

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 Committee on Judiciary

BILL: SB 1174

INTRODUCER: Senator Bean

SUBJECT: Custody of Minor Children by Extended Family

DATE: March 15, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	Pre-meeting
2.			CF	
3.			RC	

I. Summary:

SB 1174 grants courts more authority and flexibility in terminating orders granting temporary custody of a child to an extended family member. Specifically, the bill grants a court the authority to create conditions that a given set of parents must meet before regaining custody of a child that has been in the temporary custody of a relative.

Additionally, the bill requires courts to establish any conditions for the transition of the child to the parents' custody that are in the child's best interest. 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.

Finally, as to a relative who petitions the court for an order granting the relative custody that would be shared with the parent, the bill requires the relative to include in the petition "[a]ny other request related to the protection of the welfare of the child, including provisions for transitioning custody or a plan for visitation."

II. Present Situation:

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 Custody

To obtain a court order granting temporary custody of a child, an extended family member of the child must file a petition for temporary or concurrent custody.¹ 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.² Additionally, the petitioner must 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.³

Hearing on the Petition for Temporary 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.⁴

The court must grant the petition if it is in the best interests of the child and the parents do not object.⁵ If at least one of the child’s parents object, 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.⁶ “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.⁷

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, in an order granting temporary custody. The order may also redirect all or part of an existing child support payment to be paid to the relative who is being granted temporary custody. However, 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.

Parents’ Regaining Custody of Child

After the entry of the order granting temporary custody, either parent may petition the court to modify or terminate the order.⁸ 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.⁹

¹ See s. 751.03, F.S.

² *Id.*

³ Section 751.03(9), F.S.

⁴ Section 751.05(1), F.S.

⁵ Section 751.05(2), F.S.

⁶ Section 751.05(3)(b), F.S.

⁷ *Id.*

⁸ Section 751.05(6), F.S.

⁹ Section 751.05(6), F.S.

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.

III. Effect of Proposed Changes:

The bill grants courts more authority and flexibility in terminating orders granting temporary custody of a child to an extended family member. Specifically, if the order 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. 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.

Finally, as to a relative who petitions the court for an order granting the relative custody that would be shared with the parent, the bill requires the relative to include in the petition "[a]ny other request related to the protection of the welfare of the child, including provisions for transitioning custody or a plan for visitation."

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").

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.¹⁰

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.

¹⁰ *De Los Milagros Castellat v. Pereira*, 225 So. 3d 368, 372 (2017). 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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 Changes:

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

None.

B. Amendments:

None.