



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |  |   |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |

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

The bill allows the court to award visitation to grandparents and great-grandparents over the objection of the parents, in certain circumstances. The bill appears to allow the government to interfere with the constitutionally protected right of parents to raise their children. The bill may adversely affect family relationships as a result of involvement by the courts in family decisions related to children.

#### B. EFFECT OF PROPOSED CHANGES:

**Statutory Rights of Grandparents:** Courts are required to award reasonable visitation rights to the grandparent of a minor child when it is in the best interests of the minor child if:

(a) The marriage of the child's parents has been dissolved; **{has been found to be unconstitutional<sup>1</sup>}**

(b) A parent of the child has deserted the child; or

(c) The minor child was born out of wedlock and not later determined to be a child born within wedlock<sup>2</sup> **{has been found to be unconstitutional<sup>3</sup>}**.

The statute provides factors which the court must consider in determining the best interest of the child.<sup>4</sup>

In dependency cases, a grandparent or step-grandparent is entitled to reasonable visitation with a grandchild who has been adjudicated dependent and taken from the physical custody of the parent, unless the court finds that such visitation is not in the best interest of the child or that such visitation would interfere with the goals of the case plan.<sup>5</sup> Grandparents are also entitled to notice of a termination of parental rights hearing if the child has lived with the grandparent for 6 months.<sup>6</sup>

Regarding adoption, grandparents are given priority to adopt children who have lived with them for 6 months, if the grandparents petition the court and the child is placed for adoption.<sup>7</sup> The visitation rights

<sup>1</sup> See *Lonon v. Ferrell*, 739 So.2d 650 (Fla. 2d DCA 1999), in which the Second District Court of Appeal held that providing a grandparent standing to petition for visitation in cases where the marriage of the child's marriage was dissolved violated the parent's constitutional right to privacy.

<sup>2</sup> See s. 742.091, F.S., which requires a child to be held as the child of the husband and wife if born out of wedlock and the mother and reputed father shall at any time after birth intermarry.

<sup>3</sup> See *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000), in which the Florida Supreme Court held that providing a grandparent standing to petition for visitation in cases where the child was born out of wedlock violated the parent's constitutional right to privacy.

<sup>4</sup> See s. 752.01(2), F.S., which requires the court to consider the willingness of the grandparent to encourage a close relationship between the child and the parent(s); the length and quality of the prior relationship between the child and the grandparent(s); the preference of the child if the child is determined to be of sufficient maturity to express a preference; the mental and physical health of the child; the mental and physical health of the grandparent(s); and such other factors as are necessary in the particular circumstances.

<sup>5</sup> See s. 39.509, F.S.

<sup>6</sup> See s. 39.801(3)(a)5., F.S.

<sup>7</sup> See s. 63.0425, F.S.

of grandparents are unaffected by the subsequent adoption of the child if adopted by a spouse of the living parent or a close relative upon the death of one or both parents.<sup>8</sup>

Regarding custody of children in dissolution of marriage cases, the court may recognize grandparents who actually reside with their grandchild, whether the court has awarded custody to the grandparent or not, as having the same standing as parents for evaluating what custody arrangements are in the best interest of the child. The Florida Supreme Court has declared this statutory provision unconstitutional.<sup>9</sup>

**Effect of proposed changes:** The bill provides five scenarios under which a grandparent or great-grandparent may petition for visitation rights:

- One or both of the parents are deceased;<sup>10</sup>
- The marriage of the parents of the minor has been dissolved, whether or not a dissolution action is pending;<sup>11</sup>
- A parent of the minor has deserted the minor; or
- The minor was born out of wedlock and not later determined to be born within wedlock;<sup>12</sup>
- A deceased parent of the minor has made a written testamentary statement requesting that there be visitation between the surviving minor child and the grandparents or great-grandparents.

The court is required to hold a preliminary hearing to find whether there is evidence that the minor is suffering or is threatened with suffering demonstrable significant mental or emotional harm or harm as defined in s. 39.01(30), F.S.,<sup>13</sup> as a result of a parental decision not to permit visitation or contact. Absent such a finding, the court is required to dismiss the petition and to award reasonable attorney's fees and costs to be paid by the petitioner.

If the court does find evidence that the minor is suffering or threatened with suffering demonstrable significant mental or emotional harm as a result of a parental decision not to permit visitation or contact, the court may appoint a guardian ad litem and shall order the matter to family mediation.<sup>14</sup>

If mediation fails to yield a resolution, the court shall order a psychological evaluation of the minor, if comparable evidence is unavailable.<sup>15</sup> After a hearing, the court may award reasonable rights of visitation to the grandparent or great-grandparent if the court finds that there is clear and convincing evidence that the minor is suffering or is threatened with suffering demonstrable significant mental or emotional harm, or harm as defined in s. 39.01(30), F.S., as a result of a parental decision not to permit visitation and that visitation

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<sup>8</sup> See s. 63.172(2), F.S.

<sup>9</sup> See *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000), in which the Florida Supreme Court held that s. 61.13(7), F.S., violates the natural parent's fundamental right to privacy in rearing his or her child.

<sup>10</sup> See *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998), in which the Florida Supreme Court held that the constitutional guarantee of privacy was violated by a statute that mandated that if one or both parents are deceased, trial court shall order grandparent visitation upon grandparent's petition, when in the best interest of the minor child, without first requiring proof of demonstrable harm to the child.

<sup>11</sup> Unconstitutional under *Lonon v. Ferrell*, 739 So.2d 650 (Fla. 2d DCA 1999).

<sup>12</sup> Unconstitutional under *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000).

<sup>13</sup> See s. 39.01(30), F.S., which defines 'harm' to a child's health or welfare when any person inflicts or allows to be inflicted upon the child physical, mental, or emotional injury. Injury includes, but is not limited to: willful acts that produce enumerated injuries; purposely giving a child poison; leaving a child without adult supervision; inappropriate or excessively harsh disciplinary action that is likely to result in physical injury, mental injury or emotional injury; commits or allows to be committed, sexual battery against the child; allows sexual exploitation of the child; exploits a child; abandons the child; neglects the child; exposes a child to a controlled substance or alcohol; uses mechanical devices, unreasonable restraints, or extended periods of isolation; engages in violent behavior that demonstrates a wanton disregard for the presence of a child; negligently fails to protect a child in his or her care from inflicted physical, mental, or sexual injury caused by the acts of another; has allowed a child's sibling to die as a result of abuse, abandonment, or neglect; or makes a child unavailable for the purpose of impeding or avoiding a protective investigation.

<sup>14</sup> See chapter 44, F.S., relating to mediation and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure.

<sup>15</sup> See Rule 12.363, Florida Family Law Rules of Procedure.

will alleviate or mitigate the harm; and that the visitation will not materially harm the parent-child relationship.

The bill also provides that the Uniform Child Custody Jurisdiction and Enforcement Act applies to grandparent visitation actions brought under this chapter,<sup>16</sup> and encourages courts to consolidate visitation actions that are pending concurrently under chapter 752 and s. 61.13, F.S.

The bill allows an original action to be filed for visitation only once in any 2-year period, except on a showing of good cause, and allows modification of an order granting visitation upon a showing of a substantial change in circumstances or that the visitation is causing material harm to the parent-child relationship.

The bill makes the attorney's fees provisions of s. 57.105, F.S., applicable to actions brought under chapter 752, F.S.<sup>17</sup>

Regarding step-parent adoption, the bill allows courts to terminate grandparent visitation based on the standards for granting such visitation set forth in the bill.

HB 1107 extends to great-grandparents the following rights and preferences currently provided to grandparents:

- Reasonable visitation with a dependent child.
- Notice of the advisory hearing to terminate parental rights of a dependant child.
- Visitation rights pursuant to a child custody determination in a pending divorce.
- Prohibition of denial of visitation based solely on infection with HIV.
- Notice regarding petitions for termination of parental rights in certain circumstances.
- Continuation of visitation rights if a parent of the child has died and the child is adopted by the spouse of the living parent or a close relative.

The bill repeals s. 752.01, F.S., the current statute providing for grandparent visitation, and s.61.13(7), F.S., which has been declared unconstitutional.<sup>18</sup>

#### C. SECTION DIRECTORY:

**Section 1 creates s. 752.011, F.S.**, to revise the substantive and procedural requirements relating to a petition for grandparent or great-grandparent visitation rights.

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

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<sup>16</sup> See Part II of chapter 61, F.S., which provides a uniform act designed to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child; discourage the use of the interstate system for continuing controversies over child custody; deter abductions; avoid relitigating the custody decisions of other states in this state; facilitate the enforcement of custody decrees of other states; promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and make uniform the law with respect to child custody jurisdiction and enforcement.

<sup>17</sup> See s. 57.105, F.S., which provides for the award of reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense in which the court finds that the losing party or it's attorney know or should have known that a claim or defense when initially presented to the court or at any time before trial: was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts.

<sup>18</sup> See *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000), in which the court held that s. 61.13(7), F.S., in allowing the court to recognize grandparents as having the same standing as parents for evaluating what custody arrangements are in the best interests of the child when the child is residing with a grandparent violates the natural parent's fundamental right to privacy in rearing his or her child.

**Section 3 amends s. 752.015, F.S.**, to incorporate references to newly created s. 752.011, F.S., in mediation provisions.

**Section 4 amends s. 752.07, F.S.**, to incorporate references to newly created s. 752.011, F.S., in provisions relating to step-parent adoptions, and deleting the best-interest standard.

**Section 5 amends s. 39.01, F.S.**, to include 'great-grandparent' in the definitional section of dependency provisions.

**Section 6 amends s. 39.509, F.S.**, to include great-grandparents among those who may petition for visitation rights when there has been an adjudication of dependency and removal of the child from the physical custody of the parent.

**Section 7 amends s. 39.801, F.S.**, to provide great-grandparents with the right to notice of a hearing on a petition for termination of parental rights.

**Section 8 amends s. 61.13, F.S.**, to extend to great-grandparents the same rights held by grandparents in the event of a dissolution of marriage of the parents of the child, and to repeal s. 61.13(7), F.S.

**Section 9 amends s. 63.0425, F.S.**, to give great-grandparents notice regarding petitions for termination of parental rights.

**Section 10 amends s. 63.172, F.S.**, to give great-grandparents the same protection regarding visitation rights when the child is adopted after the death of a parent.

**Section 11** provides an effective date of July 1, 2003.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The costs of legal counsel, mediation services, and court-ordered evaluations may accrue to losing parties in legal provisions brought pursuant to the provisions of the bill.

### D. FISCAL COMMENTS:

Since the courts cannot predict the number of actions that will arise if this bill passes, the aggregate fiscal impact on state and local governments is indeterminate. The courts advise that these cases, by definition, would be high conflict and require evidentiary hearings that are estimated to last one or two days.

The bill does not address who will or should bear the costs associated with the discretionary appointment of the guardian ad litem, mediation, and the court-ordered psychological evaluation in

those cases where the parties are indigent. Revision 7 to Article V of the State Constitution directs state government to assume the cost of the state court system, to be fully effectuated by July 1, 2004. The Legislature is in the process of defining the state court system to determine which programs and services are part of the state court system.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not affect counties or municipalities.

##### 2. Other:

**Privacy Rights of Parents to Raise their Children:** The Florida Supreme Court has systematically and consistently ruled<sup>19</sup> that grandparent visitation rights as set forth 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 to the United States Constitution,<sup>20</sup> and explicitly protected under the right of privacy provision in the Florida Constitution.<sup>21</sup> The only occasion where states may interfere with privacy rights is when there is a compelling state interest. The Florida Supreme Court found that using the 'best interest of the child' standard as the basis of warranting government interference into a parent's constitutional right of privacy in a parenting decision is unconstitutional. Only where there is demonstrable harm to the child is the state interest sufficiently compelling to warrant government intrusion.<sup>22</sup> Harm to a child as defined in s. 39.01(30), F.S., has been found to be a compelling state interest.<sup>23</sup> Any lower standard of harm may be in danger of rendering a statute constitutionally infirm.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The term 'great-grandparents' are already included in the definition of 'grandparents' for the purposes of chapter 752, F.S. Thus, several sections of this bill which add the term 'great-grandparents' to provisions of chapter 752, F.S. appear to be redundant.

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<sup>19</sup> See *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996) (statute allowing grandparent visitation rights within an intact family was found unconstitutional); *Von Eiff v. Azicri*, 699 So.2d 772 (Fla. 1998) (statute allowing grandparent visitation rights when one or both parents are deceased was found unconstitutional); *Lonon v. Ferrell*, 739 So.2d 650 (Fla. 2<sup>nd</sup> DCA 1999) (statute providing for grandparent visitation rights in cases where the marriage of the child's parent was dissolved was found unconstitutional); *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000) (statute providing for grandparent visitation in cases where child born out of wedlock was found unconstitutional); *Richardson v. Richardson*, 734 So.2d 1063 (Fla. 2000) (statute giving grandparents standing regarding custody evaluations in divorce cases was found unconstitutional).

<sup>20</sup> The Due Process Clause of the Fourteenth Amendment restricts states from engaging in action which deprives citizens of life, liberty, or property. Termination of parental rights is considered among the more serious deprivations of rights. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>21</sup> See Article 1, section 23 of the State Constitution which provides that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

<sup>22</sup> See *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

<sup>23</sup> See *C.S., D.S., and B.S., v. Biddle*, 829 So.2d 1004 (Fla. 2<sup>nd</sup> DCA 2002) in which the Second District Court of Appeal found that the grandparents had no right to direct children's upbringing because there was no harm as defined by s. 39.01(30), F.S.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

The Judiciary Committee adopted a strike-all amendment on April 9, 2003, which makes the following changes:

- Does not allow grandparents to petition for visitation over the parents' objection if the parents are still married;
- Removes the factors for the court to consider when considering harm;
- Uses the definition of 'harm' found in s. 39.01(30), F.S.;
- Repeals s. 61.13(7), F.S.;
- Requires that grandparents be given notice of a petition for termination of parental rights in specified circumstances.

This analysis is drafted to the bill as amended.