to counsel under these circumstances as is provided under ch. 39, F.S. (See "Constitutional Issues" below). Once an order has been entered, 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>7</sup>

### **Effect of Bill**

The bill changes the definition of "extended family" in s. 751.011(1), F.S., to "extended family member."

"Extended family member" is defined by the bill 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; or
- 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 full time for that child, and a half-brother or half-sister of that child, in the role of substitute parent.

Currently, extended family only includes a child's brother, sister, grandparent, aunt, uncle, or cousin. The new definition adds great-aunts, great-uncles, great-grandparents, and stepparents along with step-family members within the third degree of blood or marital relationship to the stepparent. However, by specifying which family members are entitled to petition for temporary custody, the bill also limits which family members may petition as well. A relative of the third-degree only extends to a first-cousin. The definitional change will allow only those relatives to file a petition for temporary custody of a child when that person has the parent's permission or to petition when the child is presently living with that person.

Additionally, the bill modifies what must be provided in a petition for temporary custody to also include:

- 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 temporary or permanent child support, attorney's fees, costs, and disbursements;
- 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; and
- A statement that it is in the best interest of the child for the petitioner to have custody of the child.

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

<sup>4</sup> Section 751.03, F.S.

<sup>5</sup> Section 751.05(2), F.S.

<sup>6</sup> Section 751.05(3), F.S.

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

The effective date of the bill is July 1, 2006.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 751.011(1), F.S., to expand the definition of extended family members entitled to petition for temporary custody of a minor child.

**Section 2.** Amends s. 751.02, F.S., to provide that an extended family member may petition for temporary custody of a child under certain circumstances.

**Section 3.** Amends s. 751.03, F.S., to require additional information to be included in a petition for temporary custody, and to provide 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, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has the potential to have an indeterminate fiscal impact on the state court system as an increased number of petitions for temporary custody may be filed, resulting in additional hearings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent the bill would permit more filings under Chapter 751, those individuals filing petitions would incur any related expenses/fees. However, these amounts are unknown.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

Chapter 751, F.S., does not require legal counsel to be appointed to represent the parents in a temporary custody proceeding. The proceeding is similar in nature to a ch. 39, F.S., dependency proceeding and requires similar findings regarding parental fitness. Chapter 751, F.S., also specifically references ch. 39, F.S., and requires the court to make findings that would support an adjudication of dependency if the temporary custody petition was contested. However, it does not appear that the lack of appointed counsel in a ch. 751, F.S., proceeding is necessarily a violation of a constitutional right - the right to raise one's own children<sup>8</sup> because the constitutional right to counsel only extends to cases where the parent faces a permanent loss of parental rights or when a parent may be charged with criminal child abuse.<sup>9</sup> 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.<sup>10</sup>

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### Comments by the Future of Florida's Families Committee

#### Definitions

Chapter 751, F.S., does not clearly specify the relatives who may petition a court for temporary custody of a child because the defined term "extended family" is not uniformly used in subsequent provisions of the chapter. Section 751.011, F.S., defines the term "extended family" as "any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle, or cousin." However, s. 751.02, F.S., states that "**any** relative of a minor child . . . may bring proceedings in the circuit court to determine the temporary custody of the child." Additionally, s. 751.01, F.S., describing the purposes of ch. 751, F.S., refers to extended family members, rather than extended family. This is corrected by the bill.

The bill creates a definition of the term "extended family member" to identify specific family members who may petition the court for temporary custody of a child. "Extended family member" is defined as follows:

- (a) Within the third degree by blood or marriage to the parent or stepparent of a child and who is caring full-time for that child in the role of substitute parent; or
- (b) Within the third degree by blood or marriage to the parent or stepparent of a child and who is caring full-time for that child and a half-brother or half-sister of that child, in the role of substitute parent.

<sup>8</sup> *S.B. v. Dep't of Children & Families*, 851 So. 2d 689, 692-693 (Fla. 2003); *In Interest of D.B.*, 385 So. 2d 83, 90 (Fla. 1980).

<sup>9</sup> *S.B.*, 851 So. 2d at 692-693.

<sup>10</sup> See s. 39.806, F.S., grounds for termination of parental rights.

Paragraph (b) does not appear to change the group of third-degree relatives of a parent or stepparent who may petition for temporary custody and therefore may be unnecessary.

Currently, section 751.011(2), defines “putative father” as a man who reasonably believes himself to be the biological father of the minor child, but who is unable to prove his paternity due to the absence of the mother of the child. This definition would appear to be scientifically obsolete because advances in DNA testing have made it possible to determine paternity without a sample from the mother.

### Persons Who May Petition for Temporary Custody

Under existing law, a relative who may petition for temporary custody could be interpreted to be limited to a brother, sister, grandparent, aunt, uncle, cousin, or a putative father. Under the bill, a relative within the third degree by blood or marriage to the parent or stepparent of a child may petition for temporary custody, if the relative is acting as a substitute parent. The table below identifies the relatives within the third degree of a parent or stepparent.

### Relatives within the third degree of a parent or stepparent

			<b>3</b> Great-Grandparents of a parent or stepparent
		<b>2</b> Grandparents of a parent or stepparent	
	<b>1</b> Parents of a parent or stepparent	<b>3</b> Aunts/Uncles of a parent or stepparent	
<b>0</b> Parent or stepparent of the child	<b>2</b> Brothers/Sisters of a parent or stepparent		
<b>1</b> Children of the parent or stepparent	<b>3</b> Nephews/ Nieces of a parent or stepparent		

### Modification of Orders

Section 751.05(7), F.S., provides only for the termination of an order granting temporary custody. The bill changes that provision to also allow a parent to petition the court to modify the order. However, the bill does not add “modification” to a subsequent sentence in the section which makes the authority of a court to modify a temporary custody order somewhat unclear.

### Redirection of Child Support

The bill adds information related to child support obligations for the benefit of the child to the list of information to be included in a petition for temporary custody. There is no mention of redirecting that support to the individual being granted temporary custody of the child.

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

On October 19, 2005, the Civil Justice Committee considered the bill and adopted one amendment. The amendment removed the words “or similar jurisdiction” to prevent any confusion over the meaning of those words. The bill, as amended, was reported favorably as a committee substitute.