

**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 Children, Families, and Elder Affairs Committee

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BILL: SB 2636

INTRODUCER: Senator Storms

SUBJECT: Concurrent Custody of Children

DATE: April 6, 2008

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Toman</u>	<u>Jameson</u>	<u>CF</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>HA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

Senate Bill 2636 amends ch. 751, F.S., to authorize a court to order concurrent (as well as temporary) custody of a minor child to a family member who has physical custody of the child. The bill defines concurrent custody, delineates the requirements of a petition for concurrent custody, and provides the evidentiary standards for a concurrent custody order.

The bill amends s. 39.013, F.S., to allow a dependency court to extend its jurisdiction to a proceeding for concurrent custody.

The bill amends s. 49.011, F.S., including actions for concurrent custody among those in which service may be effectuated by publication.

This bill substantially amends the following sections of the Florida Statutes: 751.01, 751.02, 751.011, 751.03, 751.05, 39.013, and 49.011.

**II. Present Situation:**

**Kinship Care**

The Child Welfare League of America (CWLA) defines kinship care as "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."<sup>1</sup>

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<sup>1</sup> CWLA, *Kinship Care: Fact Sheet*, available at <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited April 2, 2008).

In the United States, more than six million children (approximately 1 in 12) are living in households headed by grandparents or other relatives. In many of these homes, grandparents and other relatives are taking on primary responsibility for the children's needs, without either of the child's parents present in the home.<sup>2</sup>

The increase in recent years in the numbers of children living with relatives can be attributed to many factors, including:

- Increased reporting of abuse and neglect;
- Change in drug usage and addiction related to the spread of crack cocaine and other drugs;
- Increased levels of poverty;
- More children are affected by HIV/AIDS;
- More parents are struggling with physical and mental health problems;
- Family violence and parental incarceration; and
- Decline in the availability of traditional foster homes.<sup>3</sup>

In Florida, 258,952 children live in grandparent-headed households (7.1% of all the children in the state). There are another 86,152 children living in households headed by other relatives (2.4% of all the children in the state). Of the children living in households headed by grandparents or other relatives, 151,492 are living there without either parent present.<sup>4</sup> Although many children living with relatives are doing so pursuant to a court order after being adjudicated dependent pursuant to ch. 39, F.S., far more are living with relatives in informal arrangements, with no court involvement, often because their parents are incarcerated or drug addicted.<sup>5</sup>

### **Temporary Custody of Minor Children by Extended Family**

Chapter 751, F.S., establishes a process by which a relative of a child may petition a court for temporary custody of the child. An award of temporary custody allows a relative with physical custody of a child to consent to medical treatment, obtain records, make decisions for a child's education, and do other things necessary for the child's care.<sup>6</sup>

Temporary custody of a child may be awarded to a relative with or without the consent of the child's parents.<sup>7</sup> If the child's parents do not object, the court will award temporary custody to the petitioning relative when it is in the best interest of the child to do so.<sup>8</sup> If the parents do object, the court may enter a temporary custody order only after finding by clear and convincing evidence that the parents are unfit and have abused, neglected, or abandoned the child.<sup>9</sup> At any

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<sup>2</sup> AARP Foundation, *et al.*, *State Fact Sheets for Grandparents and Other Relatives Raising Children* (October 2007).

<sup>3</sup> CWLA, *Kinship Care: Fact Sheet*, available at <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited April 2, 2008).

<sup>4</sup> AARP Foundation, *et. al.*, *GrandFacts, Florida* (November 2007).

<sup>5</sup> *See generally*, Judge Tracy Sheehan, *Relative Caregiver Legislative Priority 2007* (received April 3, 2008, on file with the Senate Committee on Children, Families and Elder Affairs).

<sup>6</sup> Section 751.01(3), F.S.

<sup>7</sup> Section 751.05, F.S.

<sup>8</sup> Section 751.05(2), F.S.

<sup>9</sup> Section 751.05(3), F.S.

time, a parent may petition the court to terminate a temporary custody order, and the court will terminate the order upon a finding that the parent is fit or upon the consent of the parties.<sup>10</sup>

### **Consent to Medical Care of a Minor**

Section 743.0645, F.S., authorizes the following individuals to consent to the medical care or treatment of a minor if, after a reasonable attempt, a person who has the power to consent as (e.g., a parent) cannot be contacted by the treatment provider:

- A person who possesses a power of attorney to provide medical consent for the minor.<sup>11</sup>
- The stepparent.
- The grandparent of the minor.
- An adult brother or sister of the minor.
- An adult aunt or uncle of the minor.

"Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, power of attorney, or informed consent as provided by law is required.

### **Guardianship of a Minor**

Section 744.3021, F.S., allows a parent, brother, sister, next of kin or other interested person to petition a court for the appointment of a guardian for a minor, without the need for adjudication of incapacity. Once appointed, the guardian has the authority of a plenary guardian.<sup>12</sup>

A child who has been adjudicated dependent pursuant to ch. 39, F.S., may be placed by court order in a permanent guardianship<sup>13</sup> or in a permanent placement with a relative.<sup>14</sup> In both circumstances the court is required to provide the caregiver with a separate order establishing the caregiver's authority to care for the child.

### **Power of Attorney**

Section 709.08(1), F.S., defines a durable power of attorney to be "a written power of attorney by which a principal designates another as the principal's attorney in fact." Pursuant to a durable power of attorney, the attorney in fact "has full authority to perform, without prior court approval, every act specifically enumerated in the durable power of attorney."<sup>15</sup> If authority is

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<sup>10</sup> Section 751.05(6), F.S.

<sup>11</sup> A power of attorney executed after July 1, 2001, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the power of attorney.

<sup>12</sup> Pursuant to s. 744.102(9)(b), F.S., a plenary guardian is "a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property."

<sup>13</sup> Section 39.6221, F.S.

<sup>14</sup> Section 39.6231, F.S.

<sup>15</sup> Section 709.08(7)(a), F.S.

specifically granted, the attorney in fact may make health care decisions on behalf of the principal.<sup>16</sup>

There is no specific provision in Florida law for a power of attorney that allows someone other than a parent or legal custodian to care for a minor child, although nothing in the law precludes the execution of such a document. Some states have passed legislation that specifically addresses the use of a power of attorney to allow a parent to delegate temporary caregiving authority to a relative.<sup>17</sup>

### **III. Effect of Proposed Changes:**

Senate Bill 2636 amends ch. 751, F.S., to authorize a court to order concurrent (as well as temporary) custody of a minor child to a family member who has physical custody of the child.

The bill defines concurrent custody to mean that a person who is eligible to obtain temporary custody may alternatively obtain custodial rights to care for a child concurrently with the child's parents. The definition provides that it is not necessary to find abuse, abandonment or neglect in order to grant concurrent custody over the objection of a parent, and that concurrent custody does not eliminate or diminish the custodial rights of a parent.

The bill requires that a petition for concurrent custody must include a statement regarding the consent of the child's parents or a description of the efforts made to obtain consent.

The bill provides that the court shall grant an order of concurrent custody only upon a finding of clear and convincing evidence that the child's parents are not "routinely available to provide the care and control of the child" and that the relative is the primary caregiver for the child.

The bill reiterates that concurrent custody does not affect the ability of the child's parent's to obtain physical custody at any time.

The bill amends s. 39.013, F.S., to allow a dependency court to extend its jurisdiction to a proceeding for concurrent custody.

The bill amends s. 49.011, F.S., including actions for concurrent custody among those in which service may be effectuated by publication.

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

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

None.

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<sup>16</sup> Section 709.08(7)(c), F.S.

<sup>17</sup> See, e.g., Ariz. Rev. Stat. s. 14-5104 (2007); Cal. Fam. Code s.6550 (2008); 11 P.S. s. 2511 (2008); Tenn. Code Ann. s. 34-6-301, *et. seq.* (2007).

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

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

Parents have a fundamental liberty interest in determining the care and upbringing of their children. The interest is protected by both the Florida and federal constitutions.<sup>18</sup> This bill authorizes a court to give custody of a child to another individual over the objection of the child's parents and, as such, it may be subject to constitutional scrutiny.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill may prevent some children from entering into the foster care system by allowing their relatives to adequately care for them.

**VI. Technical Deficiencies:**

The definition of "concurrent custody" in the bill is unclear, because it is internally inconsistent. It appears to allow a court to grant concurrent custody over the objection of the parents (even in the absence of a finding that the parents are unfit) and yet it also purports to leave the parent's custodial rights intact.

**VII. Related Issues:**

The bill amends ch. 39, F.S., to allow a dependency court to exercise jurisdiction over a proceeding for concurrent custody. This appears to allow a dependency court to consider and grant concurrent custody to a parent who has been found to have abused, neglected or abandoned the child.

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<sup>18</sup> See *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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

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