STORAGE NAME: h0423.flc
DATE: March 6, 2000

HOUSE OF REPRESENTATIVES
COMMITTEE ON
FAMILY LAW AND CHILDREN
ANALYSIS

BILL #: HB 423

RELATING TO: Grandparents' Visitation Rights

SPONSOR(S): Representatives Kelly, Bainter, and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) FAMILY LAW AND CHILDREN
(2) CRIMINAL JUSTICE APPROPRIATIONS
(3)
(4)
(5)

I. SUMMARY:

This bill revises the substantive and procedural requirements underlying a petition for grandparent visitation rights. 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 has an effective date of July 1, 2000.

This bill may have a fiscal impact, but it is indeterminate.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

History of Grandparent Visitation Laws

Until 1978, grandparents did not have any common law or statutory right to visit their grandchild. In 1978, the Florida Legislature provided for the courts to award grandparents visitation rights, in an existing action for dissolution of marriage. *See* ch. 78-5, L.O.F. Grandparents could not be made parties and had no legal standing as contestants to the action for dissolution of marriage. s. 61.13(2)(b), F.S.

In 1984, the Legislature enacted chapter 752, F.S., which established a grandparent's freestanding statutory right to exercise visitation with his or her grandchild. *See* ch. 84-64, L.O.F. A grandparent may initiate an independent action to exercise grandparent visitation rights. The law requires the court to grant visitation "when in the best interest of the child," and if one of the following parental or marital 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 relationship between the child and the grandparent(s).
s. 752.01(1), F.S.

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. s. 752.01(2), F.S.

There are other statutory provisions, unconnected with ch. 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, ch. 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* s. 39.509, F.S. Additionally, ch. 61, F.S., relating to proceedings involving dissolution of marriage, child

support and custody, provides for court-ordered 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* s. 61.13, F.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 (1925); *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 may make laws regulating parental conduct (e.g. state may compel attendance in school until a certain age, states may require that parents inoculate 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.

The 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.

The citizens of Florida approved an amendment to the Florida Constitution guaranteeing an explicit privacy right which appears in Article 1, Section 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 citizens of Florida has been found to be even stronger and broader in scope than that found in the penumbra of the Fourteenth 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, but 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 would warrant 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).

Harm to a child is defined in s. 39.01(30), F.S. Protecting children from harm, as defined in ch. 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*. Any lower standard of harm is in danger of rendering a statute constitutionally infirm. *See Beagle* at 1271.

Current Status of the Law

Since the enactment of ch. 752, F.S., the Supreme Court of Florida has systematically ruled various provisions of the grandparents visitation rights statute unconstitutional. The Court has determined that the grandparent visitation right as currently established in ch. 752, F.S. infringes upon a parent's fundamental and constitutional 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.

Paragraph (e) of subsection (1) of s. 752.01, F.S., provided for the ability of the grandparents to petition for visitation in a situation where both parents were alive and living together, and "either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents." This provision of the law was challenged and found to be unconstitutional in 1996 in *Beagle v. Beagle*, 678 So.2d 1271 (1996). The Florida Supreme 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. *Id.*

In *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998), the Florida Supreme Court found s. 752.01(1)(a), F.S., unconstitutional. This paragraph provides grandparents with standing to petition for visitation where one or both of the parents are deceased. In *Von Eiff*, 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 of the parents are deceased. Relying on the Beagle decision, the court found that there was no compelling 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.* The court held that the privacy rights of a parent did not depend on whether or not the family was intact. 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 exclude or limit the grandparents' visitation with their child.'" *See Von Eiff*, 720 So.2d at 515, *quoting Von Eiff v. Azicri*, 699 So.2d 772, 781 (Green, J. dissenting).

Most recently, the Supreme Court found paragraph (d) of subsection (1) of s. 752.01, F.S., providing for grandparent standing to petition for visitation in cases where the child was born out of wedlock, unconstitutional. *Saul v. Brunetti*, 23 Fla. L. Weekly S52 (Fla. 1999). The Court stated that "the fact the parents of the child in *Brunetti* were never married should not change this Court's analysis of the constitutionality of this statute. Section 752.01(1)(d) suffers from the same constitutional infirmity as subsection (a) in *Von Eiff*." *Id.*

During the 1999 legislative session, a House bill relating to grandparent visitation rights was filed to address the constitutional defects in ch. 752, F.S., raised by the court rulings. See HB 185 (companion SB 696). This bill did not pass.

United States Supreme Court

The United States Supreme Court recently granted certiorari to review a Washington State Supreme Court case, *Troxel v. Granville* (99-0137). In *Troxel*, the Washington State Supreme Court determined that although the grandparents had 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. The high Court heard oral arguments on January 12, 2000, and a decision is expecting sometime during the summer of 2000.

C. 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. Subsection (1) expands upon the existing categories of grandparents that may petition for visitation rights to include a grandparent of a minor whose deceased parent has made a written testamentary statement requesting that grandparent visitation be permitted with the surviving minor. It also allows a grandparent to pursue an action under the provisions of ch. 752, F.S., even if a dissolution of marriage proceeding is pending under ch. 61, F.S.

Subsection (2) requires the court to hold initially 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. If a finding of the specified harm is made at the preliminary hearing, subsection (3) allows the court to appoint a guardian ad litem. The court must then order the matter to family mediation in accordance with ch. 44, F.S., relating to court-ordered mediation, and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure, relating to the psychological evaluation of a minor.

If mediation is unsuccessful and there is no other comparable psychological evaluative evidence available, subsection (4) requires the court to order a psychological evaluation of the minor pursuant to the Florida Family Law Rules of Procedure.

Under subsection (5), a court may award reasonable grandparent visitation rights after a final hearing. In contrast to the preliminary hearing, the court must find both that: (a) the minor is suffering or is threatened with suffering demonstrable significant mental or emotional hard due to the parental decision to prohibit visitation that could be alleviated or mitigated by allowing the visitation, and (b) the visitation will not materially harm the parent-child relationship.

Subsections (6) and (7) provide two expansive and different lists of factors for the court to consider in determining whether there is evidence of existing or threatened demonstrable significant mental or emotional harm due to the parental decision to prohibit the visitation and 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:

- whether 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;
- other factors as the court deems necessary.

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

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

Subsection (10) allows for the modification of an order granting grandparent visitation upon a showing that there is a substantial change in circumstances 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 two 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 the earlier action.

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

Subsection (13) makes the provisions relating to the award of attorneys fees under s. 57.105, F.S., applicable to actions brought under ch. 752, F.S.

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

Section 3. Amends subsection (2) of s. 61.13, F.S., relating to custody, support and visitation proceedings. This section incorporates 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 ch. 61, F.S. This section also encourages courts to consolidate the custody, support and visitation actions with the grandparent visitation actions under ch. 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 determinations of 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.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

See "Fiscal Comments" section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill could prompt an increased number of filings of petitions for grandparent visitation since the bill restores 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.

D. FISCAL COMMENTS:

According to the Office of State Courts Administrator, the potential for increased filings of petitions for grandparent visitation may result in additional judicial workload and the need for additional judicial resources to conduct the preliminary and final evidentiary hearings. Additionally, since the required finding of threatened harm under the bill may reach the threshold of a dependency action under ch. 39, F.S., there may be costs associated, at a minimum, with the appointment of a counsel to represent the parents in a dependency action.

This 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 a 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.

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 take an action requiring 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 does not reduce the percentage of state sales tax shared with municipalities.

V. COMMENTS:

A. 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). The Supreme Court of Florida has stated that the State cannot satisfy a compelling state interest standard absent a showing of "a substantial threat of demonstrable harm to the child's health or welfare" to warrant government intervention into a parent's constitutional right of privacy in his or her decision to limit or exclude a grandparent's visitation with a grandchild. *See Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998). Although this bill substantially revises the substantive and procedural framework and imposes a higher burden than previously required for securing grandparent visitation rights, it is indeterminate whether the provisions in this bill would survive a constitutional challenge.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FAMILY LAW AND CHILDREN:

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