

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provides for limited government: This bill prohibits modification of a child custody order while a parent is activated to military service unless there is clear and convincing evidence that modification is in the best interest of the child, and provides further limitation on the courts' ability to modify custody orders related to military personnel.

B. EFFECT OF PROPOSED CHANGES:

CURRENT LAW

I. Current Law Regarding the Custody of Minor Children

a. Rights of Parents

The "parent and child relationship" is the legal relationship existing between a child and his or her natural or adoptive parents, and includes the mother and child relationship and the father and child relationship. The word "father" does not ordinarily apply in a legal sense to a stepfather.¹

Like the law of other domestic relations, state law rather than federal law governs the law of parent and child.² Custody embraces the sum of parental rights with respect to the rearing of a child, including its care. Parents have a natural and a legal right to the custody of their children, but this right is subject to the power of the state and may be restricted by appropriate legislative or judicial action.³

The Florida courts have consistently ruled that a parent's desire and right to the companionship, care, custody, and management of his or her children is an important interest that warrants deference and, absent a powerful countervailing interest, protection. A child's welfare is presumed to be best served by the care and custody of the natural parent except in cases of clear, convincing, and compelling reasons to the contrary. Although the right to the integrity of the family is among the most fundamental rights, the parent's rights are subject to overriding concern for the ultimate welfare or best interest of the child.⁴ Conditions that might justify relieving a parent temporarily of the custody of a child would not necessarily support absolute and permanent transfer of the child to a stranger or even other near-kin.⁵

b. Determining Custody of Children

The trial court determines the initial custody of children in dissolution of marriage proceedings pursuant to the guidelines in s. 61.13, F.S., which requires all matters related to the custody of a minor child to be determined in accordance with the best interest of the child.⁶ In determining the best interest of a child, the court must consider all factors affecting the welfare and interests of the child.⁷ The prime and controlling consideration in awarding custody is the best interest and welfare of the child, not the rights of the parents.

¹ 25 Fla. Jur 2d, Family Law, s. 87; 59 Am. Jur. 2d, Parent and Child, s. 2.

² 25 Fla. Jur 2d, Family Law, s. 87.

³ 25 Fla. Jur 2d, Family Law, s. 91.

⁴ 25 Fla. Jur 2d, Family Law, s. 94.

⁵ 25 Fla. Jur 2d, Family Law, s. 94.

⁶ s. 61.13(2)(b)(1), F.S.

⁷ s. 61.13(3), F.S.

The Legislature has declared “[i]t is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. After considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.”⁸ The statutes require parental responsibility for a minor child to be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.⁹ The inherent rights of parents to enjoy the society and association of their children, with reasonable opportunity to impress upon them a parent’s love and affection in their upbringing, must be regarded as an important consideration in determining custody.¹⁰

c. Modification of Custody Award

Section 61.13(2)(c), F.S., grants continuing authority to the courts to modify a previous custody order, including orders pertaining to the children of military personnel. The statutes do not, however, specify the circumstances that justify modification of custody orders or provide specific standards for review. Therefore, modifications are governed by tests developed by the courts in case law. Under the current case law, “[a] trial court’s authority and discretion in a modification proceeding are more restricted than at the time of the initial custody determination,” and the party seeking modification has an “extraordinary burden” to show that there has been a substantial change in circumstances and that modification is in the child’s best interest.¹¹

In 2005, the Florida Supreme Court articulated the following two-part “substantial change test” that applies in all modification proceedings: A final divorce decree providing for the custody of a child may be materially modified only if (1) there are facts concerning the welfare of the child that the court did not at the time the original decree was entered and (2) there has been a change in circumstances shown to have arisen since the original decree was issued.¹²

The court concluded that the party seeking modification is not required to prove that the changed circumstances are a “detriment” to the child; rather, the party must show that a change of custody would promote the child’s best interest.¹³ The best interest of the child, rather than the best interest of a parent or relative, is paramount in modification of custody.¹⁴

Therefore, in seeking modification of custody, the party seeking modification must show both that the circumstances have substantially and materially changed since the original custody determination and that the child’s best interest justify changing custody.¹⁵ Further, the substantial change must be one that was not reasonably contemplated at the time of the original determination.¹⁶ In a modification proceeding, there is a presumption in favor of the custodial parent, and the non-custodial parent seeking modification bears an extraordinary burden.¹⁷

d. Rights as Between Parent and Third Person

In a custody dispute between a parent and a third person, the rights of the parent are paramount unless there is a showing the parent is unfit, or that the parent’s custody will be detrimental to the child’s

⁸ s. 61.13(2)(b)(1), F.S.

⁹ s. 61.13(2)(b)(2), F.S.

¹⁰ 25A Fla. Jur 2d, Family Law, s. 797.

¹¹ Wade v. Hirschman, 903 So.2d 928 (Fla. 2005).

¹² Id.

¹³ Id. at 934.

¹⁴ Bazan v. Gambone, 902 So.2d 174 (Fla. 3rd DCA 2005).

¹⁵ Cooper v. Gress, 854 So.2d 262 (Fla. 1st DCA 2003).

¹⁶ Id.

¹⁷ McKinnon v. Staats, 899 So.2d 357 (Fla. 1st DCA 2005).

welfare. The foregoing rule giving preference to the parents holds true even though the third parties are able and willing to provide greater love and affection or better financial and social prospects.¹⁸

The rule that in a custody dispute between a parent and a third person, the rights of the parent are paramount unless there is a showing the parent is unfit, or that the parent's custody will be detrimental to the child's welfare, has been applied where the custody contest is between the parent(s) and either the grandparent(s), stepparent, uncle and aunt, or adult sister of the child.¹⁹ Awarding sole parental custody to a stepparent to the exclusion of the natural parent is unusual, if not drastic relief, and a judgment that makes that ruling should contain findings to support this extreme action.²⁰

II. Clear and Convincing Evidence Standard of Proof

Under current Florida case law, "clear and convincing" evidence is an intermediate standard which requires the evidence be credible, clear, and lacking in confusion such that the trier of fact is convinced of the matter's truthfulness without hesitancy.²¹ "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."²²

In other words, the quantum of proof necessary must be more than a "preponderance of the evidence," but the proof need not be "beyond and to the exclusion of a reasonable doubt."²³

III. Servicemembers' Civil Relief Act

The Servicemembers' Civil Relief Act²⁴ ("Act") protects the civil rights of persons in the military service of the United States by providing for a suspension of civil proceedings against such persons in state and federal court. The Act supersedes state law and is binding on state courts even if state law does not contain a similar provision.²⁵

The Act vests discretion in trial courts to grant or deny a stay of the proceedings, depending upon whether the service member's ability to prosecute or defend the action is "materially affected" by reason of military service. In determining whether a service member will be prejudiced by denial of a stay, the courts have considered and weighed the nature of the case, the issues involved, the extent to which the service member's rights may be "materially affected" by absence, availability at trial, and the diligence with which the service member takes advantage of the opportunities to preserve rights that might have been afforded during the course of the litigation.²⁶ The burden is on the party who opposes postponement of a trial to show that the service member's ability to conduct a defense is not materially affected.²⁷

Postponement is mandatory unless the trial court expressly finds that the service member is not prejudiced by his or her absence, and the court's findings are supported by the record.²⁸

¹⁸ 25 Fla. Jur 2d, Family Law, s. 95

¹⁹ 25 Fla. Jur 2d, Family Law, s. 96

²⁰ Plantilla v. Plantilla, 777 So.2d 978 (Fla. 2nd DCA 2000).

²¹ W.R. v. Department of Children and Family Services, 896 So.2d 911 (Fla. 4th DCA 2005), citing In re Davey, 645 So.2d 398, 404 (Fla.1994).

²² Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

²³ In re Davey, 645 So.2d 398, 404 (Fla.1994).

²⁴ Servicemembers Civil Relief Act, Title 50, Appendix 39 U.S.C. ss. 501 et seq.

²⁵ 36 Fla. Jur 2d, Military Affairs, s. 11

²⁶ King-Coleman v. Geathers, 795 So.2d 1092 (Fla. 4h DCA 2001) quoting Robbins v. Robbins, 193 So.2d 471, 473 (Fla. 2d DCA 1967) (italics and footnotes omitted). See Cadieux v. Cadieux, 75 So.2d 700 (Fla.1954); Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943).

²⁷ Coburn v. Coburn, 412 So. 2d 947 (Fla. 3rd DCA 1982).

²⁸ Id.

EFFECT OF PROPOSED CHANGES

This bill creates s. 250.85, F.S., to specifically govern the modification of child custody orders pertaining to the children of military personnel who are deployed on active military service. The new provision provides that, if a motion for change of custody is filed during the time a parent is activated to military service, a court may not modify the child custody order that existed on the date the military parent was activated, except that a court may enter a temporary order modifying custody if there is clear and convincing evidence that the modification is in the best interests of the child. If a temporary order is issued, the court must reinstate the custody order in effect at the time of the military parent's activation upon the parent's return.

The new section further provides that a parent's absence, relocation, or failure to comply with custody and visitation orders is not, by itself, sufficient to justify modification of custody or visitation orders if the reason for the absence, relocation, or failure to comply is the parent's activation to military service and deployment out of state.

The extent to which this bill alters or supersedes the current tests applied by the Florida courts in modification proceedings is unclear. (Please see previous discussion of modification proceedings.)

C. SECTION DIRECTORY:

Sections 1-7. Amends various sections of law to update a citation to Federal law.

Section 8. Creates s. 250.85, F.S., related to custody of the children of military personnel.

Section 9. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not appear to affect municipal or county government.

2. Other: None.

- B. **RULE-MAKING AUTHORITY:** This bill does not affect any agency required to adopt rules under ch. 120., F.S., the Florida Administrative Procedure Act.

- C. **DRAFTING ISSUES OR OTHER COMMENTS:** In response to a request for comments, The Family Law Section of The Florida Bar provided comments and suggested revisions of the bill.

- D. **STATEMENT OF THE SPONSOR:** The sponsor did not submit a statement.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

It is anticipated that the bill sponsor, Representative Harrell, will offer a strike-all amendment in the Committee on Military & Veterans' Affairs to incorporate the suggested revisions from The Family Law Section of The Florida Bar.