

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 128

SPONSOR: Committee on Judiciary and Senator Campbell

SUBJECT: Grandparent Visitation Rights

DATE: April 22, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Roberts	JU	Fav/CS
2.			AAV	
3.			AP	
4.				
5.				
6.				

I. Summary:

This bill replaces provisions in chapter 752, F.S., relating to a grandparent's or great-grandparent's statutorily-created right to petition for visitation independent of any pending action. It sets forth new substantive and procedural requirements. Specifically, the bill:

- Replaces the "best interest" standard with a "harm" standard to determine whether the minor is "suffering or threatened with suffering demonstrable significant mental or emotional harm" due to a parent's decision to prohibit visitation or contact between the child and the grandparent or great-grandparent;
- Requires a preliminary hearing to determine whether there is a threshold finding of specified harm as a result of the prohibition against visitation;
- Allows for the discretionary appointment of a guardian ad litem;
- Mandates court-ordered family mediation, and if the mediation is unsuccessful, court-ordered psychological evaluation of the child if comparable evaluation is not available;
- Requires a final hearing to determine whether there is clear and convincing evidence to grant grandparent or great-grandparent visitation which would reduce the harm but would not materially harm the parent-child relationship
- Allows for modification of such award based on a substantial change in circumstance or a showing that the visitation is materially harming the parent-child relationship;
- Limits such petitions to once in any 2-year period with exceptions, and
- Provides for award of attorney's fees and costs if petition is dismissed for lack of threshold finding of specified harm.

The bill also extends rights and preferences to great-grandparents currently accorded to grandparents under chapter 39, F.S., relating to dependency and delinquency, chapter 61, F.S., relating to dissolution, custody, and support, and chapter 63, F.S., relating to adoption. The bill also modifies a grandparent's statutory right of priority for adoption to one of right of notice of

an adoption. The bill creates section 752.011, F.S., and amends the following sections of the Florida Statutes: 39.01, 39.509, 39.801, 61.13, 63.0425, 752.015, and 752.07. The bill also repeals s. 752.01, F.S.

II. Present Situation:

Historical Background

In Florida, a grandparent's right to visitation and custody is based on statutory law, not common law. The statutory right was created by the Legislature in 1978.¹ Chapter 752, F.S., gives a grandparent² the right to petition for visitation or custody independent or in the absence of any pending court matter relating to a child's custody, health, safety or welfare. The law required the court to grant visitation based on a child's best interest standard,³ under any one of the following parental or marital scenarios:

- 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). *See* s. 752.01, F.S. (1997).

Current State of the Law

In recent years, however, many of Florida and other states' laws granting grandparent visitation or custody rights have come under intense constitutional scrutiny. Both federal and Florida state courts have been striking down these "grandparent visitation right" laws as unconstitutional. The courts' rationale is these laws infringe on a parent's fundamental and constitutional right to raise a child free from governmental interference. Absent some compelling state interest such as a showing of "substantial threat of demonstrable harm to the child's health or welfare" or parental unfitness, a parent has the right to limit or even prohibit a child from associating with a grandparent or any relative or other person. *See Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998).

In addition to striking down provisions in chapter 752, F.S., relating to the grandparent's right to petition for visitation, the Florida Supreme Court has also declared s. 61.13(7), F.S., unconstitutional, which granted grandparent custodial rights in custody or dissolution of marriage proceedings. *See Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000). The Court held that section 61.13(7), F.S., inappropriately vested grandparents with standing equal to those of parents in custody disputes based solely on whether it was in the child's best interest without making any other determination as to whether there was detrimental harm to the child. The court found this provision to be even more intrusive on a parent's right to raise his or her child than the grandparent visitation statute in chapter 752, F.S., even in cases where a child had been previously residing with a grandparent in a stable relationship.

¹ See ch. 78-5, L.O.F. (s. 68.08, F.S., repealed); ch. 84-64, L.O.F. (s. 61.1301, F.S.)

² The term "grandparent" encompasses a "great-grandparent". *See* s. 752.001, F.S.

³ In determining the "best interest of the child", the court was 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.

The U.S. Supreme Court has also ruled on the issue of grandparent visitation and custody rights. In 2001, the Court (in a plurality opinion) struck down a Washington state law on visitation as unconstitutional as applied. *See Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 (2000) (plurality opinion). In *Troxel*, paternal grandparents had petitioned to expand visitation rights to their deceased son's children after the children's biological mother who had remarried reduced the visitation from every weekend to once a month. The Washington State Supreme Court held that although the grandparents had standing to petition for visitation under its state law, the law, as written, facially violated a parent's constitutional right to raise a child without state interference. The U.S. Supreme Court subsequently agreed and found that the law to be "breathhtakingly broad" within the context of a "best interest" determination. The Court added that no consideration had been given to the decision of the parent and noted that parent's fitness to make decisions had not been questioned or otherwise raised as an issue. The Court avoided ruling that all nonparental visitation statutes would be facially unconstitutional and stated that that determination would have to be made by each state on a case-by-case basis.

Therefore, the current state and federal case law recognizes that a parent's decisional autonomy regarding matters such as childrearing and education is a fundamental right implicitly protected under the Fourteenth Amendment of the *United States Constitution*⁴, and explicitly protected under the right of privacy in article 1, section 23 of the *Florida Constitution*. In other words, presumptive weight is to be given to a fit parent's decision to limit, control or otherwise prohibit a child's association with a relative whether it be a grandparent, an uncle or other family member. Although that parental right is not absolute, that right can not be superseded by a nonparent such as a grandparent or other relative seeking to secure visitation under current law unless there is some showing of detrimental harm or parental unfitness.

These court rulings do not necessarily bar the court from granting grandparent visitation and custody, however, it is implied that there must be a finding that the parent is unfit or there is some demonstrable harm to the child sufficient to overcome a parents' constitutionally-protected right to raise their child as they see fit. These court rulings do not affect a grandparent's statutorily-recognized priority in adoption of the child if the child has lived with a grandparent for at least 6 months. *See s. 63.0425, F.S.*

These court rulings also do not affect a grandparent's right to petition for visitation and custody in proceedings under chapter 39, F.S., relating to dependency and termination of parental rights, where the issue of the child's health and welfare and possibly the parents' fitness is at issue before the court. A grandparent is entitled to reasonable visitation if the grandchild has been adjudicated dependent and removed from parental, custodial or legal custody. *See s. 39.509, F.S.* In fact, a grandparent's right to visitation survives a termination of parental rights unless the court finds that such visitation is not in the child's best interest or that such visitation would interfere with the goals of permanently placing the child.

⁴ 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).

III. Effect of Proposed Changes:

Section 1 creates 752.011, F.S., to replace the substantive and procedural requirements that were declared unconstitutional in chapter 752, F.S., relating to the right to petition for grandparent visitation rights. Specifically, subsection (1) provides five scenarios under which a grandparent or great-grandparent (hereinafter “grandparent”) may petition for visitation rights independent of or in absence of any pending related matter:

- i. When one or both parents are deceased;
- ii. When the parents are divorced or divorcing;
- iii. When a parent has deserted the minor;
- iv. When a minor was born out of wedlock; or
- v. When a deceased parent has executed a testamentary statement requesting grandparent visitation between the surviving child(ren) and the grandparent or great-grandparent.

Pursuant to subsections (2) and (3), a preliminary evidentiary hearing must be held to determine whether there is evidence to make a threshold finding that the minor is suffering or threatened with suffering demonstrable significant mental or emotional harm due to the parental decision to prohibit visitation or contact between the child and the grandparent. Absent such finding, the petition must be dismissed and the court shall award reasonable attorney’s fees and costs to the parents. If the court makes a threshold finding of the specified harm, the court may appoint a guardian ad litem. The parties must then undergo court-ordered family mediation in accordance with s.44.102(c), F.S., and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure⁵.

If the mediation is unsuccessful and no other comparable evaluative information is available, subsection (4) requires the minor to be psychologically evaluated in accordance with the Florida Family Law Rules of Procedure. At the final hearing pursuant to subsection (5), the court may grant reasonable grandparent visitation rights at the final hearing if there clear and convincing evidence that: if the following specific findings are made at the final hearing:

- a) The minor is “suffering or is threatened with suffering demonstrable significant mental or emotional harm” due to the parent’s decision to prohibit visitation between the child and the grandparent,
- b) The visitation will alleviate or lessen the harm, and
- c) The visitation will not materially harm the parent-child relationship.

Under subsection (6), the Uniform Child Custody Jurisdiction and Enforcement Act is made applicable to grandparent visitation right actions brought under chapter 752, F.S. Subsection (7) of the bill encourages the courts to consolidate pending actions under chapter 752, F.S., and chapter 61, F.S.

Pursuant to subsection (8), a grandparent visitation order may be modified if there is a substantial change of circumstances or there is a showing that the visits are causing material harm to the

⁵ Statutes and the court rules only require referral of family law matters to mediation if the circuit provides for family mediation programs or services.

parent-child relationship. Subsection (9) limits the right to petition for grandparent visitation to once in every 2-year period. An exception is provided upon good cause shown based on a showing of material harm which was not known at the time of the earlier petition. Subsection (10) is a verbatim restatement of the current s.752.01(3), F.S., which excludes grandparent rights from the provisions of chapter 63, F.S., relating to adoption, with the exception if the child is being adopted by a stepparent.

Subsection (11) states that actions brought under chapter 752, F.S., are subject to the attorney fee provisions in s. 57.105, F.S., relating to frivolous claims or defenses.

Section 2 repeals s.752.01, F.S., relating to the current grandparent visitation provisions that have been declared unconstitutional.

Section 3 amends s. 752.015, F.S., relating to public policy regarding mediation of grandparent visitation disputes, to incorporate the cross-reference to the new s. 752.011, F.S.

Section 4 amends s.752.07, F.S., to incorporate the cross-reference to the new s. 752.011, F.S., so that the new specified “harm” standard will apply to terminate established grandparents visitation rights subsequent to an adoption of a child by a stepparent.

Section 5 amends ss. 39.01(46) and (50), F.S., relating to definitions for purposes of dependency proceedings. Great-grandparents are added to the list of persons who qualify as “next of kin.” It’s only significance is that when a child is taken into custody under chapter 39, F.S., a parent, caregiver or legal custodian must now also give (when requested) to the department or the court the names and addresses of the great-grandparents, if known. Great-grandparents are also added to the definition for “participant.” This means that although a participant is not a party to a proceeding under chapter 39, F.S., great-grandparents (like grandparents) must be given notice of any hearings involving their great-grandchild.

Section 6 amends s. 39.509, F.S., relating grandparent’s visitation rights in those cases where a grandchild has been adjudicated dependent and removed from parental custody. This section extends to great-grandparents visitation rights and obligations already accorded to grandparents under existing law.

Section 7 amends subsection (3) of 39.801, F.S., relating to notice and service in termination of parental right proceedings. This section extends to great-grandparents the rights already accorded grandparents with priority adoption rights to receive notice and services relating to a petition to terminate parental rights.

Section 8 amends s. 61.13, F.S., relating to child support, custody, and visitation. Specifically it amends subsection (2) to incorporate the cross-reference to the new s. 752.011, F.S. Therefore, the court will be required to use the specified harm standard in lieu of the “child’s best interest” standard to determine whether to grant grandparent or great-grandparent visitation. It also encourages the court to consolidate pending separate actions. In addition, subsections (4) and (6), are amended to extend to great-grandparents the following statutory rights already accorded grandparents:

- Compensation for extra visitation time in the event a custodial parent does not honor a visitation right (subsection (4)); and
- Prohibition against denial of visitation rights based on whether it is believed or the grandparent is actually infected with HIV (subsection (6)).

Subsection (7) which gave grandparents equal standing to those of parents in custody disputes has been repealed. This provision had been declared unconstitutional by the Florida Supreme Court.

Section 9 amends s. 63.0425, F.S., relating to grandparent's priority in adoption. First, the bill revises a grandparent's statutory right of priority in adoption to one of right of notice of an adoption. Second, it limits such notice to those grandparents with whom a child has lived at least 6 months during a 2-year period prior to the filing a termination of parental rights. Third, these provisions are made applicable to great-grandparents.

Section 10 amends s. 63.172, F.S., to extend to great-grandparents the same protection accorded currently to grandparents regarding continuation of established visitation rights after termination of parental rights and the adoption of a child by the other parent or close relative.

Section 11 provides for the act to take effect on July 1, 2003.

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:

The bill implicates a parent's fundamental right to raise a child free from governmental interference as implicitly protected by the Fourteenth Amendment of the *United States Constitution*, and explicitly protected by the right of privacy provision in article 1, section 23 of the *Florida Constitution*. There must a compelling state interest to justify the governmental interference with such fundamental right. *See e.g., Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 (2000) (plurality opinion; *See also Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998). Although the bill stresses the importance of preserving the parent-child relationship and requires a finding of requisite harm, the bill permits the court to grant visitation over a parent's objection. The bill implicitly carves out an exception for parents in married relationships regardless of stability or lack thereof in that no independent statutory right to grandparent visitation exists in that scenario. However,

the courts have indicated that any provision that treats differently parents who are equally fit based on marital status whether divorced, widowed or unmarried may be subject to a constitutional challenge.

Some of the provisions of the bill implicate services or programs that may be affected by the ongoing 4-year phase-in implementation of the 1998 Constitutional Revision 7 to Article V of the *Florida Constitution*. See ch. 2000-237, L.O.F. The appointment of a guardian ad litem, family law mediation services and psychological evaluations are available to some degree or another throughout the court system and their funding sources vary from state, federal and local levels. These services or programs will undergo scrutiny as the Legislature determines what constitute constitutionally mandated elements of a state-funded court system and what services or programs currently part of the court system are required or optionally funded at the local level.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill could generate an increased number of filings for statutory right to visitation by both or either sets of grandparents⁶ (and great-grandparent's). However, the requisite threshold finding of harm, the limit on the number of petitions within a two-year period and the imposition of sanctions for attorney's fees and costs may deter frivolous or unfounded filings. The parties, particularly, the parents may incur additional costs associated with attorney's fees, mediation services, and court-ordered evaluations.

C. Government Sector Impact

This bill may impact judicial workload and may necessitate additional judicial resources to conduct the preliminary and final evidentiary hearings, to appoint guardians ad litem, and to provide access to psychological evaluators in the pro-se or indigent cases. The bill does not address who will or should bear the costs associated with the discretionary appointment of a guardian ad litem, the mandated mediation, and the psychological evaluation if needed. Family court mediation programs are locally supported through county appropriations. The current resources of the GAL programs statewide are limited such that only about 50% of dependent children are actually represented. Judicial reeducation and training may be required to alert judges to the change in standards from "best interest" to "material harm" in determinations regarding grandparent and great-grandparent visitation as arise solely under chapter 61 or 752, F.S., and whether visitation is to a parent or a grandparent. In addition, family law rules and forms relating to this issue will have to be amended to reflect the changes in the bill.

⁶ Census Survey Report reflected almost 150,000 grandparents acting as caregivers for grandchildren. Florida-specific data is based on the 2000 U.S.

VI. Technical Deficiencies:

There is redundancy in several sections of the bill which add the term “great-grandparents” to the new provisions of chapter 752, F.S. The term ‘great-grandparents’ is already included in the definition of ‘grandparents’ in s. 752.001, F.S.

VII. Related Issues:

Read together, subsections (3) and (4) of section 1 of the bill suggest that if evidence of harm is found and whether or not a guardian ad litem is appointed, family law mediation is mandated. This appears somewhat in conflict with the stated policy in s. 752.015, F.S., chapter 44, F.S., and the family court rules that only require participation in family law mediation programs or services if they are available. The bill does not address what occurs in the event that there are no mediation programs or services available, and the parties can not afford such services.

Under the bill, the criteria for the threshold finding of specified harm may actually trigger an abuse report or involvement by the Department of Children and Families under chapter 39, F.S. (relating to delinquency and dependency). The bill cross-references the definition for “harm” as provided in s. 39.01, F.S. In such case, the proceedings may be governed by chapter 39, F.S., in lieu of chapter 752, F.S., which in turn may activate a parent’s right to legal representation and other due process considerations.

VIII. Amendments:

None.