



## 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 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

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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 March 10, 2009).

<sup>2</sup> Child Welfare League of America, *Kinship Care: Fact Sheet*, <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited March 10, 2009).

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

<sup>4</sup> American Ass’n of Retired Persons et al., *State Fact Sheets for Grandparents and Other Relatives Raising Children* (Oct. 2007), [http://www.grandfactsheets.org/state\\_fact\\_sheets.cfm](http://www.grandfactsheets.org/state_fact_sheets.cfm) (last visited March 10, 2009).

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

<sup>6</sup> *Kinship Care: Fact Sheet*, *supra* note 2.

<sup>7</sup> American Ass’n of Retired Persons et al., *GrandFacts, Florida* (Nov. 2007), <http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf> (last visited March 10, 2009).

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

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

pursuant to a court order,<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 Hillsborough County, over 18,000 of the 23,000 children in kinship placements are living with relatives without any court supervision or formalized custody arrangement.<sup>12</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>13</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 levels of government for service providers and caregivers;
- Provides training for service provider agencies, universities, and kinship caregivers;
- Provides direct services to kinship caregivers throughout Florida by means of the Kinship Care Warmline, a statewide listening line for kinship caregivers who need emotional support, information, and referral services; and
- Provides direct services to children living in kinship care families through a school-based intervention pilot project.<sup>14</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>15</sup>

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<sup>10</sup> As of December 2008, there were 8,406 children in Florida who had been placed with relatives pursuant to a court order. See Florida Dep't of Children and Families, *Department of Children and Families Staff Analysis and Economic Impact, Senate Bill Number 1276* (Jan. 21, 2009); e-mail from Julie Mayo, Florida Dep't of Children and Families, to staff of the Senate Committee on Judiciary (March 12, 2009) (on file with the Senate Committee on Judiciary).

<sup>11</sup> See generally Judge Tracy Sheehan, *Relative Caregiver Legislative Priority 2007* (April 3, 2008) (on file with the Senate Committee on Judiciary); 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 March 10, 2009).

<sup>12</sup> Children's Board of Hillsborough County, *Concurrent Custody* (provided by Amelia Petrla, Director of the Children's Board of Hillsborough County, to staff of the Senate Committee on Judiciary on Mar. 30, 2009) (on file with the Senate Committee on Judiciary).

<sup>13</sup> Pursuant to a contract that ends June 30, 2009, the Florida Department of Children and Families 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 ends. Anne L. Strozier, Ph.D., M.S.W., Director, Florida Kinship Center, Univ. of South Florida, *Florida Kinship Center, Keeping Families Together* (presentation to the Senate Committee on Children, Families, and Elder Affairs) (Feb. 4, 2009).

<sup>14</sup> School of Social Work, Univ. of South Florida, *Kinship Support Center*, <http://www.cas.usf.edu/~krisman/> (last visited March 10, 2009).

<sup>15</sup> The average Relative Caregiver payment is \$263 per month per child; the average foster care board rate is \$461 per month per child. Florida Dep't of Children and Families, *DCF Quick Facts 6* (Oct. 20, 2008), available at <http://www.dcf.state.fl.us/publications/docs/quickfacts.pdf> (last visited March 10, 2009).

Chapter 39, F.S., however, does not otherwise explicitly require that relatives<sup>16</sup> be involved in or informed of child protective investigations or dependency proceedings, unless they are legal custodians of the subject child or children.<sup>17</sup>

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

Chapter 751, F.S., establishes a process by which a child's extended family member<sup>18</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 necessary and reasonable medical and dental care (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>19</sup>

A petition for temporary custody must contain a verified statement that the petitioner obtained the consent of the child's parents, or state the specific acts or omissions of the parents which demonstrate that the parents have abused, abandoned, or neglected the child.<sup>20</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 interests of the child.<sup>21</sup> If one of the parents does 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>22</sup> At any time, either or both of the child's parents may petition the court to modify or terminate a temporary custody order. The court must terminate the order upon a finding that the parent is fit or upon the consent of the parties.<sup>23</sup> The temporary custody order may redirect all or part of an existing child support obligation to be paid to the extended family member granted temporary custody.<sup>24</sup>

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<sup>16</sup> Pursuant to s. 39.01(64), 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."

<sup>17</sup> Section 39.502(17), F.S., requires reasonable notice of dependency proceedings to all "participants." Section 39.01(50), 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>18</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>19</sup> Section 751.01(3), F.S.

<sup>20</sup> Section 751.03, F.S.

<sup>21</sup> Section 751.05(2), F.S.

<sup>22</sup> Section 751.05(3), F.S.

<sup>23</sup> Section 751.05(6), F.S.

<sup>24</sup> Section 751.05(5)(b), F.S.

### **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>25</sup>
- A stepparent;
- 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, and well-child care. The term 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.<sup>26</sup>

### **Guardianship of a Minor**

Section 744.3021, F.S., allows a parent, brother, sister, next of kin, or other interested person to petition the 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>27</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>28</sup> or in a permanent placement with a relative.<sup>29</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 as “a written power of attorney by which a principal designates another as the principal’s attorney in fact.” Unless otherwise limited, the attorney in fact “has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the durable power of attorney.”<sup>30</sup> If authority is

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<sup>25</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. See s. 743.0645(2)(a), F.S.

<sup>26</sup> Section 743.0645(1)(b), F.S.

<sup>27</sup> 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.” Section 744.102(9)(b), F.S.

<sup>28</sup> See s. 39.6221, F.S.

<sup>29</sup> See s. 39.6231, F.S.

<sup>30</sup> Section 709.08(7)(a), F.S.

specifically granted, the attorney in fact may make health care decisions on behalf of the principal.<sup>31</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>32</sup>

### III. Effect of Proposed Changes:

This bill 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.

Concurrent custody is defined to mean that an eligible individual is awarded custodial rights to care for a child concurrently with the child's parent or parents.

The bill provides that a person seeking concurrent custody must have physical custody of the child, and must have had physical custody for at least 10 days in any 30-day period within the last 12 months, and must not have signed, written documentation from a parent that is sufficient to enable the custodian to do things necessary for the care of the child.

The bill requires that, in addition to the requirements of a petition for temporary custody,<sup>33</sup> a petition for concurrent custody must include a statement providing:

- The time periods during the last 12 months that the child resided with the petitioner;
- The type of document, if any, provided by the parent to enable the petitioner to act on behalf of the child;
- The services or actions that the petitioner is unable to obtain or undertake without an order of custody; and
- Whether each parent has consented, in writing, to the entry of an order of concurrent custody.

Additionally, the bill requires a copy of the parent's written consent and any other documents provided by the parent to assist the petitioner to be attached to the petition.

The bill provides that if one of the child's parents objects to a petition for concurrent custody, in writing, the court may not grant the petition even if the other parent consents. The court must give the petitioner the option of converting the petition to a petition for temporary custody, and, if the petitioner so elects, the matter will be set for further hearing and proceed as a petition for temporary custody. If the petitioner does not convert the petition, the petition for concurrent custody will be dismissed.

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<sup>31</sup> Section 709.08(7)(c), F.S.

<sup>32</sup> See, e.g., Ariz. Rev. Stat. Ann. s. 14-5104; Cal. Fam. Code s. 6550 (relating to authorization affidavits for a caregiver to consent to medical or dental care); Tenn. Code Ann. s. 34-6-301, *et. seq.*

<sup>33</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. Section 751.03(8), F.S.

The bill clarifies that an order granting concurrent custody does not eliminate or diminish the custodial rights of the child's parent or parents. The order for concurrent custody must expressly state that the grant of custody does not affect the ability of the child's parents to obtain physical custody of the child at any time.

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 be paid to the extended family member who is granted custody of the child.

The bill also provides that the petitioner or either or both of the child's parents may move to modify the child support provision or terminate the order granting concurrent custody. The court must terminate an order for concurrent custody upon a finding that either or both parents object to the order. The bill provides that if an order for concurrent custody is terminated, any eligible person may petition for temporary custody. The court may modify an order granting child support if the parties consent and modification is in the best interests of the child.

The bill provides an effective date of July 1, 2009.

#### **Other Potential Implications:**

This bill authorizes a court to grant an order for concurrent custody of a minor child to an extended family member. By allowing minor children to be placed in the care of an extended family member, rather than in foster care, the bill may have a positive fiscal impact on the state. According to the Children's Board of Hillsborough County, approximately 60 percent of children in Hillsborough County are placed with relatives rather than in the formal foster care system, saving Hillsborough County approximately \$20 million annually.<sup>34</sup>

Additionally, 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 how redirecting child support to the extended relative may affect the ability of the parent to support the child during periods when he or she does obtain physical custody.

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

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

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<sup>34</sup> Children's Board of Hillsborough County, *supra* note 12.

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>35</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. However, because the parent's consent is required before an order for concurrent custody may be entered, and because an order for concurrent custody does not eliminate or diminish the parent's custodial rights, the bill may pass constitutional muster.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Courts Administrator (OSCA), the bill may have a slight impact on the courts in terms of judicial workload because the bill allows certain individuals to petition for concurrent custody.<sup>36</sup> However, the exact fiscal impact on the state courts system cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial workload.<sup>37</sup>

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill places language authorizing a court to order concurrent custody of a minor child within ch. 751, F.S., titled "Temporary Custody of Minor Children by Extended Family." The bill, however, does not address the title of the chapter. The chapter title may need to be revised to specify "Temporary and Concurrent Custody of Minor Children by Extended Family."

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<sup>35</sup> *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996).

<sup>36</sup> Office of the State Courts Administrator, *Judicial Impact Statement, SB 1888* (Feb. 27, 2009) (on file with the Senate Committee on Judiciary).

<sup>37</sup> *Id.*



**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Judiciary on April 6, 2009:**

The committee substitute:

- Amends the definition of “concurrent custody”;
- Requires a person seeking concurrent custody to have physical custody of the child and have had physical custody for at least 10 days in any 30-day period within the last 12 months, as well as requires a person to not have signed, written documentation from a parent sufficient to allow the person to do all things necessary to care for the child;
- Amends the petition requirements for concurrent custody to include the time periods the child has resided with the petitioner, the type of document provided by the parent to enable the petitioner to act on the child’s behalf, and the services the petitioner cannot obtain without an order for custody;
- Provides that if one of the child’s parents objects to the petition, in writing, the court may not grant the petition, even if the other parent consents;
- Clarifies that an order granting concurrent custody does not eliminate or diminish the custodial rights of the child’s parent or parents; and
- Provides that the petitioner, as well as the child’s parents, may move the court to modify the child support provision or terminate the order granting concurrent custody.

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

The committee substitute:

- 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;
- Eliminates the reference that a court can terminate an order for concurrent custody upon a finding of parental fitness because a concurrent custody order is not dependent on a finding of unfitness. Instead, the committee substitute provides that the court must terminate a concurrent custody order if a parent withdraws consent; and
- Deletes inapplicable, conforming references.

- B. **Amendments:**

None.