

**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 Rules

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BILL: CS/CS/SB 124

INTRODUCER: Judiciary Committee; Children, Families, and Elder Affairs Committee; and Senator Bean

SUBJECT: Custody of Minor Children by Extended Family

DATE: January 27, 2020

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Preston</u>	<u>Phelps</u>	<u>RC</u>	<u>Favorable</u>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 124 authorizes a court to include in its order granting “temporary” or “concurrent” custody to a child’s extended family member any provision requested by the petitioner which is in the best interest of the child. As under current law, an award of custody of a child for an indefinite period is considered “temporary” if the award excludes the parents, but “concurrent” if custody is shared with the parents.

The bill expands the definition of “extended family member” to include “fictive kin”—nonrelatives who have a familial relationship to the child—thus allowing them to petition for concurrent or temporary custody. As for the petition itself, the bill requires it to include “[a]ny other provisions that are related to the best interests of the child.” And the bill authorizes the court to include these provisions, including a transition plan, in its order granting temporary or concurrent custody.

Under the bill, as under current law, a court may order concurrent custody only if the parents do not object, and the court may order temporary custody only if the parents do not object or are unfit. And under current law a court *must* terminate a concurrent custody order if a parent objects to the order, and the court *must* terminate a temporary custody order if the parent becomes a fit parent. However, the bill authorizes a court to maintain a concurrent custody order after a parent objects, or to maintain a temporary custody order after the parents become fit, under certain circumstances. Particularly, a court may maintain these orders beyond objection or fitness to

ensure compliance with a transition plan or other provision of the order which is related to the best interest of the child.

## 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," provided 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>

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

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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.

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

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

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 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>

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<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.

<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.

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 authorizes a court to include in a temporary or concurrent custody order any provision that is in the best interest of a child and that was included in the petition for the order. The bill also adds "fictive kin" to the class of people who may file a petition. "Fictive kin" means "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."<sup>19</sup>

The bill requires an extended family member to include in his or her petition for concurrent or temporary custody "[a]ny other provisions that are related to the best interests of the child." And the bill authorizes the court to include these provisions, including a transition plan, in its order granting temporary or concurrent custody.

Under the bill, as under current law, a court may order concurrent custody only if the parents do not object, and the court may order temporary custody only if the parents do not object or are unfit. And under current law a court *must* terminate a concurrent custody order if a parent objects to the order, and the court *must* terminate a temporary custody order if the parent becomes a fit parent. However, the bill authorizes a court to maintain a concurrent custody order after a parent objects, or to maintain a temporary custody order after the parents become fit, under certain circumstances. Particularly, a court may maintain these orders beyond objection or fitness to ensure compliance with a transition plan or other provision of the order which is related to the best interest of the child.

The bill is effective July 1, 2020.

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

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

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

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

<sup>19</sup> Section 39.01(29), F.S.

## C. Trust Funds Restrictions:

None.

## D. State Tax or Fee Increases:

None.

## E. Other Constitutional Issues:

Under the bill, a court may order anything requested by the petitioner which is in the best interest of a child. This could include a transition plan that would require parents to permit a nonparent to see their child following a period of temporary or concurrent custody.

This aspect of the bill might be unconstitutional, as Florida courts have repeatedly held that parents' constitutional right to determine who sees their child may be infringed only if harm to the child would otherwise result:

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>20</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>21</sup>

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<sup>20</sup> *De Los Milagros Castellet v. Pereira*, 225 So. 3d 368, 370-371 (Fla. 3d DCA 2017).

<sup>21</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

Nonetheless, because child custody awards under ch. 751, F.S., often involve unfit parents, as well as 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 fit 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.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 751.01, 751.011, 751.02, 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/CS by Judiciary on December 10, 2019:**

The committee substitute 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 best

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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.

interest of the child. Under the bill, the “parties” had to have agreed to these provisions, but the bill was unclear as to who exactly the “parties” would be.

**CS by Children, Families, and Elder Affairs on November 5, 2019:**

- Expands the definition of the term “extended family member” to include “fictive kin” as defined in Chapter 39, Florida Statutes.
- Revises the standard for transitions of custody from considering the child’s developmental stage and psychological needs to best interests which is the standard for other determinations in Chapter 751, Florida Statutes.
- Clarifies that any conditions related to the best interests of the child to be included in an order will be requested by the parties in the petition.

**B. Amendments:**

None.