

SENATE 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: Children and Families Committee

BILL: PCS/CS/SB 118

INTRODUCER: Children and Families Committee, Judiciary Committee and Senator Fasano

SUBJECT: Temporary Child Custody

DATE: January 3, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Sanford</u>	<u>Whiddon</u>	<u>CF</u>	<u>Pre-Meeting</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The PCS/CS/SB 118 clarifies the definition of relatives who may petition a court for temporary custody of a child. Current law appears to limit the pool of relatives who petition for temporary custody to brothers, sisters, grandparents, aunts, uncles, cousins, and putative fathers, but this limitation is ambiguous. The bill clarifies that a relative within the third degree by blood or marriage to the parent or stepparent of a child may petition for temporary custody. The bill limits the group of stepparents who may petition for custody of a child to those who are currently married to a parent of the child and who are not engaged in litigation with either parent. Relatives within the third degree to these stepparents may also petition. The parents must have given consent for the custody arrangement or the petitioner must be caring for the child full time in the role of substitute parent in order to petition for custody. The bill removes all references to putative fathers as persons who may petition for temporary custody of a child.

The bill also:

- requires petitions for temporary custody to provide the court with additional information on the circumstances surrounding the petition;
- authorizes a court to modify a temporary custody order; and
- authorizes a court to order that existing child support obligations be paid to an extended family member who is granted temporary custody of a child.
- Clarifies procedures regarding arrearages when an existing child support obligation is transferred to a new custodian.

This bill substantially amends the following sections of the Florida Statutes: 751.01, 751.011, 751.02, 751.03, and 751.05.

II. Present Situation:

Chapter 751, F.S., creates a process by which a relative of a child, including a putative father,¹ may petition a court for temporary custody of that child. According to s. 751.01, F.S., an award of temporary custody is needed to consent to medical treatment, obtain records, make decisions for a child's education, and to do other things necessary for the child's care.

Before a relative or putative father may petition for temporary custody of a child, the relative or putative father must live with the child or have the signed, notarized consent of the child's parent(s).² Under ch. 751, F.S., the relatives who may petition for temporary custody *appear* to be limited to a brother, sister, grandparent, aunt, uncle, or cousin.³ If a putative father is able to locate the mother of a child, the putative father must petition for the establishment of paternity, custody, and other relief under ch. 742, F.S., instead of temporary custody under ch. 751, F.S.⁴

Temporary custody of a child may be awarded to a relative or putative father with or without the consent of the child's parent(s).⁵ Unless the parents object, the court must award temporary custody to the petitioning relative or putative father when it is in the best interest of the child to do so.⁶ If the parents object, a temporary custody order may only be entered if the court finds by clear and convincing evidence⁷ that the parents are unfit and have abused, neglected, or abandoned the child.⁸ In effect, the petitioning relative must satisfy "the same burden the state must satisfy in a dependency proceeding under chapter 39."⁹ At any time, a parent may petition

¹ A "[p]utative father" is a man who reasonably believes himself to be the biological father of the minor child, but who is unable to prove his paternity due to the absence of the mother of the child." Section 751.011(2), F.S. This definition may be scientifically obsolete due to technological advances which now allow the determination of paternity without the presence of the mother of a child. Chapter 742, Determination of Parentage, contains provisions for establishing paternity and determining support and visitation after paternity is established.

² Section 751.02, F.S.

³ Chapter 751, F.S., does not clearly specify the relatives who may petition a court for temporary custody of a child because the defined term "extended family" is not used in the substantive provisions of the chapter. Section 751.011, F.S., defines the term "extended family" as "any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle, or cousin." In contrast, s. 751.02, F.S., states that "[a]ny relative of a minor child . . . may bring proceedings in the circuit court to determine the temporary custody of the child." Additionally, s. 751.01, F.S., describing the purposes of ch. 751, F.S., refers to extended family members. The ambiguity in ch. 751, F.S., was highlighted in a circuit court order pertaining to Elian Gonzalez. See *In re the Matter of Lazaro Gonzalez*, 2000 WL 492102, at *8-*10 (Fla. Cir. Ct. Apr. 13, 2000). According to the order, Lazaro Gonzalez, the paternal great uncle of Elian Gonzalez, sought temporary custody of Elian under s. 751.02, F.S., as a "relative." *Id.* The ambiguity regarding which relatives may petition for temporary custody is corrected by the bill.

⁴ Section 751.02, F.S.

⁵ Section 751.05, F.S.

⁶ Section 751.05(2), F.S.

⁷ The clear and convincing evidence standard requires more proof than a 'preponderance of the evidence' but the less than 'beyond and to the exclusion of a reasonable doubt.' Clear and convincing evidence has been described as follows:

This intermediate level of proof 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.

In Re Inquiry Concerning a Judge, 832 So. 2d 716, 726 (Fla. 2002) (quoting *In re Davey*, 645 So.2d 398, 404 (Fla. 1994)).

⁸ Section 751.05(3), F.S.

⁹ *Languin v. Carneal*, 837 So. 2d 525, 527 (Fla. 4th DCA 2003).

the court to terminate a temporary custody order.¹⁰ The court will terminate the order upon a finding that the parent is fit or upon the consent of the parties.¹¹

An order of temporary custody may grant visitation to a parent and may require the payment of child support.¹² Chapter 751, F.S., does not impose any limits on the duration of a temporary custody order. Chapter 751, F.S., also does not state whether or to what extent a parent retains any parental rights under an award of temporary custody. Further, ch. 751, F.S., does not appear to authorize a relative to have visitation rights when a fit parent seeks to terminate a temporary custody order.

III. Effect of Proposed Changes:

This bill:

- Clarifies the definition of the group of relatives who may petition a court for temporary custody of a child;
- Requires petitions for temporary custody to provide the court with additional information on the circumstances surrounding the petition;
- Authorizes a court to modify a temporary custody order; and
- Authorizes a court to order that existing child support obligations be paid to an extended family member who is granted temporary custody of a child.
- Clarifies procedures regarding arrearages when an existing child support obligation is transferred to a new custodian.
- Removes putative fathers as persons who may petition for temporary custody of a child under this chapter.

Persons Who May Petition for Temporary Custody

Under existing law, a relative who may petition for temporary custody *appears* to be limited to a brother, sister, grandparent, aunt, uncle, cousin, or a putative father.¹³ Under the bill, a relative within the third degree by blood or marriage to the parent or stepparent of a child may petition for temporary custody,¹⁴ but the stepparent must be currently married to a parent of the child and must not be engaged in litigation against either parent in order for either the stepparent or the relative to petition for custody. The petition may be filed with the signed, notarized consent of the child's parents. Alternatively, the petition may be filed by an extended family member who is living with and caring full time for the child.

Under the civil law system, the degree of relationship between two persons is found by counting the generations up from one person to the nearest common ancestor of both persons. Then, one

¹⁰ Section 751.05(7), F.S.

¹¹ *Id.*

¹² Section 751.05(4) & (5), F.S.

¹³ See note 3, *supra*.

¹⁴ A third-degree relative of a parent is a fourth-degree relative of the child. For example, a parent's third-degree relative who is a great grandparent is the child's great-great grandparent. A parent's third-degree relative who is an aunt or uncle of the parent is a great aunt or great uncle of the child. A parent's third-degree relative who is a niece or nephew is a first cousin of the child.

must count the generations down from the common ancestor to the other person.¹⁵ The total number of generations counted is the degree of relationship.¹⁶ The table below identifies the relatives within the third degree of a parent or stepparent.

Relatives within the Third Degree of a Parent or Stepparent			
			3 Great-Grandparents of a parent or stepparent
		2 Grandparents of a parent or stepparent	
	1 Parents of a parent or stepparent	3 Aunts/Uncles of a parent or stepparent	
0 Parent or Stepparent of the child	2 Brothers/Sisters of a parent or stepparent		
1 Children of the parent or stepparent	3 Nephews/Nieces of a parent or stepparent		

Additional Petition Requirements

The bill requires petitions for temporary custody of a child to contain additional information. The additional information must include statements showing:

- Specific acts or omissions of the parents that demonstrate that the parents have abused, abandoned, or neglected the child as defined in Chapter 39, Florida Statutes;
- Any temporary or permanent orders for child support, including the court entering the order and the case number;
- whether a protective order is in effect which pertains to the petitioner, the parents, or the child and the court and case number for any such order;
- that it is in the best interest of the child for the petitioner to have custody; and
- any temporary or permanent child support obligations for the benefit of the child.

Redirection of Child Support

Under the bill, a court entering a temporary custody may order that all or part of an existing child support obligation be paid to a relative granted temporary custody of a child. The clerk of the circuit court, however, must transmit a copy of the order to the court that originally entered a child support order.¹⁷ The bill provides clarification regarding child support obligations that are in arrearage at the time the order changing custody is entered and provides direction to the child support depository to keep separate records for individual obligees for the child support.

Authority to Modify a Temporary Custody Order

Existing law provides that a parent “may petition the court to *terminate* the order granting temporary custody upon a finding that the parent requesting the termination of the order is a fit

¹⁵ BLACK’S LAW DICTIONARY (2004 8th ed.), degree. Committee staff has been unable to locate legal authority specifying whether Florida law determines degrees of relationship under the civil law system or the common law. According to Black’s Law Dictionary, most jurisdictions apply the civil law system. Additionally, the commentary to a prior version of the Florida Code of Judicial Conduct implied that the civil law system for determining degrees of relationship is appropriate. *See Aetna Life & Casualty Company v. Thorn*, 319 So. 2d 82, note 4 (Fla. 3d DCA 1975).

¹⁶ *Id.*

¹⁷ See s. 61.17(1)(b), F.S., for a similar notification procedure.

parent, or by consent of the parties.”¹⁸ The bill expressly authorizes a parent to petition a court to *modify* the order granting temporary custody. The order may be modified if modification is in the best interest of the child.

Effective Date

The bill takes effect on July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under ch. 751, F.S., a court may award temporary custody of a child over the objection of a parent if the petitioner shows that the parent has abused, neglected, or abandoned the child.¹⁹ In such circumstances, a parent may have a right to counsel under the U.S. and State Constitutions. The right to counsel may exist because a ch. 751, F.S., proceeding may lead to criminal child abuse charges or interfere with the parent’s “constitutionally protected interest in preserving the family and raising [his or her] children.”²⁰

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill permits a larger group of family members to petition a court for temporary custody of a child.

C. Government Sector Impact:

The bill permits a larger group of family members to petition a court for temporary custody of a child. As a result, more petitions for temporary custody may be filed in the

¹⁸ Section 751.05(7), F.S. (emphasis added).

¹⁹ *Landinguin v. Carneal*, 837 So. 2d 525, 527 (Fla. 4th DCA 2003) and s. 751.05(3), F.S.

²⁰ *S.B. v. Department of Children and Families*, 851 So. 2d 689, 692 (Fla. 2003).

courts. Additionally, circuit court clerks must provide a copy of an order redirecting child support to the court originally entering a child support order. If the courts determine that a right to counsel exists for parents from whom custody is removed over their objection, there may be a fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
