

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 109 CS

Temporary Custody of a Child by an Extended Family Member

**SPONSOR(S):** Anderson; Waters

**TIED BILLS:** None

**IDEN./SIM. BILLS:** CS/CS/SB 118

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Kruse</u>	<u>Bond</u>
2) <u>Future of Florida's Families Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Preston</u>	<u>Collins</u>
3) <u>Justice Council</u>	<u>9 Y, 0 N, w/CS</u>	<u>Blalock</u>	<u>De La Paz</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Chapter 751, F.S., provides a procedure whereby a court may grant a relative or a putative father of a minor child temporary legal custody of the child under certain specified circumstances.

This bill expands the definition of the term "extended family" and allows a relative within the third degree by blood or marriage to the parent of a child, or the stepparent of a child under certain circumstances, to petition for temporary custody, if they are caring full time for that child as a substitute parent. This bill limits the group of relatives who may petition a court for temporary custody of a child compared to the current law. This bill also requires petitions for temporary custody to provide the court with additional information on the circumstances surrounding the petition and allows for court modification of a temporary custody order.

This bill removes all references to "putative father" in ch. 751, F.S.

This bill provides that an order granting temporary custody may redirect all or part of an existing child support obligation to the extended family member granted custody of the child and provides direction to the clerk of court.

This bill has an indeterminate fiscal impact on the state court system due to a possible increase in the number of petitions for temporary custody, resulting in additional hearings. This bill does not appear to have a fiscal impact on local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This 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. This bill also 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

Provide limited government -- This bill may increase the number of petitions filed for temporary custody, which would increase the number of court hearings.

Promote personal responsibility -- This bill removes provisions allowing a putative father to seek temporary custody of a child under this ch. 751, F.S. In order to gain legal custody of a child, the putative father must petition for the establishment of paternity, custody, and other relief under ch. 742, F.S.

#### 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", and expands the number of relatives that are included in the definition.

"Extended family member" is defined by the bill as:

- A relative within the third degree by blood or marriage to the parent; or
- The stepparent of a child if the stepparent is currently married to the parent of the child and is not a party in a pending civil or criminal proceeding in any court involving one or both of the child's parents as an adverse party.

The degrees of consanguinity (blood) and affinity (marriage) are calculated by beginning with the person of interest and then determining the direct line where blood relations are descended directly from one another with each generation up or down counting as one degree. Thus, a father and son are related to each other in the first degree, a grandfather and grandson are related to each other in the second degree, and so on. In the collateral line where there are blood relations who are not descended directly from one another but from a common ancestor, the degrees of consanguinity are calculated by counting from the one person up to the nearest common ancestor and then down to the other person. Again, each generation is counted as a degree. The number of degrees of consanguinity is then the number of generations between each person and the nearest common ancestor added together. Thus, brothers are related to one another in the second degree, an uncle is related to his nephew in the third degree, and so on. A individual's cousin is a relative of the 4th degree. This is determined by starting with the individual and count 2 degrees up to reach the common ancestor of the cousin (grandparent), then down one degree, which is the parent of the individual and the parent's sibling. Next, count down one more degree to the child of the parent's sibling, which is the cousin of the individual (2+1+1 = 4 degrees).

The table below identifies the relatives within the third degree of a parent by blood and marriage.

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<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.

## Relatives within the third degree of a parent by blood and marriage

			<b>3</b> Great-Grandparents by blood and marriage of the parent
		<b>2</b> Grandparents by blood and marriage of the parent	
	<b>1</b> Mother/Father and Mother in-law/Father in-law of the parent	<b>3</b> Aunts/Uncles by blood and marriage of the parent	
<b>0</b> Parent of the Child	<b>2</b> Brothers/Sisters and Brothers in-law/Sisters in-law of the parent		
<b>1</b> Children of the parent	<b>3</b> Nephews/ Nieces by blood and marriage of the 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. Current law allows any relative of a minor child who has the parent's consent, or with whom the child is presently living, to bring a petition for temporary custody. The definitional change will only allow those relatives that are considered "extended family members" to file a petition for temporary custody of a child when that relative has the parent's permission or when that relative is caring for the child fulltime in the role of a substitute parent. This bill also provides that the stepparent of a child is authorized to petition for temporary custody of a child if the stepparent is currently married to the parent of the child and is not a party in any civil or criminal proceeding in any court of the competent jurisdiction involving one or both of the child's parents as an adverse party.

This bill removes all references to "putative father" throughout ch. 751, F.S.

This bill amends s. 751.01, F.S., to incorporate the changes made throughout the bill to the term "extended family" and to remove the reference to "putative father" in the purposes section of ch. 751, F.S.

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 provides that an order granting temporary custody may redirect all or part of an existing child support obligation to the extended family member granted custody of the child and provides direction to the clerk of court. This bill provides that an order granting temporary custody must include a determination of past unpaid child support (arrearages) owed to any obligee and the person awarded

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

C. SECTION DIRECTORY:

Section 1 amends s. 751.01, F.S., to conform to the change to "extended family member", and to remove references to "putative father" found in this section.

Section 2 amends s. 751.011(1), F.S., to replace the term "extended family" with the term "extended family member", and revises the definition, which expands who is entitled to petition for temporary custody of a minor child. This section also removes the definition of "putative father".

Section 3 amends s. 751.02, F.S., to provide that an extended family member may petition for temporary custody of a child under certain circumstances. This section also removes all references to "putative father" found in this section.

Section 4 amends s. 751.03, F.S., to require additional information to be included in a petition for temporary custody, and to provide that only an extended family member may petition for temporary custody. This section also removes references to "putative father".

Section 5 amends s. 751.05(5), (6), and (7), F.S., to provide that an order granting temporary custody may redirect all or part of an existing child support obligation to the extended family member granted custody of the child and provides direction to the clerk of court. This section removes subsection (6) regarding the "putative father". The section also provides that either or both of the child's parents may petition to modify, as well as to terminate, an order granting temporary custody.

Section 6 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.<sup>8</sup>

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<sup>8</sup> Fiscal analysis supplied by Brenda Johnson of the State Court System.

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>9</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>10</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>11</sup>

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**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.

On December 7, 2005, the Future of Florida's Families Committee adopted one amendment to the bill. The amendment made the following changes:

- Allows a court to order that an existing child support obligation be paid to a relative who is granted temporary custody of a child;
- Removes the redundancy from the definition of the term "extended family member"; and
- Clarifies exactly which relatives are eligible to petition for temporary custody of a child.

As amended, the bill was reported favorably as a committee substitute.

On February 8, 2006, the Justice Council adopted one amendment to this bill. The amendment revises the definition of "extended family member" to include a relative within the third degree by blood or marriage to the

<sup>9</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>10</sup> *S.B.*, 851 So. 2d at 692-693.

<sup>11</sup> See s. 39.806, F.S., grounds for termination of parental rights.

parent, or the stepparent of a child if the stepparent is still married to the parent of the child and is not a party to a civil or criminal proceeding involving one or both of the child's parents as an adverse party. The amendment also removes all references to "putative father" found in ch. 751, F.S., pertaining to temporary custody of a child, and requires an order granting temporary custody to include a determination of arrearages. The bill was then reported favorably with a committee substitute.