

**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: SB 334

INTRODUCER: Senator Storms

SUBJECT: Temporary and Concurrent Custody of a Child

DATE: January 11, 2010      REVISED: 01/13/10

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Preston	Walsh	CF	<b>Fav/2 Amendments</b>
2.			JU	
3.			JA	
4.				
5.				
6.				

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

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

**I. Summary:**

The bill authorizes a court to order concurrent (as well as temporary) custody of a minor child to an extended family member who has physical custody of the child, but does not have signed, written documentation from a parent which is sufficient to enable the custodian to do things necessary to care for the child. The bill provides petition requirements for requesting concurrent custody and provides that if one of the minor child's parents objects to the petition, the petitioner may convert the petition to one for temporary custody. The bill provides that concurrent custody may not eliminate or diminish the custodial rights of the parent and the court must terminate an order for concurrent custody if one of the minor child's parents objects 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 concurrent custody of the child.

The bill substantially amends 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 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 January 4, 2010).

<sup>2</sup> Child Welfare League of America, *Kinship Care: Fact Sheet*, <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited January 4, 2010).

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

<sup>4</sup> American Association 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 January 4, 2010).

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

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

<sup>7</sup> American Association of Retired Persons et al., *GrandFacts, Florida* (Nov. 2007), <http://www.grandfactsheets.org/doc/Florida%2007%20New%20Template.pdf> (last visited January 4, 2010).

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

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<sup>10</sup> As of January, 2010, there were 7,623 children in Florida who had been placed with relatives pursuant to a court order. E-mail from Joyce Sealey, Florida Department of Children and Families, to staff of the Senate Committee on Children, Families, and Elder Affairs (January 6, 2010) (on file with the Senate Committee on Children, Families, and Elder Affairs).

<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 January 4, 2010).

<sup>12</sup> Pursuant to a contract that ended June 30, 2009, the Florida Department of Children and Families provided the Center with \$400,000 in funding per year, as well as a designated program liaison. As a result of the loss of that funding, the Center will be able to maintain its current programs until July 2010. Center staff is currently working to determine which programs will end and trying to recruit volunteers to assume some program functions. E-mail from Dr. Anne Strozier, Director, Florida Kinship Center, to staff of the Senate Committee on Children, Families, and Elder Affairs (January 10, 2010) (on file with the Senate Committee on Children, Families, and Elder Affairs).

<sup>13</sup> School of Social Work, Univ. of South Florida, *Florida Kinship Center*, <http://www.flkin.org/> (last visited January 4, 2010).

<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. Florida Dep't of Children and Families, *DCF Quick Facts* (February 6, 2009), available at <http://www.def.state.fl.us/publications/docs/quickfacts.pdf> (last visited January 4, 2010).

## 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 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>18</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>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 interests of the child.<sup>20</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>21</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>22</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>23</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:

<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.

<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 751.03, 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> Section 751.05(5)(b), F.S.

- A person who possesses a power of attorney to provide medical consent for the minor;<sup>24</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>25</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>26</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>27</sup> or in a permanent placement with a relative.<sup>28</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>29</sup> If authority is specifically granted, the attorney in fact may make health care decisions on behalf of the principal.<sup>30</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

<sup>24</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>25</sup> Section 743.0645(1)(b), F.S.

<sup>26</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>27</sup> See s. 39.6221, F.S.

<sup>28</sup> See s. 39.6231, F.S.

<sup>29</sup> Section 709.08(7)(a), F.S.

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

the use of a power of attorney to allow a parent to delegate temporary caregiving authority to a relative.<sup>31</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 an extended 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>32</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 in writing. 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 without prejudice.

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.

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<sup>31</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>32</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 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, 2010.

#### **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>33</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.

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<sup>33</sup> *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996).

C. **Government Sector Impact:**

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 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>34</sup>

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

According to OSCA, the Court's Forms Workgroup and/or The Florida Bar may have to create a form petition and final order that pertain to or include concurrent custody. The effective date of this bill (July 1, 2010) will not allow enough time for the applicable entity above to create forms, if the creation of new forms is determined to be necessary. OSCA recommends that the Legislature consider changing the effective date of the bill to January 1, 2011, in order for the court to be able to educate judges and make necessary changes to court forms and rules.<sup>35</sup>

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."

VIII. **Additional Information:**

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

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

None.

B. **Amendments:**

**Barcode 913550 by Children, Families, and Elder Affairs on January 13, 2010:**

The amendment replaces the term "individual" with the term "extended family member" to clarify that only extended family members are eligible to be awarded concurrent custody.

**Barcode 676634 by Children, Families, and Elder Affairs on January 13, 2010:**

The amendment provides that the court shall terminate an order granting concurrent

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<sup>34</sup> Office of the State Courts Administrator, Judicial Impact Statement, HB 25 (Identical to SB 334) (October 28, 2009) (on file with the Senate Committee on Children, Families, and Elder Affairs).

<sup>35</sup> *Id.*



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custody if either or both parents object to the order; provides that having an order for concurrent custody terminated does not preclude any other eligible extended family member from filing a petition for temporary custody; provides that the petitioner or either or both parents may ask the court to modify an existing child support order, provides that the court may modify the order for support if the parties agree and it is in the best interest of the child to do so, and provides that any modification order must be copied and placed in the related family court file; and changes the effective date to January 1, 2011. (WITH TITLE AMENDMENT)

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

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