

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 185 Custody of Minor Children by Extended Family

SPONSOR(S): 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			
3) Judiciary Committee			

SUMMARY ANALYSIS

Currently in Florida, an average of 10,050 children receive full-time care through placement with a relative instead of a parent or parents.

Florida provides several means by which a relative may receive some measure of legal control over a child, including a process allowing an extended family member (EFM) to petition the court for custody of a minor child. 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 period of time an EFM may seek temporary or concurrent custody of a child. Custody granted under ch. 751, F.S., may be temporary or concurrent, and 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 requires an EFM petitioning for concurrent custody to provide any information relating to the protection of the child's welfare, including provisions for transitioning custody or a visitation plan. The bill permits the court to approve and enforce conditions agreed upon by an EFM and a child's parents, before returning a child to his or her parents or requires a showing that failing to comply with the condition does not endanger the child.

The bill allows the court's order granting temporary custody to an EFM due to a parent being unfit to include conditions a parent must meet to demonstrate fitness before the child may be returned. If a temporary custody order is in place for at least 6 months, the bill requires the court to consider certain factors in establishing conditions in the best interests of the child for transitioning back to a parent's custody.

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

Kinship Care and Custody of Minor Children

According to The Child Welfare League of America (CWLA),¹ kinship care is “the full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, stepparents, or any adult who has a kinship bond with a child.”² In Florida, kinship care is provided by extended family members (EFMs). An EFM is a:

- Person related to a minor child within the third degree³ 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.⁴

Between 2014 and 2015, an average of 9,175 children in Florida were placed in kinship care with 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

Florida provides several means by which a relative may receive some measure of legal control over a child, such as consent to medical care or treatment of a minor,⁶ guardianship of a minor,⁷ permanent guardianship of a dependent child,⁸ or custody of minor children by EFMs.

Custody of Minor Children by EFMs

Parents often place a child temporarily with another family member who is better able to provide care while: on a military deployment; meeting a job-related requirement, experiencing an extended illness, incarcerated, or seeking assistance for an addiction. Other parents may effectively abandon a child with an EFM.

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.⁹ In response to an increasing number of minor children temporarily residing with extended family members, the legislature enacted guidelines governing the temporary custody of minor children, under ch. 751, F.S.¹⁰ The overall purpose of ch. 751, F.S., is to

¹ Founded in 1920, the CWLA provides support to a network of public and private agencies and partners to advance policies, best practices, and collaborative strategies to achieve better outcomes for vulnerable children, youth, and families. CWLA, *Who We Are and What We Do*, <https://www.cwla.org/about-us/> (last visited Nov 5, 2019).

² Florida FAPA, *Kinship Care Information*, <http://floridafapa.org/kinship-care/> (last visited Nov. 5, 2019).

³ A parent’s third-degree relative is a fourth-degree relative of the parent’s child. For example, a parent’s: Great grandparent is the parent’s third-degree relative, but is the great-great grandparent and fourth-degree relative of the parent’s children; 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 relative of the parent’s child.

⁴ S. 751.011(2), F.S.

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 S. 743.0645, F.S.

⁷ S. 744.3021, F.S.

⁸ S. 39.6221, F.S.

⁹ A dependent child means a child subject to any proceeding under. 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 (DCF) through an abuse report called into the Florida Abuse Hotline. Children removed from their parent/parents under a dependency action are returned only when the Court determines that the risks which initiated the case are alleviated, and the child(ren) can return home safely. Generally, this finding is related to the parent/parents’ compliance with a case plan. After reunification, the Court must monitor the family for at least six months. See ch. 39, F.S.

¹⁰ Ch. 93-104, Laws of Fla.; S. 751.01(1)–(3), F.S.

protect children, by allowing temporary or concurrent custody by familiar adults, and provide families an option to manage problems without involving a dependency action.

Temporary or Concurrent Custody

Under ch. 751, F.S., 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
- Concurrent – custody shared by the EFM and a parent.¹¹

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.¹²

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 anyone the child has lived with 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.¹³

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;¹⁴
- 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 temporary or concurrent custody.¹⁵

If petitioning for temporary custody, an EFM must either:¹⁶

¹¹ S. 751.011(1), F.S.

¹² S. 751.01(3), F.S.

¹³ S. 751.03(1)-(7), F.S.

¹⁴ 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.

¹⁵ S. 751.03(8), F.S.

- 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.¹⁷

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 must award temporary custody only if it finds, based on clear and convincing evidence, the child's parents are unfit to provide adequate care and control.¹⁸
- 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.¹⁹

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.²⁰ 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.²¹

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.²²

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.²³ If the court finds that the petitioning parent is a fit parent,²⁴ 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.²⁵ 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.²⁶

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.²⁷

Effect of Proposed Changes

¹⁶ S. 751.03(9), F.S.

¹⁷ Ch. 39, F.S.

¹⁸ 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.

¹⁹ If the petitioner exercises this option, the converted petition will be heard at a later date. S. 751.05(3)(a), F.S.

²⁰ S. 751.05(4)(a), F.S.

²¹ S. 751.05(4)(b), F.S.

²² S. 751.05(5)(b) and (8), F.S.; Ch. 61, F.S., governs child support awards and modifications.

²³ S. 751.05(6), F.S.

²⁴ Ch. 751, F.S. does not provide a definition for a "fit parent."

²⁵ S. 751.05(6), 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 child care, before a child may be returned to his or her parents. See ch. 39, F.S.

²⁷ S. 751.05(7), F.S.

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 an EFM.

Concurrent Custody

When an EFM petitions for concurrent custody, the bill requires the EFM to provide any information relating to protecting the child's welfare, including provisions for transitioning custody or a visitation plan. The bill also permits the court to approve and enforce any conditions agreed upon by an EFM and a child's parents, including conditions eliminating or diminishing a parent's custody rights, if the parent agreed to the conditions when the order was entered.

If a child's parent or parents move to terminate a concurrent custody order, before allowing either or both parents to regain physical custody, the bill permits the court to enforce any conditions agreed upon in an original order or require the parent or parents to show that a failure to comply with any condition does not endanger the child's welfare.

Temporary Custody

When an order granting temporary custody to an EFM is based on the child's parents being unfit, the bill allows the court's order to include conditions the parent or parents must meet to demonstrate fitness before the child may be returned to the physical custody of the parents.

When considering termination of a temporary custody order after finding a parent is fit, or by consent of the parties, if the temporary custody order is in place for at least 6 months, the bill requires the court to establish any conditions in the best interests of the child for transitioning the child back to the parent's or parents' custody, and in setting such conditions, requires the court to consider the:

- Length of time the child lived with the EFM;
- Child's developmental stage and psychological needs;
- Need for a gradual transition from one setting to another; and
- Potential need for ongoing visitation with the EFM.

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

B. SECTION DIRECTORY:

Section 1: Amends s. 751.01, F.S., Purpose of act.

Section 2: Amends s. 751.03, F.S., Petition for temporary or concurrent custody; contents.

Section 3: Amends s. 751.05, F.S., Order granting temporary or concurrent custody.

Section 4: Provides an effective date of July 1, 2020.

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:

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 The bill may be construed to allow visitation rights to an extended family member during a transitional period over the objection of a fit parent, which 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). 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

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").

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 parents will.³¹

Additionally, 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

Because child custody awards under ch. 751, F.S., often involve the consent of or lack of objection to custody by a parent, 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. 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 44 through 46 of the bill reference requests related to the protection of the welfare of the child. “The best interest of the child” would be a better choice of language, given that it is the standard in other proceedings relating to children.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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.