

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 Judiciary Committee

BILL: CS/SB 334

INTRODUCER: Judiciary Committee and Senator Storms

SUBJECT: Temporary and Concurrent Custody of a Child

DATE: March 5, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Preston	Walsh	CF	Fav/2 amendments
2.	Daniell	Maclure	JU	Fav/CS
3.	_____	_____	JA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill authorizes a court to order concurrent 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. However, at any time the person requesting temporary or concurrent custody or the child's parents may petition the court to modify the child support order.

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)¹ 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.”² The CWLA notes that “[o]ne 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.”³

In the United States, “[m]ore than six million children – approximately 1 in 12 – are living in households headed by grandparents . . . or other relatives.”⁴ 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.⁵

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.⁶

In 2007, there were 258,952 children living in Florida in grandparent-headed households, which accounts for 7.1 percent of all the children in the state.⁷ There were another 86,152 children living in households headed by other relatives, accounting for 2.4 percent of all the children in the state.⁸ Of the children living in households headed by grandparents or other relatives, 151,492 live there without either parent present.⁹ Although many children living with relatives

¹ 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 Feb. 23, 2010).

² Child Welfare League of America, *Kinship Care: Fact Sheet*, <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited Feb. 23, 2010).

³ *Id.*

⁴ American Association of Retired Persons Foundation et al., *State Fact Sheets for Grandparents and Other Relatives Raising Children* (Oct. 2007), http://www.grandfactsheets.org/state_fact_sheets.cfm (last visited Feb. 23, 2010).

⁵ *Id.*

⁶ *Kinship Care: Fact Sheet*, *supra* note 2.

⁷ Child Welfare League of America, *GrandFacts: A State Fact Sheet for Grandparents and Other Relatives Raising Children, Florida* (Nov. 2007), <http://www.cwla.org/programs/kinship/2007statefactsheets/florida.pdf> (last visited Feb. 24, 2010).

⁸ *Id.*

⁹ *Id.*

are doing so pursuant to a court order,¹⁰ far more are living with relatives in informal arrangements, with no court involvement, often because their parents are incarcerated or addicted to drugs.¹¹

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).¹² The Center provides different services, such as emotional support, education, information and referral, advocacy, and training and research, to grandparents and other relatives who are raising children in place of the children's parents.¹³

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.¹⁴ Chapter 39, F.S., however, does not otherwise explicitly require that relatives¹⁵ be involved in or informed of child protective investigations or dependency proceedings, unless they are legal custodians of the subject child or children.¹⁶

Temporary Custody of Minor Children by Extended Family

Chapter 751, F.S., establishes a process by which a child's extended family member¹⁷ 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:

¹⁰ As of January 2010, there were 7,623 children in Florida who had been placed with relatives pursuant to a court order. Email from Joyce Sealey, Fla. Dep't of Children and Families, to staff of the Senate Committee on Children, Families, and Elder Affairs (Jan. 6, 2010) (on file with the Senate Committee on Children, Families, and Elder Affairs).

¹¹ 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 Feb. 24, 2010).

¹² 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. The staff at the Center is currently working to determine which programs will end and trying to recruit volunteers to assume some program functions. Email from Dr. Anne Strozier, director, Florida Kinship Center, to staff of the Senate Committee on Children, Families, and Elder Affairs (Jan. 10, 2010) (on file with the Senate Committee on Children, Families, and Elder Affairs).

¹³ Barbara Melendez, *USF Kinship Center Celebrates 10th Anniversary* (Aug. 13, 2008), available at <http://usfweb3.usf.edu/absolutenm/templates/?a=779&z=42> (last visited Feb. 24, 2010). For more information about the Center's programs, see <http://www.flkin.org/programs.asp> (last visited Feb. 24, 2010).

¹⁴ 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*, 4 (Dec. 31, 2009), available at <http://www.dcf.state.fl.us/publications/docs/quickfacts.pdf> (last visited Feb. 24, 2010).

¹⁵ 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."

¹⁶ 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.

- 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.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ 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.²² 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.²³

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 consent²⁴ cannot be contacted by the treatment provider:

- A person who possesses a power of attorney to provide medical consent for the minor;²⁵
- 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

¹⁷ 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.

¹⁸ Section 751.01(3), F.S.

¹⁹ Section 751.03, F.S.

²⁰ Section 751.05(2), F.S.

²¹ Section 751.05(3), F.S.

²² Section 751.05(6), F.S.

²³ Section 751.05(5)(b), F.S.

²⁴ Persons who have the ability to consent to medical care or treatment of a minor include a natural or adoptive parent, legal custodian, or legal guardian. Section 743.0645(1), F.S.

²⁵ 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.

extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required.²⁶

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.²⁷

A child who has been adjudicated dependent pursuant to ch. 39, F.S., may be placed by court order in a permanent guardianship²⁸ or in a permanent placement with a relative.²⁹ 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.”³⁰ If authority is specifically granted, the attorney in fact may make health care decisions on behalf of the principal.³¹ 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.³²

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 extended family member is awarded custodial rights to care for a child concurrently with the child’s parent or parents.

²⁶ Section 743.0645(1)(b), F.S.

²⁷ 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.

²⁸ See s. 39.6221, F.S.

²⁹ See s. 39.6231, F.S.

³⁰ Section 709.08(7)(a), F.S.

³¹ Section 709.08(7)(c), F.S.

³² 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.

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,³³ 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 specifies 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 terminate the order granting concurrent custody. The bill does not appear to allow for modification of the concurrent custody order by any party. 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.

Current law does not authorize the petitioner in a temporary custody situation to petition the court to modify or terminate the order granting temporary custody.

³³ 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.

Finally, the bill provides that the petitioner, or either or both of the child's parents, may move to modify the existing child support order. The court may modify an order granting child support if the parties consent and modification is in the best interest of the child. If the court modifies a child support order in a concurrent custody situation, the order must be placed in the related family court files.

The bill provides an effective date of January 1, 2011.

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.³⁴ 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:

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

³⁴ *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996).

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, the bill may have a slight impact on the courts in terms of judicial workload because the bill allows specified individuals to petition for concurrent custody, which may require additional hearings by the court.³⁵

VI. Technical Deficiencies:

The bill makes conforming changes throughout ch. 751, F.S., to reference temporary *and* concurrent custody. However, on line 134 of the bill, this conforming language is not included. It is unclear whether the intent is to only require a petitioner seeking temporary custody to include a statement in the petition regarding the period of time temporary custody is sought, or whether a person seeking concurrent custody must also include such a statement. If it wishes to have this provision apply to petitioners seeking concurrent custody, the Legislature could amend the bill to include the term “or concurrent” on line 134.

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.”

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 Judiciary on March 4, 2010:

The committee substitute creates an additional subsection in the bill, which provides that at any time the petitioner, or either or both of the child’s parents, may move to modify an existing child support order. The court may modify the existing order if the parties consent and modification is in the best interest of the child. If the court modifies an existing child support order in a concurrent custody proceeding, the modification order must be copied and placed in the related family court files.

Additionally, the committee substitute replaces the term “individual” with the term “extended family member” in the definition of concurrent custody, to clarify that only extended family members are eligible to be awarded concurrent custody.

B. Amendments:

None.

³⁵ Office of the State Courts Administrator, *Judicial Impact Statement, HB 25* (Identical to SB 334) (Oct. 28, 2009) (on file with the Senate Committee on Judiciary).

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