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HOUSE OF REPRESENTATIVES
COMMITTEE ON
FAMILY LAW AND CHILDREN
ANALYSIS

BILL #: HB 185

RELATING TO: Grandparent Visitation

SPONSOR(S): Representative Kelly and others

COMPANION BILL(S): SB 696

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) FAMILY LAW AND CHILDREN
(2) JUDICIARY
(3)
(4)
(5)

I. SUMMARY:

HB 185 reconfigures the existing Grandparent Visitation Statute, 742.01. The bill provides that a court shall award reasonable rights of visitation to grandparents when the court finds that statutory grounds have been met. These grounds, outlined in the bill, provide factors for the courts to consider in determining whether the child would be harmed unless visitation is granted, and whether the granting of such visitation will materially harm the parent child relationship. The bill also provides additional grounds to determine what would be in the best interests of the child.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Florida first enacted legislation regarding Grandparent Visitation in 1978. As enacted, the law authorized courts to award visitation to grandparents in dissolution proceedings, but disallowed them standing to intervene in the proceedings. The legislature also gave courts the right to award grandparent visitation where one or both of the parents were deceased. From the outset, a major factor for the court to consider in awarding visitation award was the best interests of the child.

In 1984, the legislature enacted "Grandparent Visitation Rights" after repeal of the original law. Under this new law, grandparents could petition for visitation where the minor's parents were divorced, and in the event there had been a desertion or death of one or both of the minor's parents. See Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996).

Legislation enacted in 1990 listed criteria the court should use to determine whether grandparent visitation was in the best interests of the child. In the event the family was unable to resolve the grandparent visitation issue, the legislature required mediation. See id. When the 1990 version of the statute faced a constitutional challenge under Art. I, § 23, the First DCA found that the state had a sufficiently compelling interest in children's welfare to allow intervention into the family's relationship and order grandparent visitation where it is in the child's best interests. See Sketo v. Brown, 559 So. 2d 381 (1st DCA 1990).

In 1993, the law was again amended to provide that, if found to be in the best interest of the child, the court should grant visitation to grandparents where both parents were alive and living together where "either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents." See 752.01(1)(3) F.S. (1993).

This subsection of the law was challenged and found to be unconstitutional in 1996 in the Beagle case. See Beagle v. Beagle, 678 So. 2d 1271 (1996). The Florida Supreme Court found that the explicit right to privacy found in Art. 1, § 23 of the Florida Constitution, and the implicit right to privacy found in the 14th Amendment of the U.S. Constitution rendered the law facially flawed. See id. The privacy right provided by the Florida Constitution is a fundamental right, and intrusion on that right can only be justified where there is a compelling state interest, and then only by the least intrusive means. See id. The court determined that only in the event where the child is threatened with demonstrable harm would the countervailing interest of the state be compelling against the wishes of the parents and their right to raise their child free from governmental intrusion. See id.

In 1998, the court revisited 752.01 (1) to look at another subsection of the statute which gave grandparents standing to petition for visitation where one or both parents were deceased. In Von Eiff v. Azicri, the court held that the privacy rights of an intact family are not greater than the privacy rights of a family where one or both parents are deceased. See Von Eiff v. Azicri, 23 FLW S583 (11/13/98). Relying on the Beagle decision, the court found that there was no compelling state interest, absent harm or threatened harm to the minor that would outweigh the interests of the remaining parent to decide how to raise their child. See id. Several circuits had been using the Beagle decision to distinguish between the privacy interests of an intact family and a non-intact family. The court in Azicri, in response to this trend, specifically disapproved Sketo v. Brown and S.S. v. J.M.N. and held that the privacy rights of a parent did not depend on whether or not the family was intact. See id. In the words of the Von Eiff court, "We agree with Judge Green's dissenting opinion in Von Eiff [below] that 'it appears to be an unassailable proposition that otherwise fit parents...who have neither abused, neglected, or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exlude or limit the grandparents' visitation with their child.'" See Von Eiff, 23 FLW at S594, *quoting* Von Eiff v. Azicri, 699 So. 2d 772, 781(Green, J. dissenting).

CONSTITUTIONAL ANALYSIS

I. U.S. CONSTITUTIONAL ANALYSIS

In Constitutional law jurisprudence, the privacy right has been found to be a fundamental right. See Roe v. Wade, 410 U.S. 113, 152 (1973). Among the rights which are considered "privacy" rights is the right for parents to raise their children as they see fit, unencumbered by governmental interference. See Pierce v. Society of Sisters, 268 U.S. 510, 535, see also Santosky v. Kramer, 455 U.S. 745, 753 (1982). The only occasion where states may interfere with privacy rights is when there is a compelling state interest. See Roe, 410 U.S. at 155. The statute must be given "strict scrutiny" - the highest level of scrutiny given to state legislation, to determine whether the interest rises to the level of a compelling state interest warranting governmental intrusion on a fundamental right.

Traditionally, those interests which have been found to be compelling involve the health and safety of children, protection from sexual exploitation and abuse, and education of children. See Wisconsin v. Yoder, 406 U.S. 205 (1972). Here, states make laws regulating parental conduct (e.g. states may compel attendance until a certain age, states may require that parents innoculate their children in order to attend school).

However, several of the privacy cases even in these areas accede to the wishes of the parents. For instance, in Wisconsin v. Yoder, an Amish father was allowed to remove his child from school, even though he was within the age where school attendance was compulsory. See Yoder at 207.

Tthe U.S. Supreme Court has historically found parental rights to be protected, even in the face of a child's illness, giving the parents the right to free exercise of their religious beliefs as concerning their children, and allowing parents, not government, to make the essential choices about how to raise their children.

II. FLORIDA CONSTITUTIONAL ANALYSIS

The citizens of Florida approved an amendment to the Florida Constitution guaranteeing an explicit privacy right which appears in Art. 1, § 23 of the document. Historically, the states and not the federal government guarantee personal privacy. See Katz v. United States, 398 U.S. 347 (1967). The privacy provision adopted by the citzens of Florida has been found to be even stronger and broader in scope than that found in the penumbra of the 14th Amendment of the U.S. Constitution. See Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). It is the province of the states to enumerate these protections, and they may offer more protection, however never less, than the U.S. Constitution. See, e.g. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

The Florida Supreme Court found the privacy right (which includes the right to raise children) to be a fundamental right, and as such, only a compelling state interest warrants governmental intrusion, accomplished by the least intrusive means. See Winfield at 547. Only where there is demonstrable harm to the child is the state interest sufficiently compelling to warrant governmental intrusion. See Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996). In Beagle, the court specifically discussed that the "best interests of the child" test should remain undisturbed in other areas of family law. See id. at 1277. This indicates that the demonstrable harm standard is one which is more stringent than the best interests of the child test. See id.

Harm to the child is defined in Chap. 39, F.S. Protecting children from harm, as defined in Chap. 39, has been found to be a compelling state interest by the Florida Supreme Court. See Padgett v. HRS, 577 So. 2d 565 (Fla. 1991). Examples of harm to the child which rise to the level of a compelling state interest and therefore may warrant governmental interference are abuse, abandonment and neglect of the child. See id. See also Von Eiff v. Azicri, 23 F.L.W. S583, S593 (Nov. 12, 1998) (finding a compelling interest in protecting children from "clear threat of abuse, neglect and death," sexual exploitation, and assuring that "reasonable medical treatment necessary for the preservation of life" is provided.) Any lower standard of harm is in danger of rendering a statute which includes a lesser standard of harm constitutionally infirm. See Beagle at 1271. While the proposed bill purports to allow for a finding of harm, the test for harm is combined with, and appears indistinguishable from, a "best interests of the child" test, which the Supreme Court of Florida has found not to be a compelling state interest. See id.

In the Von Eiff opinion, it is clear that not only must harm be established, but that the determination of harm must be a threshold determination before best interests of the child is even examined. See Von Eiff v. Azicri, 23 F.L.W. S583 (Nov. 12, 1998). The court approved the Tennessee Supreme Court's analogizing the level of harm used in foster care placement to that required in Grandparent Visitation proceedings. See id. at S593. The opinion states, "The Hawk court found that the State must first

establish parental unfitness or significant harm to the child before a 'best interests of the child' analysis can be utilized." See id. In Tennessee, a bifurcated procedure is used in foster care placement proceedings where a threshold determination of harm is made before further proceedings ensue. See id. This procedure was approved by the U.S. Supreme Court in Santosky. See 455 U.S. 745 (1982). Parents who have not harmed their children under this definition are fit parents and therefore have a reasonable expectation that the government will not intrude in childrearing decisions. See Von Eiff at S594.

B. EFFECT OF PROPOSED CHANGES:

Currently, most of the Grandparent Visitation Statute, 752.01, has been found to be unconstitutional by the Florida Supreme Court and the DCAs. The proposed changes would institute grandparent visitation once again in the state of Florida. In addition to the five scenarios currently written into the law where grandparents may petition for visitation unconnected to another action (death of one or both parents, divorce, child born out of wedlock, abandonment and where one or both parents in an intact family use parental authority to prohibit a relationship), this bill would add to the mix the situation where a parent has testamentarily requested the child be allowed to visit with the grandparents of the deceased parent. The bill now calls for a determination of harm where there formerly was none, and substitutes and adds factors which are used to determine the "best interests of the child."

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

   a. Does the bill increase anyone's taxes?

      N/A

   b. Does the bill require or authorize an increase in any fees?

      N/A

   c. Does the bill reduce total taxes, both rates and revenues?

      N/A

   d. Does the bill reduce total fees, both rates and revenues?

      N/A

   e. Does the bill authorize any fee or tax increase by any local government?

      N/A

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      N/A

   b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      N/A

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      N/A

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      (1) Who evaluates the family's needs?

          N/A

      (2) Who makes the decisions?

          N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 752.01, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s.752.01, F.S., relating to a grandparent's legal right to visitation, to require the assessment of harm to the child and harm to the parent-child relationship in the determination of grandparent visitation rights.

This section provides that in addition to the existing law which requires the court to award reasonable grandparent visitation rights when in the best interest of the child under any one of the five enumerated categories (death of one or both parents, divorce, desertion, child born out of wedlock, visitation denied by parental authority), the court must assess whether harm to the child will result if visitation is denied, and that the parent-child relationship would not be harmed if visitation was granted. The bill also adds the category of deceased parents who have made written testamentary statements requesting grandparent visitation with the surviving child to the list of scenarios under which a court may determine whether to grant grandparent visitation.

This section expands the list of criteria for the courts to consider in determining the best interest of the child and also the harm that might result if grandparent visitation rights are denied. The seven added criteria to consider include:

- the extent to which the grandparents have been involved in the care and support of the child;
- whether the grandparents have established or attempted to establish ongoing personal contact with the child;
- the degree to which grandparent visitation will improve, facilitate or promote the mental health and development of the child;

- whether grandparent visitation will facilitate or help maintain contact with a deceased parent's family;
- whether the visitation will provide support and stability for the child when there has been a disruption, such as divorce, in the child's family;
- whether grandparent visitation will enhance the parent-child relationship;and
- whether a written testamentary statement from a deceased parent expresses a belief that grandparent visitation will be in the child's best interests.

This section also provides an extensive list of criteria for determining whether grandparent visitation will materially harm the parent-child relationship. The court must consider:

- whether there have been previous disputes between the parents and the grandparents over child rearing or care and upbringing of the child;
- whether grandparent visitation will materially interfere with parental authority;
- whether a grandparent visitation arrangement can be made to minimize material detraction from the quality and quantity of time in a parent-child relationship;
- whether the primary purpose of seeking grandparent visitation is to continue or establish a beneficial relationship to the child;
- whether the grandparent visitation will expose the child to conduct, moral standards, experiences or other factors inconsistent with positive influences provided by the parents;
- whether the grandparents are willing and able to encourage a close and continuing relationship between the child and the parents;
- the nature of the relationship between the parents and grandparents;
- the psychological toll upon the child relating to visitation disputes, and
- such other factors as necessary in particular circumstances.

Section 2 provides for the act to take effect on July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   N/A

2. Direct Private Sector Benefits:

   N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

To adhere to the guidelines set out by the Florida Supreme Court in both Beagle and Von Eiff, it appears that it must be shown that not granting grandparent visitation would cause harm to the child. This may have to be a separate, threshold determination after the language in Von Eiff. Although the bill does include a list of factors to determine harm to the child, it is unclear which of the factors are to determine harm and which to determine “best interests of the child.” The “best interests of the child” factors used are not the same as those in either Chap. 39 or Chap. 61.

As currently provided in 752.01, all rights and privileges afforded to grandparents by this bill extend and are applicable to great-grandparents.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FAMILY LAW AND CHILDREN:

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