

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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 child within the third degree by blood or marriage to the child's parent; or
- 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 period of time for which an EFM may seek temporary or concurrent custody of a child. Custody granted under Ch. 751, F.S., allows the 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 parent or 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 parent or 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.

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 an EFM to include an individual who qualifies as a "fictive kin."

The bill requires an EFM petitioning for temporary or concurrent custody to provide provisions in the initial petition that are related to the child's best interest, which includes a plan for transitioning custody. The bill permits the court to approve provisions in the order granting temporary or concurrent custody that relate to the child's best interest.

Further, the bill allows the court to enforce provisions in the order granting temporary or concurrent custody that are related to a plan for transitioning custody before terminating the order.

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 Minors by Extended Family Members

Florida provides several means by which a relative may receive some measure of legal authority over a 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 by extended family members (EFMs). Different benefits and level of court involvement are involved depending on the type of custody the relative has over the minor.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 to a family member's care.

Temporary or Concurrent Custody under Chapter 751, F.S.

When an EFM is providing care for a child, the child is not considered a dependent child, and the family may avoid a more lengthy dependency action.⁵ In response to an increasing number of minors temporarily residing with EFMs, the Legislature enacted guidelines governing the temporary custody of minors, under Ch. 751, F.S.⁶ 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.

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

- Person related to a child within the third degree⁷ by blood or marriage to the child's parent; or
- 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.⁸

A child's EFM may seek a court order granting him or her custody of the child indefinitely. An order granting custody under Ch. 751, F.S. may be:

- Temporary – custody separate from a parent's custody; or

¹ S. 743.0645, F.S.

² S. 744.3021, F.S.

³ S. 39.6221, F.S.

⁴ For example, a minor who has been found by the dependency court to be abused, abandoned, or neglected can be placed with a relative by the Department of Children and Families, and the relative is eligible for certain benefits while caring for the minor; however, an extended family member who has temporary or concurrent custody over a minor under Ch. 751, F.S. does not have access to such benefits because the minor has not been found to be dependent by the dependency court. Furthermore, when a court awards temporary or concurrent custody to an extended family member under Ch. 751, F.S., the extended family member is not subjected to ongoing court supervision; however, there is ongoing court supervision by the dependency court when a dependent minor is placed with a relative.

⁵ 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.

⁶ Ch. 93-104, Laws of Fla.; S. 751.01(1)–(3), F.S.

⁷ 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.

⁸ S. 751.011(2), F.S.

- Concurrent – custody shared by the EFM and a parent.⁹

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.¹⁰

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 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 anyone 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.¹¹

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;¹²
- 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.¹³

If petitioning for temporary custody, an EFM must either:¹⁴

- 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.¹⁵

Hearing

⁹ S. 751.011(1), F.S.

¹⁰ S. 751.01(3), F.S.

¹¹ S. 751.03(1)–(7), F.S.

¹² 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.

¹³ S. 751.03(8), F.S.

¹⁴ S. 751.03(9), F.S.

¹⁵ Ch. 39, F.S.

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 if it finds, based on clear and convincing evidence, the child's parents are unfit to provide adequate care and control.¹⁶ If the parent or parents object to a petition for 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.¹⁷

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.¹⁸ 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.¹⁹

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.²⁰

Modification or Termination of Temporary or Concurrent Custody

Either parent or the EFM may petition the court at any time to modify or terminate an order granting temporary or concurrent custody.²¹

If the order is for temporary custody and the petition is for termination, if the court finds that the petitioning parent is a fit parent,²² or 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.

The court may modify a temporary custody order if the EFM and the child's parent or parents' consent, or if modification is in the best interest of the child.²³ However, there is no specific provision in the law authorizing the court to require a child's 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.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

Effect of Proposed Changes

HB 185 provides more authority and flexibility to 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 participating parties with greater authority to protect the best interests of a child placed in the temporary or concurrent custody of

¹⁶ 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.

¹⁷ If the petitioner exercises this option, the converted petition will be heard at a later date. S. 751.05(3)(a), F.S.

¹⁸ S. 751.05(4)(a), F.S.

¹⁹ S. 751.05(4)(b), F.S.

²⁰ S. 751.05(5)(b) and (8), F.S.; Ch. 61, F.S., governs child support awards and modifications.

²¹ S. 751.05(6), F.S.

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

²³ S. 751.05(6), F.S.

²⁴ 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.

²⁵ S. 751.05(7), F.S.

an EFM. The bill also expands the definition of an EFM to include “fictive kin”²⁶ so individuals who have a significant relationship with the child but are not related by birth, marriage, or adoption may take advantage of the court process.

Temporary or Concurrent Custody

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, which includes, but is not limited to, a plan for transitioning custody.

The bill permits the court to approve in the order granting temporary or concurrent custody provisions requested in the petition that are related to the child’s best interest. Further, the bill allows the court to enforce provisions approved in the temporary or concurrent custody order that are related to a plan for transitioning custody prior to terminating the order.

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

B. SECTION DIRECTORY:

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

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

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

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

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

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

²⁶ As defined in s. 39.01(29), “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.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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 Florida²⁷ and federal constitutions.²⁸ The bill may be construed to allow visitation rights to an extended family member during a transitional period; however, the bill limits what is enforced during the transitional period to provisions in the petition that relate to a plan for transitioning custody of the child.

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, which limits state action in the absence of a compelling state interest.²⁹ 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

²⁷ Art. I, s. 23, Fla. Const.

²⁸ *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").

²⁹ *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.").

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.”³⁰ 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 the parent’s will unless the court finds there is significant harm to the child threatened by or resulting from the parent’s decision-making.³¹ 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.³²

Child custody awards under Ch. 751, F.S., often involve the consent of or lack of objection to custody by a parent, or involve situations where the court finds a parent is unfit to care for his or her child. 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 or where the court did not find a demonstrated harm to the child. It is unclear whether these differences are sufficient to survive a challenge based on the privacy rights of a fit parent.

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.

³⁰ *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998).

³¹ *De Los Milagros Castellat v. Pereira*, 225 So. 3d 368, 370-371 (Fla. 3d DCA 2017).

³² *Id.* at 372.