

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 25 Temporary and Concurrent Custody of a Child  
**SPONSOR(S):** Health Care Services Policy Committee, Glorioso  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 334

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	Civil Justice & Courts Policy Committee	12 Y, 0 N	DeZego	De La Paz
2)	Health Care Services Policy Committee	14 Y, 0 N, As CS	Schoonover	Schoolfield
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

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**SUMMARY ANALYSIS**

The bill amends ch. 751, F.S., to authorize a court to order concurrent custody of a minor child to an extended family member. An order of concurrent custody does not affect a parent or parents' ability to obtain physical custody of the child at any time.

In order to bring proceedings for concurrent custody under this bill, a person must:

- Be an extended family member who has signed, notarized consent of the child's legal parents or an extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living;
- Currently have physical custody of the child;
- Have had physical custody of the child for at least 10 days within any 30-day period in the last 12 months; and
- Not have signed documentation from a parent which allows the petitioner to obtain necessary care for the child that an order for concurrent custody would provide.

A judge may award concurrent custody if it is in the best interest of the child, unless the parents object. If a parent objects in writing, then the court may not grant the petition. The petitioner or either or both parents may move to terminate an order granting concurrent custody at any time, and an order must be terminated if either parent objects to the order.

The court may also provide an order for child support to the extended family member under this bill if the parent receives notice and there is evidence of the parent's ability to pay. In addition, the court may direct all or part of an existing child support obligation to be paid to the extended family member who is granted concurrent custody of the child.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

### FULL ANALYSIS I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### 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>

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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 October 6, 2009).

<sup>2</sup> Child Welfare League of America, Kinship Care: Fact Sheet, <http://www.cwla.org/programs/kinship/factsheet.htm>. Last accessed October 6, 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 accessed October 6, 2009.

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

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

In Florida, approximately 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 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>

The University of South Florida's School of Social Work established the Florida Kinship Center in response to the growing needs of children living in kinship care homes.<sup>12</sup> The Center provides statewide and local programs to kinship caregivers throughout Florida. The programs include<sup>13</sup>:

- The Warmline, which provides emotional support, information, and referral for relative caregivers throughout Florida;
- The Legal Hotline, which provides education, information and referral to volunteer lawyers and legal aid for caregivers facing legal challenges;
- The Kinship Partners Program, which provides support groups and training to 12 counties in Florida;
- The Kin As Teachers Program, which provides support to relative caregivers raising children from ages birth to kindergarten; and
- The Kinship Care Connection, which provides school-based support such as mentors, one-on-one academic services, and intensive therapeutic interventions.

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 informed of child protective investigations or dependency proceedings, unless they are legal custodians of the subject child or children.<sup>16</sup> However, s. 39.502(1), F.S. and s. 39.502(19), F.S. were amended in 2009 to provide notification of dependency proceedings and hearings when requested in writing by relatives. Florida law provides several means by which a relative may be granted some measure of control over a child.

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<sup>7</sup> American Ass'n of Retired Persons, GrandFacts, Florida (Nov. 2007),

<http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf>. Last accessed October 6, 2009.

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

<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 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 accessed October, 2009.

<sup>12</sup> See <http://www.flkin.org/index.asp>. Last accessed October 21, 2009.

<sup>13</sup> *Kinnectivity*, Summer 2009 available at <http://www.flkin.org/News14241770.asp>. Last accessed October 21, 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 (February 6, 2009).

<sup>15</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>16</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.

## 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:<sup>18</sup>

- 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.

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;
- 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>

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<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.

<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."

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>

### **Effect of Bill**

This bill amends ch. 751, F.S., to authorize a court to order concurrent custody of a minor child to an extended family member.<sup>30</sup> This bill defines concurrent custody to mean that an eligible extended family member is awarded custodial rights to care for a child concurrently with the child's parent or parents. This bill provides that in order to bring proceedings for concurrent custody, a person must:

- Be an extended family member who has signed, notarized consent of the child's legal parents or be an extended family member who is caring full time for the child in the role of a substitute parent and with whom the child is presently living;
- Currently have physical custody of the child;
- Have had physical custody of the child for at least 10 days within any 30-day period in the last 12 months; and
- Not have signed documentation from a parent which allows the petitioner to obtain necessary care for the child that an order for concurrent custody would provide.

### Petition for Concurrent Custody

A petition for concurrent custody must provide in part the following:

- The names and addresses of persons with whom the child has lived in the past five years;
- The time periods during the last 12 months when the child resided with the petitioner;
- The type of document, if any, provided by the parent or parents to the petitioner to act on behalf of the child;
- The services or actions that the petitioner is not able to attain or perform without an order of custody; and
- Whether each parent has consented in writing to the entry of an order of concurrent custody.

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<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 (2009); Cal. Fam. Code s. 6550 (2009); Tenn. Code Ann. s. 34-6-301, et. seq. (2008).

<sup>30</sup> An extended family member is defined as a person who is a relative within the third degree by blood or marriage or the stepparent of the child if still married to the child's parent. Section 751.011(2), F.S.

Notice and an opportunity to be heard must be given to the parents by personal or constructive service of process.

### Order for Concurrent Custody

Under this bill, a judge may award concurrent custody if it is in the best interest of the child, unless the parents object. If a parent objects in writing, then the court may not grant the petition. If a parent objects, then the petitioner may change their petition to one for temporary custody and set the matter for a separate hearing. Separate notice must be given for the new hearing in this case. If the petition is not converted into a petition for temporary custody, then the petition for concurrent custody must be dismissed without prejudice.

An order of concurrent custody does not affect a parent or parents' ability to obtain physical custody of the child at any time. The petitioner or either or both parents may move to terminate the order granting concurrent custody. The order must be terminated if either parent objects to the order.

### Child Support

This bill also provides that the court may provide an order for child support, pursuant to the guidelines in ch. 61, F.S., if the parent receives notice and there is evidence of the parent's ability to pay. In addition, the court may direct all or part of an existing child support obligation to be paid to the extended family member who is granted concurrent custody of the child. If any modification is made in the child support, the order shall be copied and placed in the related family court files.

The petitioner or either or both parents may move to modify the child support provision. The support order may be modified if the parties consent and the modification is in the best interests of the child.

## B. SECTION DIRECTORY:

Section 1 amends s. 751.01, F.S., relating to the temporary custody of a minor child by extended family.

Section 2 amends s. 751.011, F.S., relating to definitions.

Section 3 amends s. 751.02, F.S., relating to determination of temporary custody proceedings.

Section 4 amends s. 751.03, F.S., relating to a petition for temporary or concurrent custody.

Section 5 amends s. 751.04, F.S., relating to notice and opportunity to be heard for temporary or concurrent custody.

Section 6 amends s. 751.05, F.S., relating to an order granting temporary or concurrent custody.

Section 7 amends s. 49.011, F.S., relating to service of process for temporary custody of a minor.

Section 8 provides an effective date of July 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None

#### 2. Expenditures:

This bill appears to have a minimal indeterminate negative fiscal impact. See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None

2. Expenditures:

None

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None

**D. FISCAL COMMENTS:**

To the extent that individuals under this bill will be able to petition for concurrent custody, this bill may increase the judicial workload according to the Office of the State Courts Administrator.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

This bill may require the creation of a petition and final order for concurrent custody. According to the Office of the State Courts Administrator, the creation of these forms cannot be completed by the effective date of this bill.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On January 12, 2010, two amendments were adopted by the Health Care Services Policy Committee.

- The first amendment changed the definition of “concurrent custody” so that it applies to extended family members rather than all individuals.
- The second amendment clarified how the parents of a child and the court may terminate the order granting concurrent custody. Also clarified any modification made by the court with the parties consent to the child support order shall occur under the child support guidelines of ch. 61, F.S. The amendment also requires that a copy of any such modification be placed in the related family court files.