

**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.)

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

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BILL: CS/SB 1174

INTRODUCER: Judiciary Committee and Senator Bean

SUBJECT: Custody of Minor Children by Extended Family

DATE: March 29, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1174 grants courts more authority and flexibility in establishing and terminating orders granting “temporary” or “concurrent” custody of a child to an extended family member. As under current law, custody of a child by his or her relative for an indefinite period is referred to in the statutes as “temporary” if it excludes the parents, and as “concurrent” if shared with the parents.

The bill requires a relative to include his or her petition for concurrent custody “[a]ny other request related to the protection of the welfare of the child, including provisions for transitioning custody or a plan for visitation.” And in an order granting concurrent custody, the bill authorizes a court to include conditions agreed to by the parties, including conditions that eliminate or diminish a parent’s custody rights if the parent agrees to the conditions.

Later, when a parent makes a motion to terminate concurrent custody, the court may decline the parent’s request to terminate the order if the parent has failed to meet the conditions and does not demonstrate that the failure does not endanger the welfare of the child.

Regarding an order for *temporary* custody, if it is based on the unfitness or absence of the parents, the court may establish conditions that the parents must meet before the court deems them fit and thus able to retake custody of their child.

Additionally, the bill requires courts to establish any conditions for the transition of the child to the parents' custody which are in the child's best interest if the child was in the temporary custody of a relative for at least six months. In determining these conditions, the court must consider:

- The length of time the child lived with the extended family member;
- The child's developmental stage and psychological needs;
- The need for a gradual transition from one setting to another; and
- Visitation with the extended family member.

The bill is not expected to have a fiscal impact and has an effective date of July 1, 2019.

## II. Present Situation:

### The Concept of Temporary or Concurrent Custody of a Child

Under ch. 751, F.S., a child's extended family member may obtain a court order granting him or her custody of the child for an indefinite period of time. This custody may be exclusive of, or concurrent with, the parent's custody. Custody that is exclusive of the parent's custody is referred to in the statutes as "temporary," and custody that is shared by the relative and the parent is "concurrent." Nonetheless, both are indefinite and tend to be temporary.

This system differs from "dependency," set forth in ch. 39, F.S., in that it pertains to *non-dependent* children.

### Petition for Temporary or Concurrent Custody

To obtain a court order granting temporary or custody of a child, an extended family member of the child must file a petition for temporary or concurrent custody.<sup>1</sup> In either type of petition, the petitioner must state several things to the court, to the best of his or her knowledge, including the places where the child has lived during the past 5 years, information about other custody proceedings involving the child, the petitioner's relationship to the child, and that it is in the child's best interest for petitioner to have custody.<sup>2</sup>

In a petition for concurrent custody, the petitioner must also state:

- 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 or parents 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.<sup>3</sup>

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<sup>1</sup> See s. 751.03, F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 751.03(8), F.S.

In a petition for temporary custody, the petitioner must also state that the parents consent or the petitioner must state “the specific acts or omissions of the parents which demonstrate that the parents have abused, abandoned, or neglected the child” as defined in the dependency statutes.<sup>4</sup>

### **Hearing on the Petition for Temporary or Concurrent Custody**

The court will then hold a hearing on the petition. At the hearing, the court must hear the evidence concerning the child’s need for care by the petitioner, as well as the objection and other testimony of either parent, if present.<sup>5</sup>

The court must grant the petition if it is in the best interests of the child and the parents do not object.<sup>6</sup> However, if at least one parent objects the court must proceed in different ways depending on the type of petition.

If at least one parent objects to a petition for concurrent custody, the court must deny the petition and give the petitioner the option of converting the petition to one for temporary custody.<sup>7</sup> If the petitioner exercises this option, the converted petition will be heard at a later date.<sup>8</sup>

If at least one of the child’s parents objects to a petition for temporary custody, the court must grant the petition only if it finds, based on clear and convincing evidence, that the parents are unfit to provide for the care and control of the child.<sup>9</sup> “In determining that a parent is unfit, the court must find that the parent has abused, abandoned, or neglected the child,” as defined in the dependency statutes.<sup>10</sup>

### **Order Granting Temporary or Concurrent Custody**

#### ***Order Granting Temporary Custody***

In an order granting temporary custody, the statutes authorize a court to grant visitation rights to a child’s parent or parents, if it is in the best interest of the child.<sup>11</sup> The statutes do not expressly authorize the court to state what parents who have been found unfit must do later to prove their fitness, and thus regain the custody of their child.

#### ***Order Granting Concurrent Custody***

The order granting concurrent custody may not eliminate or diminish the custodial rights of the child’s parent or parents.<sup>12</sup> In fact, the order must expressly state that the grant of custody does

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<sup>4</sup> Section 751.03(9), F.S.

<sup>5</sup> Section 751.05(1), F.S.

<sup>6</sup> Section 751.05(2), F.S.

<sup>7</sup> Section 751.05(3)(a), F.S.

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

<sup>9</sup> Section 751.05(3)(b), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> Section 751.05(2), F.S.

<sup>12</sup> Section 751.05(4)(a), F.S.

not affect the ability of the child's parent or parents to obtain physical custody of the child at any time.<sup>13, 14</sup>

### **Terminating Temporary or Concurrent Custody**

#### ***Terminating Temporary Custody***

After the entry of the order granting temporary custody, either parent may petition the court to modify or terminate the order.<sup>15</sup> The court must grant the order upon a finding that the petitioning parent is fit, or upon consent of the relative that took custody of the child.<sup>16</sup>

If a court terminates temporary custody, the child might immediately return to his or her parent's custody, and nothing in statute precludes a parent from restricting contact between the child and the relative, regardless of how long the temporary custody lasted.

#### ***Terminating Concurrent Custody***

The petitioner or either parent may make a motion to terminate concurrent custody at any time.<sup>17</sup> The court must terminate concurrent custody on a parent's request.<sup>18</sup>

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

The bill grants courts more authority and flexibility in establishing and terminating orders granting temporary or concurrent custody of a child to an extended family member. If an order for temporary custody is based on the unfitness or absence of the parents, the court may establish conditions that the parents must meet before the court deems them fit, and thus able to retake custody of their child.

The bill requires a relative to include his or her petition for concurrent custody "[a]ny other request related to the protection of the welfare of the child, including provisions for transitioning custody or a plan for visitation." And in an order granting concurrent custody, the bill authorizes a court to include conditions agreed to by the parties, including conditions that eliminate or diminish a parent's custody rights if the parent agrees to the conditions.

Later, when a parent makes a motion to terminate concurrent custody, the court may decline the parent's request to terminate the order if the parent has failed to meet the conditions and does not demonstrate that the failure does not endanger the welfare of the child.

Regarding an order for *temporary* custody, if it is based on the unfitness or absence of the parents, the court may establish conditions that the parents must meet before the court deems them fit and thus able to retake custody of their child.

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<sup>13</sup> *Id.*

<sup>14</sup> An order granting temporary or concurrent custody may require a parent to pay child support to the relative if the parent was served with process, the petition requests the court to child support, and there is evidence of the parent's ability to pay. However, the court may order the redirection of all or part of an existing child support payment to be paid to the relative who is being granted temporary or concurrent custody. Section 751.05(5), F.S.

<sup>15</sup> Section 751.05(6), F.S.

<sup>16</sup> Section 751.05(6), F.S.

<sup>17</sup> Section 751.05(7), F.S.

<sup>18</sup> *Id.*

Additionally, the bill requires courts to establish any conditions for the transition of the child to the parents' custody which are in the child's best interest if the child was in the temporary custody of a relative for at least six months. In determining these conditions, the court must consider:

- The length of time the child lived with the extended family member;
- The child's developmental stage and psychological needs;
- The need for a gradual transition from one setting to another; and
- Visitation with the extended family member.

The bill takes effect July 1, 2019.

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

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The ability of an extended family member to obtain custody of a child in proceedings under ch. 751, F.S., are contingent on a parent's consent or lack of objection or a finding that a parent is unfit. If the bill can be construed to allow an extended family member to retain visitation rights or custody during a transitional period over the objection of a fit parent, the bill may implicate the parent's privacy rights.

In court opinions addressing the right of a nonparent or grandparent to have custody of or visitation with a child, courts have held that a nonparent may have custody of or visitation with a child in very limited circumstances:

Florida's constitutional right to privacy recognizes the zone of autonomy around a nuclear family into which a judge, legislator, or official, no matter how well intentioned, simply cannot go. This zone protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *D.M.T. v. T.M.H.*, 129 So.3d 320, 336 (Fla. 2013) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct.

1208, 31 L.Ed.2d 551 (1972)). The only exception occurs if one of the members of the family is at risk of significant harm. In this regard, the Florida Supreme Court has held that “[n]either the legislature nor the courts may properly intervene in parental decision making absent significant harm to the child threatened by or resulting from those decisions.” *Von Eiff*, 720 So.2d at 514. Under these principles, it is violation of a parent’s right to privacy for the legislature to confer on non-parents, even biological relatives such as grandparents, the right to visit minor children against the parents will. *See Beagle v. Beagle*, 678 So.2d 1271, 1277 (Fla. 1996) (holding that the State cannot impose grandparent visitation upon a minor child “without first demonstrating a harm to the child”).<sup>19</sup>

Moreover, the courts have held that the removal of a beneficial relationship with a grandparent or other person who acted like a parent is not the type of harm necessary to grant custody to or visitation with a nonparent.<sup>20</sup>

Because child custody awards under ch. 751, F.S., often involve the consent of or lack of objection to custody by a parent at the outset of the proceedings, the provisions of the bill may be distinguishable from the court opinions in which a parent objected to child custody at the outset of legal proceedings. Whether these differences are sufficient to survive a challenge based on the privacy rights of a fit parent is not clear.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

None.

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<sup>19</sup> *De Los Milagros Castellat v. Pereira*, 225 So. 3d 368, 370-371 (Fla. 3d DCA 2017).

<sup>20</sup> *Id.* at 372. The *Pereira* court explained that the removal of a beneficial relationship does not constitute sufficient harm to interfere with a parent’s authority over a child as follows:

As our Supreme Court has held, “[t]here may be many beneficial relationships for a child, but it is not for the government to decide with whom the child builds these relationships. This concept implicates the very core of our constitutional freedoms and embodies the essence of Florida’s constitutional right to privacy.” *Von Eiff*, 720 So.2d at 516. The child’s life may well be enhanced by the additional financial, social, spiritual, and emotional support the former partner might provide. But whether the benefits of such support, from a former partner who is neither the biological or legal parent, outweigh possible detriments lies in the hands of the birth mother: the State of Florida cannot wrest that choice from her.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 751.01, 751.03, and 751.05.

**IX. 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 18, 2019:**

The committee substitute authorizes a court to enforce conditions in a concurrent custody order that diminish a parent's custody rights if the parent agrees to the conditions.

Additionally, the committee substitute allows a court to require transition conditions for a child that has been in the temporary custody of a relative only if the child was in the relative's custody for at least six months.

- B. **Amendments:**

None.