

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 288

SPONSOR: Senator Campbell

SUBJECT: Grandparent (and Great-Grandparent) Visitation Rights

DATE: December 9, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill revises the substantive and procedural requirements underlying a petition for grandparent (and great-grandparent) visitation rights. The bill's provisions are not applicable to familial scenarios involving married parents. The bill replaces the "best interest of the child" standard with the requisite determination of whether the minor is "suffering or threatened with suffering demonstrable significant mental or emotional harm" due to the parent's prohibition against visitation, and whether court-ordered visitation would materially harm the parent-child relationship. Specifically, the bill:

- requires a preliminary evidentiary hearing to determine whether there is a threshold finding of specified harm due to the prohibition against visitation,
- provides for an award of attorneys' fees and costs upon dismissal of a petition for lack of preliminary evidence of the specified harm to the minor,
- allows the court to appoint a guardian ad litem,
- requires court-ordered family mediation, and if the mediation is unsuccessful, court-ordered psychological evaluation of the minor,
- requires a final evidentiary hearing to determine whether to grant grandparent visitation under specified circumstances, and
- limits grandparent visitation rights actions to once every two years with an exception.

This bill creates section 752.011, Florida Statutes, and amends the following sections of the Florida Statutes: 61.13, 752.015, and 752.07. The bill also repeals s. 752.01, F.S.

II. Present Situation:

Background

Until 1978, neither grandparents or great-grandparents had any common law or statutory right to visit their grandchild or great-grandchild. In 1978, the Florida Legislature enacted chapter 752, Florida Statutes. It established a grandparent's freestanding statutory right to petition for

grandparent visitation. That is, a grandparent may initiate an independent action to exercise grandparent visitation rights. The law requires the court to grant the visitation if in the child's "best interest" and if one of the following parental or familial scenarios exists:

- a) one or both of the child's parents are deceased;
- b) the parents are divorced;
- c) one parent has deserted the child;
- d) the child was born out of wedlock; or
- e) one or both parents, who are still married, have prohibited the formation of a grandparent-grandchild relationship.

In determining the "best interest of the child" the court is required to consider: the grandparent's willingness to encourage a close parent-child relationship, the nature and length of the prior grandparent-child relationship, the child's preference, the child's mental and physical health, and the grandparent's mental and physical health.

Current Status of the Law

In recent years, the Florida courts have ruled that certain provisions of chapter 752, F.S., are facially unconstitutional. The courts have determined that the grandparent visitation rights as currently established in chapter 752, F.S., infringe on a *parent's fundamental and constitutional right to parent a child free from governmental interference* as implicitly protected under the Fourteenth Amendment of the United States Constitution, and more explicitly protected under the right of privacy provision in article 1, section 23 of the Florida Constitution.¹ Specifically, the Florida Supreme Court held that the state did not have a compelling state interest in imposing grandparent visitation rights in an "intact family" except in cases where a child is threatened with harm. *See Beagle v. Beagle* 678 So.2d 1271, 1276 (Fla. 1996). In 1998, the Court expanded this holding to apply to a "non-intact family." *See Von Eiff v. Azicri*, 720 So.2d 510, 515 (Fla. 1998). The Court expressly found an inherent problem in using the "best interest" standard in lieu of a showing of "demonstrable harm to the child's health or welfare" as the basis for warranting government interference into a parent's constitutional right of privacy in a parenting decision such as grandparent visitation. *Id.* at 516.

There are other statutory provisions (unconnected with chapter 752, F.S.) that govern grandparent visitation rights. These provisions apply to ongoing proceedings in which the health, welfare, paternity, or custody of a child is already at issue. For example, chapter 39, F.S., relating to dependency and child protection, states that a grandparent is entitled to reasonable visitations with a grandchild who has been adjudicated a dependent child and already removed from parental, custodial or legal custody. *See* §39.509, F.S. Additionally, chapter 61, F.S., relating to proceedings involving dissolution of marriage, child support and custody, provides for court-

¹*See Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998)(subsection (1)(a) of section 752.01, F.S., relating to visitation rights after the death of a biological parent is unconstitutional); *Beagle v. Beagle*, 678 So.2d 1271, 1272 (Fla. 1996)(subsection (1)(e) of section 752.01, F.S., relating to visitation rights within an intact family, is unconstitutional); *Lonon v. Ferrell* 1999 WL 550673 (July 30, 1999) (Fla. 2d DCA 1999)(subsection (1)(b) of section 752.01, F.S., relating to visitation rights after the dissolution of a marriage, is unconstitutional)(not yet officially published); *Brunetti v. Saul*, 724 So.2d 142 (4th DCA 1998)(subsection (1)(d) of section 752.01, F.S., relating to visitation rights of a child born out of wedlock is unconstitutional).

ordered grandparent visitation rights. However, a grandparent is not automatically entitled to be made a party to the proceedings, to be given notice of the dissolution of marriage proceedings, or to require the court to order that a child remain in the state for purposes of allowing grandparent visitation. *See* §61.13, F.S.

During the 1999 legislative session, two Senate bills relating to grandparent visitation rights were filed to address the constitutional defects in chapter 752, F.S., raised by the court rulings. *See* SB 284 (companion HB 0007) and SB 696 (companion HB 185). Neither of these bills passed.

Update

There are currently two cases before the Florida Supreme Court regarding the constitutionality of provisions relating to grandparent visitation rights under chapters 61 and 752, F.S. . *See Richardson v. Richardson* (No. 94,810) and *Brunetti v. Saul* (No. 94,843). In *Brunetti v. Saul*, 724 So. 142 (Fla. 4th DCA 1998), the Fourth District Court of Appeal found section 752.01(1)(d), F.S., relating to grandparent visitation rights to a child born out of wedlock, to be unconstitutional. By applying the same argument that the “best interest standard” alone could not warrant intrusion into a parent’s fundamental privacy rights, the First District Court of Appeal in *Richardson v. Richardson*, 24 Fla. L. Weekly D165 (Fla. 1st DCA 1999) found section 61.13(7), F.S., relating to grandparent rights to a child involved in a custody, support or visitation proceeding, to be unconstitutional. No rulings have been issued to date in either case.

The United States Supreme Court recently granted certiorari to review a grandparent visitation statute. *See Troxel v. Granville* (99-0137)(the case is actually a consolidation of three cases). In *Troxel*, the Washington State Supreme Court determined that the state’s statute provided a grandparent with legal standing to petition for visitation, the state law which allows any non-parent to petition for visitation, without regard to changed circumstances and to harm, violated a parent’s constitutional right to raise a child without state interference. Oral argument is scheduled for Wednesday, January 12, 2000.

III. Effect of Proposed Changes:

Section 1 creates 752.011, F.S., to revise the substantive and procedural requirements underlying a petition for grandparent visitation rights.

Specifically, subsection (1) provides five parental or non-marital scenarios under which a grandparent may petition for visitation rights: a) one or both parents are deceased; b) the parents are divorced or divorcing; c) a parent has abandoned the minor; d) a minor was born out of wedlock; and e) a deceased parent executed a testamentary statement requesting grand parental visitation. A grandparent is able to pursue an action under the provisions of chapter 752, F.S., regardless of a pending dissolution of marriage proceeding under chapter 61, F.S. The provisions of this bill are not available when there is an “intact family” unit.

Subsections (2) and (3) require the court to hold a preliminary evidentiary hearing to determine whether the minor is “suffering or threatened with suffering demonstrable significant mental or emotional harm” due to the parental decision to prohibit the grandparent visitation. If no finding is made at the preliminary hearing, the court must dismiss the petition and may award reasonable

attorneys' fees and costs to the prevailing party. However, if the court makes a finding of specified harm at the preliminary hearing, the court may appoint a guardian ad litem and then proceed to family mediation as provided in chapter 44, F.S., and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure, all of which relate to court-ordered mediation in family law matters. Specifically, section 44.102(c), F.S., and the Florida Family Law Rules of Procedure permit the court to order a referral of a family law matter to mediation in those circuits providing family mediation programs or services.

Subsection (4) requires the court to order a minor to undergo a psychological evaluation in accordance with the Florida Family Law Rules of Procedure if the mediation is unsuccessful and no other comparable evaluative information is available.

Subsection (5) permits the court award reasonable grandparent visitation rights after a final hearing. In contrast to the preliminary hearing, the court must making two findings: a) that the minor is "suffering or is threatened with suffering demonstrable significant mental or emotional harm" due to the parental decision to prohibit visitation, and b) that the visitation will not materially harm the parent-child relationship.

Subsections (6) and (7) provide two extensive lists of factors for the court to consider in determining: a) whether there is evidence of existing or threatened demonstrable significant mental or emotional harm due to the parental decision to prohibit the visitation and b) whether granting the petition will cause material harm to the parent-child relationship, respectively.

Factors to consider for finding existing or threatened demonstrable significant mental or emotional harm:

- the existing love, affection and other emotional ties in the grandchild-grandparent relationship
- the length and quality of prior grandchild-grandparent relationship, including care and support
- established or attempted personal contacts with the grandchild
- the reasons for the parental decision to end grandparent visitation previously permitted
- the degree of support and stability of grandparent visitation in cases of significant mental or emotional harm caused by the disruption (death, divorce, disability, etc.) in the family unit
- the existence or threat of mental harm
- the impact of grandparent visitation in maintaining or facilitating contact between the child and a deceased parent's extended family
- the grandchild's present mental, physical and emotional needs and health
- a grandparent's present mental, physical, and emotional health
- guardian ad litem's recommendation
- a minor's psychological evaluation
- a grandchild's expressed preference
- a deceased parent's written testamentary statement requesting grandparent visitation as helping to reduce or mitigate the grandchild's mental or emotional harm resulting from a parent's death.
- other factors as the court deems necessary

Factors to consider for finding that visitation will not materially harm the parent-child relationship:

- where there have been previous disputes between grandparents and parents regarding the grandchild's rearing or upbringing
- 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,
- the primary purpose of seeking grandparent visitation is to continue or establish a beneficial relationship to the child,
- the exposure of the child to conduct, experiences or other factors contrary to the parent's influences
- the nature of the parent-grandparent relationship
- the reasons for the parental decision to end grandparent-grandchild visitation previously permitted
- the psychological toll of the visitation disputes upon the child, and
- other factors as the court deems necessary

Subsection (8) makes the Uniform Child Custody Jurisdiction Act applicable to grandparent visitation right actions brought under chapter 752, F.S.

Subsection (9) strongly encourages courts to consolidate separate actions brought independently under chapter 752, F.S., relating to independent grandparent visitation rights actions and chapter 61.13, relating to custody, support and visitation proceedings.

Subsection (10) allows for the modification of a grandparent visitation order upon a showing that the circumstances have changed substantially or that the visitation is materially harming the parent-child relationship.

Subsection (11) limits the frequency of actions for grandparent visitation to once in a 2-year period, except for good cause shown or imminent or existing demonstrable significant mental or emotional harm caused by the parental decision to deny or limit visitation by the grandparent which was not known prior to the filing of an earlier action.

Subsection (12) is a verbatim restatement of the current subsection (3) under s. 752.01, F.S., which prohibits grandparent visitation rights for minors adopted under chapter 63, F.S., by someone other than a stepparent as provided in s. 752.07, F.S.

Subsection (13) applies the provisions for attorney fees under s. 57.105, F.S., to actions brought under chapter 752, F.S.

Section 2 repeals s.752.01, F.S., relating to the current provisions governing a grandparent's legal right to visitation.

Section 3 amends subsection (2) of section 61.13, F.S., to incorporate the cross-reference to the newly created s. 752.011, F.S., so that the new criteria will apply in determinations of grandparent visitation rights in custody, support and visitation actions arising under chapter 61, F.S. This section also encourages courts to consolidate actions under chapter 61 with grandparent visitation actions under chapter 752, F.S., to minimize the impact on the minor.

Section 4 amends s. 752.015, F.S., relating to public policy regarding mediation of grandparent visitation disputes, to incorporate the cross-reference to the newly created s. 752.011, F.S.

Section 5 amends s.752.07, F.S., to incorporate the cross-reference to the newly created s. 752.011, F.S., so that the new criteria will apply to grandparents visitation rights as affected by the adoption of a child by a stepparent.

Section 6 provides for the act to take effect on July 1, 2000.

As currently exists, all rights and privileges afforded to grandparents by this bill extend and would apply to great-grandparents.

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:

This bill may still raise constitutional concerns regarding a parent's fundamental right to parent a child free from governmental interference as protected under the Fourteenth Amendment of the United States Constitution, and under the explicit right of privacy provision in article 1, section 23 of the Florida Constitution. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998). According to the Florida Supreme Court, absent a compelling state interest through a showing of "demonstrable harm to the child's health or welfare," the State cannot warrant or justify government intrusion into a parent's constitutional right of privacy in his or her decision to limit or exclude a grandparent's visitation with a grandchild. *Von Eiff*, 720 So.2d at 515-516 (Fla. 1998).

Based on the recent court rulings, the heightened level of specified harm needed to satisfy a petition for grandparent visitation in the substantially revised substantive and procedural provisions of the bill, may withstand a constitutional challenge. However, recent court rulings, culminating with the *Von Eiff* decision, suggest that the bill may be subject to a legal challenge based on the disparate recognition of a parent's absolute privacy right to limit or deny grandparent visitation in an "intact family" versus a parent's less constitutionally protected privacy right in a "non-intact family" such as a widowed parent, unmarried or divorced parent. The bill does not provide for grandparents to petition for visitation when the child resides with his or her married parents. The Supreme Court has recently stated that it "was unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental right of a parent from a non-intact family such as a widower. *See Von Eiff v. Azicri*, 720 So.2d 510, 515, (Fla. 1998)(remarried widowed parent and adoptive stepparent), quoting from the dissent in *Fitts v. Poe*, 699 So.2d 348, 348-49 (Fla. 5th DCA 1997)(widowed parent).

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill could prompt an increased number of filings of petitions for grandparent visitation since the bill restores grandparent (and great-grandparent) rights to assert visitation rights. However, the sanctions for attorneys' fees and costs, and the higher requisite burden of proof may deter some individuals from petitioning for grandparent visitation.

C. Government Sector Impact:

According to the Office of State Courts Administration, the potential for increased filings of petitions for grandparent (and great-grandparent) visitation may result in additional judicial workload and the need for additional judicial resources to conduct the preliminary and final evidentiary hearings.

The bill does not address who will or should bear the costs associated with the discretionary appointment of a guardian ad litem, the court-ordered mediation, and the psychological evaluation in those cases where the parties do not have the financial ability to pay. Currently, the family court mediation programs are locally supported through county appropriations.

Additionally, since the preliminary threshold finding of specified harm needed to allow a grandparent to petition for visitation under the bill may approximate the threshold finding of specified harm needed to initiate involvement or action by the Department of Children and Families under chapter 39, F.S., relating to delinquency and dependency, there may be other costs incurred including the cost of representing indigent parents in subsequent custody actions brought by the Department of Children and Families.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- **Section 1:** Subsection (10) does not state what would constitute a "substantial change of circumstances" warranting a modification of an order granting grandparent visitation.

VIII. Amendments:

None.