

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Judiciary Committee

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BILL: SPB 7040

INTRODUCER: For consideration by Judiciary Committee

SUBJECT: Interference with Custody

DATE: November 8, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	<b>Pre-meeting</b>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

Senate Proposed Bill 7040 stems from Senate Interim Project Report 2006-142 of the Committee on Judiciary relating to the criminal offense of interference with custody. The bill revises the interference-with-custody statute to:

- Expand an existing exception for a spouse who takes a child in order to seek shelter from domestic violence or to protect the welfare of the child. The bill expands the exception beyond spouses to include a person having a legal right to custody of the child. The bill also includes the taking of an incompetent person within the coverage of the exception and within the procedural steps that a person must follow to avail himself or herself of the exception.
- Revise an existing defense for victims of domestic violence, to require the defendant to also establish that he or she reasonably believed it was necessary to take the child or incompetent person in order to escape the violence or to protect the child or incompetent person from being exposed to the violence.
- Revise an existing defense for cases in which the child or incompetent person instigates his or her own taking, to require the defendant to also establish that it was reasonable to rely on the instigating actions of the child or incompetent person.

The bill also clearly makes the offense of interference with custody applicable to the taking of a minor, replacing the term “child 17 years of age or under” with the term “minor.”

This bill substantially amends section 787.03, Florida Statutes.

## II. Present Situation:

### Interference with Custody

The Legislature created the offense of interference with custody in 1974 and has enacted multiple revisions to the relevant statute since. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a child 17 years of age or under or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.<sup>1</sup> Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, guardian, or relative who has custody of a child or incompetent person to take or conceal the child or incompetent person with a malicious intent to deprive another person of his or her right to custody.<sup>2</sup>

There are three statutory defenses to the offense of interference with custody:

(a) The defendant reasonably believes that his or her action was necessary to preserve the child or the incompetent person from danger to his or her welfare.

(b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that his or her action was necessary to protect himself or herself from an act of domestic violence as defined in s. 741.28.

(c) The child or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the child or incompetent person.<sup>3</sup>

The defense related to the welfare of the person taken and the defense related to instigation by the person taken were part of the original enactment of the inference-with-custody law. The Legislature added the domestic-violence defense in 2000.

Distinct from the three defenses, the Legislature in 1988 specified that the statute does not apply at all:

in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence ... or believes that his or her action was necessary to preserve the child or the incompetent person from danger to his or her welfare seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger.<sup>4</sup>

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<sup>1</sup> Section 787.03(1), F.S.

<sup>2</sup> Section 787.03(2), F.S.

<sup>3</sup> Section 787.03(4)(a)-(c), F.S.

<sup>4</sup> Section 787.03(6)(a), F.S.

Until 2000, there were no particular requirements associated with this apparent statutory exception. At that time, however, the Legislature further revised the statute to provide that, in order to avail herself or himself of the exception for spouses, a person who takes a child must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the child resided. The report must include the name of the person taking the child, the current address and telephone number of the person and the child, and the reasons the child was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act or the Uniform Child Custody Jurisdiction and Enforcement Act.
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the child.<sup>5</sup>

### **Accompanying Public-Records Exemption**

Under an accompanying public-records exemption, the name of the person taking the child and the current address and telephone number of that person and the child, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.<sup>6</sup> As originally enacted in 2000, this exemption applied to “information provided” to a sheriff or state attorney as part of the report filed within 10 days of taking a child. Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.<sup>7</sup> The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.<sup>8</sup>

During the 2005 Regular Session, the Legislature re-enacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.<sup>9</sup>

### **Senate Interim Project**

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. These issues posed challenges in fully evaluating the exemption. For example, the offense generally applies to the taking of a child or an incompetent person, while the public-records exemption appears to apply solely to the taking of a child. As a consequence,

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<sup>5</sup> Section 787.03(6)(b), F.S.

<sup>6</sup> Section 787.03(6)(c), F.S.

<sup>7</sup> See s. 787.03(6)(c), F.S. (2000)

<sup>8</sup> The Florida Senate, Committee on Judiciary, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody*, s. 787.03, F.S. (Interim Project Report 2005-217) (November 2004).

<sup>9</sup> Chapter 2005-89, L.O.F. (House Bill 1699).

the 2005 legislation re-enacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it is reviewed and saved from repeal through re-enactment.<sup>10</sup>

The Senate Committee on Judiciary conducted an interim project during the summer of 2005 in order to analyze the interference-with-custody statute and to recommend whether changes are needed to substantive law, as well as to review the accompanying public-records exemption, in accordance with the Open Government Sunset Review Act.<sup>11</sup>

The report recommended that the Legislature retain the offense of interference, as well as the accompanying three defenses to a charge of interference with custody and the exception for those who flee actual or potential violence and who report their whereabouts to the sheriff or state attorney. However, the report further recommended that the Legislature make the following revisions to the interference-with-custody statute:

- Clarify the defense that currently authorizes a defendant to argue that the action of taking the child or incompetent person was necessary to protect the defendant from domestic violence. The report recommended that the Legislature require a nexus between the domestic violence from which the defendant is fleeing and the child or incompetent person, such as that the child or incompetent person is living in the same household or is otherwise exposed to the violence.
- Broaden the exception currently provided for “spouses” who take a child in the course of fleeing actual or potential domestic violence, or out of concern for the child’s welfare, and report their whereabouts to law enforcement. It was recommended that the Legislature broaden this exception beyond “spouses” to include a person who has lawful custody of the child, recognizing that such a person may be exposed to domestic violence in a relationship other than a marriage.
- Clarify that the statutory exception, and the accompanying reporting procedures, apply to the taking of an incompetent person as well as a child. Currently the statutory process for reporting ones whereabouts to the sheriff or state attorney refers solely to the taking of a child.
- Revise the age parameter for a child covered by the statute to specify that the offense applies to the taking of a minor – replacing the phrase “child 17 years of age or under” with “minor” or “child who has not attained the age of 18 years.”<sup>12</sup>

### **III. Effect of Proposed Changes:**

This Senate Proposed Bill revises the interference-with-custody statute under s. 787.03, F.S., to broaden an existing exception for a spouse who takes a child during the course of fleeing domestic violence or protecting the welfare of the child and reports their whereabouts to the sheriff or state attorney. The bill broadens the exception to make it available to any person having a legal right to custody of a minor, rather than simply to spouses. In addition, the bill

<sup>10</sup> See s. 787.03(7), F.S.; s. 1, ch. 2005-89, L.O.F.

<sup>11</sup> The Florida Senate, Committee on Judiciary, *Review of Application of Defense in Interference with Custody Cases, s. 787.03, F.S., and Associated Open Government Sunset Review* (Interim Project Report 2006-142) (September 2005).

<sup>12</sup> *Id.* at 8.

revises the procedural steps that a person must take in order to avail himself or herself of the exception – including reporting address and telephone information to the sheriff or state attorney within 10 days of the taking – to make them applicable not only to the taking of a child but also to the taking of an incompetent person.

The Senate Proposed Bill also revises an existing defense under the statute, to require that, in order to utilize a defense based on being a victim of domestic violence, a defendant must also establish that he or she reasonably believed the action of taking the minor or incompetent person was necessary in order to escape from the violence or preserve the minor or incompetent person from exposure to the violence. In addition, the bill revises a second defense, to require that, in order to utilize the defense that the child or incompetent person instigated his or her own taking, a defendant must also establish that it was reasonable to rely on the instigating actions of the minor or incompetent person.

The bill also makes the offense of interference with custody applicable to the taking of a minor, replacing the term “child 17 years of age or under” with the term “minor,” in order to avoid ambiguity over whether the law covers the taking of a child in the months between his or her 17th and 18th birthdays.

The bill, which stems from an interim project of the Senate Committee on Judiciary, has an effective date of October 1, 2006, one day before the currently scheduled expiration of the relevant statute. (See s. 787.03(7), F.S).

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The interim project from which Senate Proposed Bill 7040 stems also recommended revisions to a public-records exemption included within the interference-with-custody statute. (See s. 787.03(6)(c), F.S.) Section 24 of Article I of the State Constitution requires the Legislature to address public-records exemptions in separate bills from other substantive-law changes. Senate Proposed Bill 7042 addresses the public-records exemption associated with the interference-with-custody statute. That bill's effective date is contingent upon this bill or similar legislation becoming a law.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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