

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 122
 INTRODUCER: Judiciary Committee and Senator Posey
 SUBJECT: Child Custody/National Guard Member
 DATE: March 28, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.			MS	
3.				
4.				
5.				
6.				

I. Summary:

This bill prohibits a court from permanently modifying a child custody order after a parent who is the primary caretaker has been activated, deployed, or temporarily assigned to military service. However, the bill permits a court to change custody temporarily, if clear and convincing evidence shows that the change is in the best interest of the child. If custody is changed, the prior custody order must be reinstated when the parent returns from military service.

This bill creates section 61.13002, Florida Statutes.

II. Present Situation:

Members of the U.S. military often must leave their children in the care of others when they are placed on active duty.¹ If a service member is divorced and is the legal custodian of a child, the determination of who is the appropriate caretaker of the child can be a matter of dispute. In some cases, courts have had to determine whether a child should be left with a stepparent, grandparent, or ex-spouse.² However, Florida appellate courts have not directly addressed how these custodial disputes should be resolved.

¹ Single parents and military couples with children are required to plan for the care of their children through the use of a Family Care Plan. DEPARTMENT OF DEFENSE, INSTRUCTION, NUMBER 1342.19, SUBJECT: FAMILY CARE PLANS (July 1992).

² See Jones v. Van Horn, 640 S.E.2d 712 (Ga. Ct. App. 2006); In re the Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005); In the Matter of the Marriage of Rayman, 47 P.3d 413 (Kan. 2002); McDermott v. Dougherty, 869 A.2d 751, 813-816 (Md. 2005).

Award of Child Custody

Initial determination

For an initial child custody determination, trial courts must consider the guidelines in s. 61.13(3), F.S., in accordance with the best interests of the child. Section 61.13(3), F.S., states:

For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests of the child, including, but not limited to:

- (a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
- (b) The love, affection, and other emotional ties existing between the parents and the child.
- (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- (k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to s. 741.30.
- (l) Evidence of domestic violence or child abuse.
- (m) Any other fact considered by the court to be relevant.

Modification

Trial courts have the authority to modify child custody awards.³ The standards for modification, however, are set forth in case law, rather than by statute.⁴ The standard for modification is as follows:

A final divorce decree providing for the custody of a child can be materially modified only if (1) there are facts concerning the welfare of the child that the court did not know at the time the decree was entered, or (2) there has been a change in circumstances shown to have arisen since the decree. This rule promotes the finality of the judicial determination of the custody of children. After the trial court enters the original final judgment decree, it is res judicata of the facts and circumstances at the time the judgment became final. Thus, there is a presumption in favor of the reasonableness of the original decree. This

³ Section 61.13(2)(c), F.S.

⁴ Wade v. Hirschman, 903 So. 2d 928, 933 (Fla. 2005).

presumption may be overcome when changes in circumstances have arisen which warrant and justify modification of the original decree. To modify such judgments, the trial court must decide whether there is a “factual basis sufficient to show that conditions have become materially altered since the entry of the previous decree.” The degree of change in the conditions and circumstances since the date of the previous decree must be of a substantial character.⁵

III. Effect of Proposed Changes:

This bill prohibits a court from permanently modifying a child custody order after a parent who is the primary caretaker has been activated, deployed, or temporarily assigned to military service. In effect, the bill provides that a parent’s military activation, deployment, or temporary service is not a sufficient change in circumstances permitting a court to permanently modify a custody award.

The bill, however, permits a court to change custody temporarily, if clear and convincing evidence shows that the change is in the best interest of the child.⁶ If custody is changed, the prior custody order must be reinstated when the parent returns from military service. The bill also directs courts to provide for liberal visitation between the military parent and the child while the military parent is on leave from military service.

This bill provides an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁵ *Id.* at 932-933 (citations omitted).

⁶ Clear and convincing evidence has been described as more than a preponderance of the evidence, but less than beyond and to the exclusion of a reasonable doubt. The standard is an:

intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994) (citations omitted).

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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