

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

**BILL:** CS/SB 1888

**INTRODUCER:** Children, Families, and Elder Affairs Committee and Senator Storms

**SUBJECT:** Concurrent Custody

**DATE:** March 11, 2009      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Walsh	CF	Fav/CS
2.			JU	
3.			JA	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

Senate Bill 1888 amends ch. 751, F.S., to authorize a court to order concurrent (as well as temporary) custody of a minor child to a family member who has physical custody of the child.

The bill defines concurrent custody to mean that a person who is eligible to obtain temporary custody may alternatively obtain custodial rights to care for a child concurrently with the child's parents. The definition provides that it is not necessary to find abuse, abandonment or neglect in order to grant concurrent custody, and that concurrent custody does not eliminate or diminish the custodial rights of a parent.

If one of the child's parents objects to a petition for concurrent custody, the court must give the petitioner the option of converting the petition to a petition for temporary custody, and the matter will then proceed as a hearing on a petition for temporary custody. If the petitioner refuses to convert the petition, the petition for concurrent custody will be dismissed.

An order granting concurrent custody does not affect the ability of the child's parent(s) to obtain physical custody of the child at any time. The bill provides that the court must terminate an order for concurrent custody upon a finding that a parent withdraws his or her consent to the order. The

bill allows an order granting concurrent custody to redirect all or part of an existing child support obligation to the extended family member who is granted custody of the child.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 751.01, 751.011, 751.02, 751.03, and 751.05.

## II. Present Situation:

### Kinship Care

The Child Welfare League of America (CWLA)<sup>1</sup> defines kinship care as “the full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, stepparents, or any adult who has a kinship bond with a child.”<sup>2</sup> The CWLA notes that “one of the most recent stunning changes in the child welfare system has been the major growth in the number of children in state custody who are living with their relatives.”<sup>3</sup>

In the United States, more than six million children -- approximately 1 in 12 -- are living in households headed by grandparents or other relatives.<sup>4</sup> In many of these homes, grandparents and other relatives are taking on the primary responsibility for the child’s needs, without either of the child’s parents present in the home.<sup>5</sup>

The increase in recent years in the numbers of children living with relatives can be attributed to many factors, including:

- Increased reporting of abuse and neglect;
- Change in drug usage and addiction related to the spread of crack cocaine and other drugs;
- Increased levels of poverty;
- More children affected by HIV/AIDS;
- More parents struggling with physical and mental health problems;
- Family violence and parental incarceration; and
- Decline in the availability of traditional foster homes.<sup>6</sup>

In Florida, 258,952 children live in grandparent-headed households, which accounts for 7.1 percent of all the children in the state.<sup>7</sup> There are another 86,152 children living in households headed by other relatives, accounting for 2.4 percent of all the children in the state.<sup>8</sup> Of the

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<sup>1</sup> The Child Welfare League of America, founded in 1920, “provides direct support to agencies that serve children and families, improving the quality of the services they provide to more than nine million children every year.” Child Welfare League of America, *About CWLA: Fact Sheet*, <http://www.cwla.org/whowhat/more.htm> (last visited February 18, 2009).

<sup>2</sup> Child Welfare League of America, *Kinship Care: Fact Sheet*, <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited February 18, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> American Ass’n of Retired Persons, *State Fact Sheets for Grandparents and Relatives Raising Children* (Oct. 2007), [http://www.grandfactsheets.org/state\\_fact\\_sheets.cfm](http://www.grandfactsheets.org/state_fact_sheets.cfm) (last visited February 18, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> Child Welfare League of America, *supra* note 2.

<sup>7</sup> American Ass’n of Retired Persons, *GrandFacts, Florida* (Nov. 2007), <http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf> (last visited February 18, 2009).

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

children living in households headed by grandparents or other relatives, 151,492 are living there without either parent present.<sup>9</sup> Although many children living with relatives are doing so pursuant to a court order after being adjudicated dependent pursuant to ch. 39, F.S.,<sup>10</sup> far more are living with relatives in informal arrangements, with no court involvement, often because their parents are incarcerated or addicted to drugs.<sup>11</sup>

In response to the growing needs of children living in kinship care homes in Florida and the many grandparents and other relatives who are providing the primary care for them, the University of South Florida's School of Social Work established the Kinship Support Center (Center).<sup>12</sup> According to its website, the Center:

- Develops, maintains, and strengthens support groups for kinship caregivers and their children;
- Collaborates with the community to develop new, innovative services to address the needs and concerns of the kinship care family;
- Researches and develops techniques for working with children, kinship caregivers, biological parents, school systems, local and state service provider agencies, and the community;
- Serves as a statewide clearinghouse of kinship care information obtained at local, state, and federal level of government for service providers and caregivers;
- Provides training for service provider agencies, universities, and kinship caregivers; and
- Provides direct services to kinship caregivers throughout Florida by means of the Kinship Care Warmline, a statewide listening line; and
- Provides direct services to children living in kinship care families through a school-based intervention pilot project.<sup>13</sup>

Section 39.5085, F.S., establishes the Relative Caregiver Program through which relatives who care for dependent children are eligible for financial assistance within available funding limits.<sup>14</sup> Chapter 39, F.S., however, does not otherwise explicitly require that relatives<sup>15</sup> be involved in or

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<sup>9</sup> *Id.*

<sup>10</sup> In December 2008 in Florida, there were 8,406 children adjudicated dependent and in out-of-home care, who were placed with relatives. Julie Mayo, *DCF Staff Analysis and Economic Impact House Bill Number 381* (January 21, 2009).

<sup>11</sup> See generally Judge Tracy Sheehan, *Relative Caregiver Legislative Priority 2007* (April 3, 2008) (on file with the Senate Committee on Children, Families, and Elder Affairs). See also, James P. Gleeson, *Kinship Care Research and Literature: Lessons Learned and Directions for Future Research*, KINSHIP REPORTER VOL. 1, NO. 2 (Summer 2007), available at <http://www.cwla.org/programs/kinship/kinshipsummer2007.pdf> (last visited February 18, 2009).

<sup>12</sup> Pursuant to a contract that ends June 30, 2009, the Department of Children, Families and Elder Affairs provides the Center with \$400,000 in funding per year, as well as a designated program liaison. According to the Center, all of its statewide programs will cease when this funding ceases. Anne L. Strozier, Ph.D., M.S.W., Director, Florida Kinship Center, University of South Florida, *Florida Kinship Center, Keeping Families Together* (presentation to the Senate Committee on Children, Families and Elder Affairs) (February 4, 2009).

<sup>13</sup> School of Social Work, Univ. of South Florida, *Kinship Support Center*, <http://www.cas.usf.edu/~krisman/> (last visited February 18, 2009).

<sup>14</sup> The average Relative Caregiver payment is \$263 per month per child; the average foster care board rate is \$461 per month per child. DCF, *DCF Quick Facts 6* (October 20, 2008).

<sup>15</sup> Pursuant to s. 39.01(63), F.S., "relative" means a grandparent, great-grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, niece, or nephew, whether related by the whole or half blood, by affinity, or by adoption. The term does not include a stepparent.

informed of child protective investigations or dependency proceedings, unless they are legal custodians of the subject child or children.<sup>16</sup>

Florida law provides several means by which a relative may be granted some measure of control over a child:

### **Temporary Custody of Minor Children by Extended Family**

Chapter 751, F.S., establishes a process by which a child's extended family member<sup>17</sup> may petition a court for temporary custody of the child. An award of temporary custody allows an extended family member with physical custody of a child to consent to:

- Reasonable medical and dental treatment (including nonemergency surgery and psychiatric care);
- Obtain medical, educational and other records;
- Make decisions about a child's education; and
- Do other things necessary for the child's care.<sup>18</sup>

Temporary custody of a child may be awarded to a relative with or without the consent of the child's parents.<sup>19</sup> If the child's parents do not object, the court will award temporary custody to the petitioning relative when it is in the best interest of the child to do so.<sup>20</sup> If the parents do object, the court may enter a temporary custody order only after finding by clear and convincing evidence that the parents are unfit and have abused, neglected, or abandoned the child.<sup>21</sup> At any time, a parent may petition the court to terminate a temporary custody order, and the court will terminate the order upon a finding that the parent is fit or upon the consent of the parties.<sup>22</sup>

### **Consent to Medical Care of a Minor**

Section 743.0645, F.S., authorizes the following individuals to consent to the medical care or treatment of a minor if, after a reasonable attempt, a person who has the power to consent (*e.g.*, a parent) cannot be contacted by the treatment provider:

- A person who possesses a power of attorney to provide medical consent for the minor;<sup>23</sup>
- A stepparent;

<sup>16</sup> Section 39.502(17), F.S., requires reasonable notice of dependency proceedings to all "participants." Section 39.01(5), F.S., defines a "participant" for purposes of a shelter, dependency, or termination of parental rights proceeding as "any person who is not a party but who should receive notice of hearings involving the child, including the actual custodian of the child, the foster parents or the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child." A relative will meet this definition only if he or she is the current or potential placement for the child.

<sup>17</sup> An extended family member is defined in s. 751.011, F.S., 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.

<sup>18</sup> Section 751.01(3), F.S.

<sup>19</sup> Section 751.05, F.S.

<sup>20</sup> Section 751.05(2), F.S.

<sup>21</sup> Section 751.05(3), F.S.

<sup>22</sup> Section 751.05(6), F.S.

<sup>23</sup> A power of attorney executed after July 1, 2001, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the power of attorney.

- A grandparent of the minor;
- An adult brother or sister of the minor; or
- An adult aunt or uncle of the minor.

"Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required.

### **Guardianship of a Minor**

Section 744.3021, F.S., allows a parent, brother, sister, next of kin or other interested person to petition a court for the appointment of a guardian for a minor, without the need for adjudication of incapacity. Once appointed, the guardian has the authority of a plenary guardian.<sup>24</sup>

A child who has been adjudicated dependent pursuant to ch. 39, F.S., may be placed by court order in a permanent guardianship<sup>25</sup> or in a permanent placement with a relative.<sup>26</sup> In both circumstances the court is required to provide the caregiver with a separate order establishing the caregiver's authority to care for the child.

### **Power of Attorney**

Section 709.08(1), F.S., defines a durable power of attorney to be "a written power of attorney by which a principal designates another as the principal's attorney in fact." Pursuant to a durable power of attorney, the attorney in fact "has full authority to perform, without prior court approval, every act specifically enumerated in the durable power of attorney."<sup>27</sup> If authority is specifically granted, the attorney in fact may make health care decisions on behalf of the principal.<sup>28</sup> A durable power of attorney survives the principal's incapacity.

There is no specific provision in Florida law for a power of attorney that allows someone other than a parent or legal custodian to care for a minor child, although nothing in the law precludes the execution of such a document. Some states have passed legislation that specifically addresses the use of a power of attorney to allow a parent to delegate temporary caregiving authority to a relative.<sup>29</sup>

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

Senate Bill 1888 amends ch. 751, F.S., to authorize a court to order concurrent (as well as temporary) custody of a minor child to a family member who has physical custody of the child.

<sup>24</sup> Pursuant to s. 744.102(9)(b), F.S., a plenary guardian is "a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property."

<sup>25</sup> Section 39.6221, F.S.

<sup>26</sup> Section 39.6231, F.S.

<sup>27</sup> Section 709.08(7)(a), F.S.

<sup>28</sup> Section 709.08(7)(c), F.S.

<sup>29</sup> See, e.g., Ariz. Rev. Stat. s. 14-5104 (2008); Cal. Fam. Code s. 6550 (2009); Tenn. Code Ann. s. 34-6-301, *et. seq.* (2008).

The bill defines concurrent custody to mean that a person who is eligible to obtain temporary custody may alternatively obtain custodial rights to care for a child concurrently with the child's parents. The definition provides that it is not necessary to find abuse, abandonment or neglect in order to grant concurrent custody, and that concurrent custody does not eliminate or diminish the custodial rights of a parent.

The bill requires that, in addition to all the requirements of a petition for temporary custody, a petition for concurrent custody must include a statement regarding the consent of the child's parents or a description of the efforts made to obtain consent.<sup>30</sup>

If one of the child's parents objects to a petition for concurrent custody, the court must give the petitioner the option of converting the petition to a petition for temporary custody, and the matter will then proceed as a hearing on a petition for temporary custody. If the petitioner refuses to convert the petition, the petition for concurrent custody will be dismissed.

An order granting concurrent custody does not affect the ability of the child's parent(s) to obtain physical custody of the child at any time. The bill provides that the court must terminate an order for concurrent custody upon a finding that a parent withdraws consent to the order. The court may modify an order for concurrent custody if the parties consent and modification is in the best interests of the child.

The bill allows an order granting concurrent custody (like an order granting temporary custody) to redirect all or part of an existing child support obligation to the extended family member who is granted custody of the child.

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

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Parents have a fundamental liberty interest in determining the care and upbringing of their children. The interest is protected by both the Florida and federal constitutions.<sup>31</sup> This bill authorizes a court to give custody of a child to an individual other than the child's parents and, as such, it may be subject to constitutional scrutiny.

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<sup>30</sup> A petition for temporary custody requires a showing of consent or a description of the acts or omissions of the parents that demonstrate abuse, abandonment or neglect.

<sup>31</sup> *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The bill may prevent some children from entering into the foster care system by allowing their relatives to adequately care for them.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill allows an order for concurrent custody to redirect child support payments to an extended relative who is granted concurrent custody. Because the bill also provides that concurrent custody “does not affect the ability of the child’s parent or parents to obtain physical custody of the child at any time,” it is unclear if the extended relative should be entitled to child support.

**VIII. Additional Information:**

## A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families, and Elder Affairs on March 11, 2009**

The CS for SB 1888:

- Amends the definition of concurrent custody to clarify that it cannot be granted over the objection of the parent;
- Clarifies that a petition for concurrent custody is to be dismissed if the parent objects and the petitioner refuses to convert the petition to one for temporary custody;
- Clarifies that the court would not terminate concurrent custody due to a finding of parental fitness, because a concurrent custody order is not dependent on a finding of unfitness, and provides that the court must terminate a concurrent custody if a parent withdraws consent; and
- Deletes inapplicable, conforming references.

## B. Amendments:

None.