

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 185 Custody of Minor Children by Extended Family
SPONSOR(S): Judiciary Committee, Children, Families & Seniors Subcommittee, Roach and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/SB 124

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N	Frost	Luczynski
2) Children, Families & Seniors Subcommittee	15 Y, 0 N, As CS	Woodruff	Brazzell
3) Judiciary Committee	17 Y, 0 N, As CS	Frost	Luczynski

SUMMARY ANALYSIS

Florida provides several means by which a relative may receive some measure of legal authority over a child, including a process outlined in ch. 751, F.S., allowing an extended family member (EFM) to petition the court for temporary or concurrent custody of a minor. An EFM is a:

- Person related to a minor child within the third degree by blood or marriage to the child's parent; or
- Minor child's stepparent, if the stepparent is currently married to one of the child's parents, and is not an adverse party in any other legal matter involving either of the child's parents.

Chapter 751, F.S., does not provide a limit on the amount of time an EFM may seek to have temporary or concurrent custody of a child. Custody granted under ch. 751, F.S., allows an EFM to make decisions and obtain any documents necessary to appropriately care for the child. A child receiving care by an EFM under ch. 751, F.S., is not considered a dependent child.

When an EFM is granted temporary or concurrent custody, either parent or the EFM may petition the court at any time to modify or terminate the temporary or concurrent custody. If the court finds the petitioning parent to be a fit parent, or if the EFM and the child's parents consent, the court must terminate the temporary custody order. The court may modify a temporary custody order if the EFM and the child's parents consent, or if modification is in the best interest of the child. However, there is no specific provision in the law authorizing the court to require a parent or parents to comply with a plan for reunification, to complete certain tasks, or provide proof of certain qualities after a finding of unfitness to parent a child.

CS/CS/HB 185 provides more authority and flexibility to the court when granting and terminating orders for temporary or concurrent custody of a child to an EFM, and provides the court with greater authority to protect the best interests of a child placed in the temporary or concurrent custody of an EFM. The bill expands the definition of EFM to include "fictive kin." The bill requires an EFM seeking temporary or concurrent custody to provide, in his or her initial petition, any provision related to the child's best interest, including, but not limited to, a reasonable plan for transitioning custody. The bill lowers the requirements for an EFM seeking concurrent custody of a child by requiring the EFM to show only one of the following, rather than both:

- That he or she has current physical custody of the child; or
- That he or she has had physical custody for at least 10 days during any 30-day period within the previous 12 months.

The bill authorizes the court to order any provision from the initial petition relating to the child's best interest, including a reasonable plan for transitioning custody. The bill allows the court to enforce a custody transition plan before terminating an order of temporary custody. The bill also authorizes the court to establish, on its own order, a reasonable custody transition plan, considering certain factors, if temporary custody was ordered after the child's parent or parents were found to be unfit and the child has been with an EFM for a significant length of time.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Custody of Minor Children by Extended Family Members

Florida provides several means by which a relative may receive some measure of legal authority over a minor child, such as consent to medical care or treatment of a minor,¹ guardianship of a minor,² permanent guardianship of a dependent child,³ or temporary or concurrent custody of a minor child by an extended family member (EFM). When a child is placed with a relative, different benefits and levels of court supervision are involved depending on the type of custody the relative is granted.⁴

Parents often place a child temporarily with another family member who is better able to provide care while the parent is on a military deployment, meeting a job-related requirement, experiencing an extended illness, incarcerated, or seeking assistance for a substance use disorder. Other parents may effectively abandon a child in the care of an EFM. Currently in Florida, an average of 10,050 children receive full-time care through placement with an EFM instead of a parent or parents.⁵

Under ch. 751, F.S., an EFM is a:

- Person related to a minor child within the third degree⁶ by blood or marriage to the child's parent; or
- Minor child's stepparent, if the stepparent is currently married to one of the child's parents, and the stepparent is not a party in certain family court matters or other civil or criminal proceedings involving one or both of the child's parents as an adverse party.⁷

When an EFM provides care for a child, the child is not considered a dependent child, and the family may avoid a more lengthy dependency action.⁸ In response to an increasing number of children temporarily residing with EFMs, the Legislature enacted guidelines governing the temporary custody of minors, under ch. 751, F.S.⁹ The overall purpose of ch. 751, F.S., is to protect children by allowing temporary or concurrent custody by familiar adults and provide families an option to manage problems without a dependency action.

¹ S. 743.0645, F.S.

² S. 744.3021, F.S.

³ S. 39.6221, F.S.

⁴ For example, when a dependent child is placed with a relative, the relative is eligible to receive certain benefits while caring for the child, but the relative is also subject to ongoing supervision by the dependency court. When an EFM is granted temporary or concurrent custody of a minor, the EFM is not eligible to receive the benefits available to a relative caring for a dependent child, but an EFM is also not subject to ongoing court supervision.

⁵ Email from Lindsey Zander, Deputy Director of Legislative Affairs, Department of Children and Families, RE: Judiciary request, regarding stats for the number of children placed in kinship care (Nov. 5, 2019).

⁶ A parent's third-degree relative is a fourth-degree relative of the parent's child. For example, a parent's: great grandparents is the parent's third-degree relative, but is the great-great grandparent and fourth-degree relative of the parent's child; aunt or uncle is the parent's third-degree relative, but is the great aunt or uncle and fourth-degree relative of the parent's child; and niece or nephew is the parent's third-degree relative, but is the first cousin and fourth-degree of the parent's child.

⁷ S. 751.011(2), F.S.

⁸ A dependent child means a child subject to any proceeding under ch. 39, F.S. A dependency action is a civil case brought before the court based on allegations of abuse, abandonment or neglect of a child. The proceeding is based on allegations communicated to the Department of Children and Families through an abuse report called into the Central Abuse Hotline. Children removed from their parents under a dependency action are returned only when the court determines that the risks which initiated the case are alleviated, and the children can return home safely. Generally, this finding is related to the parents' compliance with a case plan. After reunification, the court must monitor the family for at least six months. See ch. 39, F.S.

⁹ Ch. 93-104, Laws of Fla.; S. 751.01(1)-(3), F.S.

Temporary or Concurrent Custody

A minor child's EFM may seek a court order granting him or her custody of the child indefinitely. An order granting an EFM custody may be:

- Temporary – custody separate from a parent's custody; or
- Concurrent – custody shared by the EFM and a parent.¹⁰

An order for temporary or concurrent custody allows the EFM to:

- Consent to necessary and reasonable medical and dental care for the child, including nonemergency surgery and psychiatric care;
- Obtain copies of any records necessary for the child's care, including, but not limited to:
 - Medical, dental, and psychiatric records;
 - Birth certificates and other records; and
 - Educational records.
- Enroll the child in school and make decisions regarding the child's participation in school activities; and
- Do all other things necessary for the care of the child.¹¹

Petition

An EFM may petition the court for temporary or concurrent custody of a child. Any EFM who obtains signed, notarized consent from the child's legal parent or parents, or any EFM providing full time care for the child and with whom the child is presently living may initiate a proceeding to determine temporary or concurrent custody of a minor child. An EFM seeking concurrent custody must also:

- Currently have physical custody of the child (and have had physical custody for at least 10 days during any 30-day period within the 12 months preceding a petition); and
- Not possess written documentation signed by a parent permitting the EFM to do all of the things necessary to care for the child which are available to a custodian under ch. 751, F.S.

An EFM's petition for temporary or concurrent custody must provide the:

- Child's name, date of birth, and current address;
- Parents' names and current addresses;
- Names and current addresses of any person with whom the child has lived in the past five years;
- Places where the child has lived in the past five years;
- Information concerning any custody proceeding involving the child;
- EFM's residence address and mailing address; and
- EFM's relationship to the child.¹²

A petition for concurrent custody must also provide:

- Time periods during the last 12 months when the child resided with the EFM;
- Type of document, if any, provided to the EFM by the child's parent or parents, authorizing him or her to act on behalf of the child;¹³
- Services or actions the EFM is not able to attain or perform on the child's behalf without an order of custody; and
- Whether each parent consents in writing to an order of concurrent custody.¹⁴

¹⁰ S. 751.011(1), F.S.

¹¹ S. 751.01(3), F.S.

¹² S. 751.03(1)–(7), F.S.

¹³ A copy of any written consent or documents the parents provided to the EFM to assist in obtaining services must be attached to the petition.

¹⁴ S. 751.03(8), F.S.

If petitioning for temporary custody, an EFM must either:¹⁵

- Provide the parent's consent; or
- Specify the acts or omissions demonstrating the parent's abuse, abandonment, or neglect of the child as described in the dependency statutes.¹⁶

Hearing

The court must hear evidence as to why a child needs care from an EFM and any parental objections to the EFM's request. If the court finds that temporary or concurrent custody by an EFM is in the best interest of the child and the parents do not object, it must grant the EFM's petition. If the child's parent or parents object to a petition for:

- Temporary custody, the court may award custody only if it finds, based on clear and convincing evidence, the child's parents are unfit to provide adequate care and control.¹⁷
- Concurrent custody, the court must deny the petition and give the EFM the option to convert his or her petition to one for temporary custody.¹⁸

An order granting concurrent custody must state that it does not affect the parent's authority to obtain physical custody of the child at any time.¹⁹ An order granting temporary custody may provide visitation rights to a child's parent or parents, if it is in the best interest of the child.²⁰

When an EFM receives temporary or concurrent custody, the court may redirect all or part of an existing child support obligation to the EFM, and the EFM or either or both parents may move the court to modify an existing child support award.²¹

Modification or Termination of Temporary or Concurrent Custody

Either parent may petition the court at any time to modify or terminate an order granting temporary custody, and if the court finds that the petitioning parent is a fit parent,²² or if the EFM and the child's parent or parents consent, the court does not have the authority to consider the best interest of the child and must terminate the temporary custody order.²³ The court may modify a temporary custody order if the parties consent or if modification is in the best interest of the child.²⁴ Either parent or the EFM may petition the court to terminate concurrent custody at any time and the court must terminate concurrent custody on a parent's request.²⁵ When a petition to terminate temporary or concurrent custody is filed, current law does not authorize the court to require the EFM and a child's parent or parents to comply with a reunification plan, to complete certain tasks, or provide proof of certain qualities after a finding of unfitness to parent a child.²⁶

Effect of Proposed Changes

CS/CS/HB 185 provides more authority and flexibility for parents and the court when granting and terminating an order for temporary or concurrent custody of a child by an EFM. When a family seeks to manage potential problems without entering dependency court, the bill provides the court and

¹⁵ S. 751.03(9), F.S.

¹⁶ Ch. 39, F.S.

¹⁷ A parent is unfit if the court finds that the parent abused, abandoned, or neglected the child as defined in ch. 39, F.S., regarding dependency. S. 751.05(3)(b), F.S.

¹⁸ If the petitioner exercises this option, the converted petition will be heard at a later date. S. 751.05(3)(a), F.S.

¹⁹ S. 751.05(4)(a), F.S.

²⁰ S. 751.05(4)(b), F.S.

²¹ S. 751.05(5)(b) and (8), F.S.; Ch. 61, F.S., governs child support awards and modifications.

²² Ch. 751, F.S. does not provide a definition for a "fit parent."

²³ S. 751.05(6), F.S.

²⁴ S. 751.05(6), F.S.

²⁵ S. 751.05(7), F.S.

²⁶ This differs from the requirements placed on parents in a dependency action, where the court requires compliance with a specific case plan, including treatment and services for both parents and children, including any requirements necessary to protect the health, safety, and well-being of the child, to preserve the stability of the child's care, before a child may be returned to his or her parents. See ch. 39, F.S.

participating parties greater authority to protect the best interests of a child placed in the temporary or concurrent custody of an EFM.

The bill expands the definition of EFM to include “fictive kin”²⁷ to provide parents seeking to avoid the dependency process with more options when choosing to voluntarily place his or her child temporarily or concurrently with an appropriate caregiver.

When an EFM petitions for temporary or concurrent custody, the bill requires the EFM to include in his or her petition any provision relating to the child’s best interest, including, but not limited to, a reasonable plan for transitioning custody when temporary or concurrent custody is no longer needed.

The bill lowers the requirements for an EFM seeking concurrent custody of a child by requiring the EFM to show only one of the following, rather than both:

- That he or she has current physical custody of the child; or
- That he or she has had physical custody for at least 10 days during any 30-day period within the previous 12 months.

The bill allows the court to include, in an order granting temporary or concurrent custody, any provision from the initial petition relating to the child’s best interest, including a reasonable plan for transitioning custody. The bill allows the court to enforce a plan for transitioning custody before terminating an order which granted temporary custody.

If a court ordered temporary custody after a child’s parent or parents were found to be unfit, and the child has been in the temporary custody of an EFM for a significant length of time, the bill authorizes the court to establish, on its own order, a reasonable custody transition plan which considers the following:

- The length of time the child lived or resided with the EFM;
- The child's developmental stage; and
- The length of time reasonably necessary to complete the transition.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 751.01, F.S., relating to purpose of act.

Section 2: Amends s. 751.011, F.S., relating to definitions.

Section 3: Amends s. 751.02, F.S., relating to temporary or concurrent custody proceedings.

Section 4: Amends s. 751.03, F.S., relating to petition for temporary or concurrent custody; contents.

Section 5: Amends s. 751.05, F.S., relating to order granting temporary or concurrent custody.

Section 6: Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

²⁷ “fictive kin” is a person unrelated by birth, marriage, or adoption who has an emotionally significant relationship, which possesses the characteristics of a family relationship, to a child. S. 39.01(29),

2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Parents have a fundamental liberty interest in determining the care and upbringing of their children. This interest is protected by both the Florida²⁸ and federal constitutions.²⁹ While the bill could be construed to allow visitation rights, over the objection of a fit parent, to an EFM during the transition of custody, the bill requires such a transition plan to be in the best interest of the child.

In opinions addressing the rights 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, which limits state action in the absence of a compelling state interest.³⁰ 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). The only exception occurs when 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."³¹ Under these principles, it is a 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 a parent's will, unless the court finds there is significant harm to the child threatened by or resulting from the parent's decision-making.³² Courts have held that the removal of a beneficial relationship with a

²⁸ Art. I, s. 23, Fla. Const.

²⁹ *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996) (holding that the State cannot impose grandparent visitation upon a minor child "without first demonstrating a harm to the child").

³⁰ *Beagle*, 678 So.2d 1271 (Fla. 1996) (noting "[o]ur cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to the child.").

³¹ *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998).

³² *De Los Milagros Castellat v. Pereira*, 225 So. 3d 368, 370-371 (Fla. 3d DCA 2017).

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.³³

An award of temporary or concurrent custody of a child under ch. 751, F.S., often involves the consent of or lack of objection by a parent, or may involve a situation where the court finds a child's parent is unfit to care for his or her child. The provisions of the bill may be distinguished from court opinions in which a parent objected to child custody at the outset of a legal proceeding or where the court did not find a demonstrated harm to the child, because if a child's parent or parents object to a petition, under ch. 751, F.S., for:

- Temporary custody, the court may award custody only if it finds, based on clear and convincing evidence, the child's parents are unfit to provide adequate care and control.
- Concurrent custody, the court must deny the petition and give the EFM the option to convert his or her petition to one for temporary custody, in which case the court must find, in order to award temporary custody, if the parent continues to object, that the child's parent or parents are unfit.

B. RULE-MAKING AUTHORITY:

Rulemaking authority is not required to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 16, 2020, the Children, Families, and Seniors Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all:

- Revises the standards for transitions of custody for considering the child's developmental stage and psychological needs to be in the child's best interest.
- Expands the definition of the term EFM to include "fictive kin" as defined in ch. 39, F.S.
- Requires a petitioner to include in his or her petition for concurrent or temporary custody any provision that he or she believes is in the child's best interest, which includes a plan for transitioning custody.
- Allows the court to approve in the order granting temporary or concurrent custody provisions requested in the petition that relate to the child's best interest.
- Allows the court to enforce provisions approved in the temporary or concurrent custody order that relate to a plan for transitioning custody prior to terminating the order.

The analysis is drafted to the committee substitute as passed by the Children, Families, and Seniors Subcommittee.

On January 30, 2020, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that a petition for and a court's order granting temporary or concurrent custody may include a reasonable custody transition plan which is in the best interest of the child, and the court may enforce such plan before terminating the order.
- Added a provision allowing a court to establish, on its own order, a reasonable custody transition plan if temporary custody was ordered after a child's parent or parents were found to be unfit and the child has been in the temporary custody of an EFM for a significant length of time.
 - Created factors a court must consider in establishing the reasonable custody transition plan.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

³³ *Id.* at 372.