The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL:	CS/SB 1052
INTRODUCER:	Children, Families, and Elder Affairs Committee and Senator Joyner
SUBJECT:	Grandparent Visitation
DATE:	March 12, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Walsh	CF	**Fav/CS**
2.			JU	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Senate Bill 1052 prescribes a procedure by which a grandparent may be awarded reasonable visitation when a parent has denied visitation, if the grandparent can demonstrate that the denial of visitation has caused or is likely to cause "demonstrable harm to the minor's health, safety, or welfare." In assessing demonstrable harm, the court must consider the totality of the circumstances, including certain specified factors. The bill provides for modification and enforcement of an award of visitation.

The bill repeals s. 752.01, F.S., which prescribes the current law on grandparent visitation rights, and which has been found to be largely unconstitutional by Florida courts. The bill also repeals s. 752.07, F.S., relating to grandparent rights after adoption by a stepparent.

This bill substantially amends s. 752.015, creates ss. 752.011 and 752.071, and repeals ss. 752.01 and 752.07 of the Florida Statutes.

II. Present Situation:

Over the last several years, courts have scrutinized laws that give grandparents the right to visit with their grandchildren over the objection of the parents. Multiple courts have struck down these laws as unconstitutional as they are written or applied because they infringe on the parents' constitutional right to raise their child free from government interference. Today there are approximately 35 states with valid grandparent visitation statutes.[1]

In Florida, grandparents' rights to visitation and custody are addressed in chs. 752 and 61, F.S., as well as in s. 39.509, F.S.

Chapter 752, F.S.
The Legislature enacted ch. 752, F.S., titled "Grandparental Visitation Rights," in 1984, giving grandparents standing to petition the court for visitation in certain situations. At its broadest, s. 752.01(1), F.S., required visitation to be granted when the court determined it to be in the best interests of the child and one of the following situations existed:

- One or both of the child's parents were deceased;
- The parents were divorced;
- One parent had deserted the child;
- The child was born out of wedlock; or
- One or both parents, who were still married, had prohibited the formation of a relationship between the child and the grandparent(s).[2]

Florida courts have considered the constitutionality of s. 752.01, F.S., on several occasions and have "'consistently held all statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child standard . . . to be unconstitutional.'"[3] The courts' rulings are premised on the fact that the fundamental right of parenting is a long-standing liberty interest recognized by both the United States and Florida constitutions.[4]

To date, almost all of the provisions in s. 752.01, F.S., have been found to be unconstitutional, although these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

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[1] The Senate Committee on Judiciary recently published a report that provides a comprehensive analysis of the issues relating to grandparent rights, as well as recommendations as to how grandparent rights might be constitutionally legislated. This analysis draws substantially from this report. Senate Committee on Judiciary, *Grandparent Visitation Rights, Interim Report 2009-120* (October 2008), available at http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf (last visited March 6, 2009).

[2] See ch. 93-279, Laws of Fla. (s. 752.01, F.S. (1993)). Subsequent amendments by the Legislature removed some of these criteria. See s. 752.01, F.S. (2008).

[3] *Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d DCA 2006) (quoting *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004)).

[4] In 1980, Florida's citizens approved the addition of a privacy provision in the state constitution, which provides greater protection than the federal constitution. Specifically, Florida's right to privacy provision states: "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." FLA. CONST. art. I, s. 23.

Chapter 61, F.S.
The courts have also struck down two grandparent rights provisions in ch. 61, F.S., which governs divorce and parental responsibility for minor children. In 2000, the Florida Supreme Court struck down s. 61.13(7), F.S.,[5] which granted grandparents custodial rights in custody or dissolution of marriage proceedings.[6]

In 2004, the Florida Supreme Court struck down the statutory provision that awarded reasonable grandparent visitation in a dissolution proceeding if the court found that the visitation would be in the child's best interest.[7] Based on the rationale of earlier Florida cases, the Court declared the provision "unconstitutional as violative of Florida's right of privacy because it fails to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation into the parental privacy rights."[8]

Section 39.509, F.S.
When a child has been adjudicated dependent and removed from the physical custody of his or her parent(s), the child's grandparents are entitled to reasonable visitation, unless visitation is not in the best interests of the child.[9] The statute provides that when the child is returned to the custody of his or her parent, the visitation rights granted to a grandparent must be terminated.[10]

None of the court rulings that have dealt with grandparent visitation rights have affected a grandparent's right to petition for visitation and custody in proceedings under ch. 39, F.S., possibly because the right is limited to the time the child is not in the custody of the parent(s).[11]

III. Effect of Proposed Changes:

Senate Bill 1052 prescribes a procedure by which a grandparent may petition the court for reasonable visitation when a parent has denied visitation. The bill delineates the procedure as follows:

- A grandparent must file a verified **petition** alleging that the denial of visitation has caused or is likely to cause "demonstrable harm to the minor's health, safety, or welfare;"
- The court must hold a **preliminary hearing** to determine whether the grandparent has made a *prima* facie showing[12] of harm resulting from denial of visitation;

[5] The subsection read that "[i]n any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having the same standing as parents for evaluating what custody arrangements are in the best interest of the child." Section 61.13(7), F.S. (1997).
[6] *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000).
[7] *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004). Specifically, s. 61.13(2)(b)2.c., F.S. (2001), provided: "The court may award the grandparents visitation rights with a minor child if it is in the child's best interest. Grandparents have legal standing to seek judicial enforcement of such an award. This section does not require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor do grandparents have legal standing as 'contestants' . . ."
[8] *Id.* at 37-38.
[9] Section 39.509, F.S.
[10] Section 39.509(4), F.S.
[11] See *T.M. v. Department of Children and Families*, 927 So.2d 1088 (1st DCA 2006).
[12] The term *prima facie* means "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary (8th ed. 2004).

- If the court finds that there is no *prima facie* evidence of harm resulting from denial of visitation, the court must dismiss the petition and award reasonable attorney's fees and costs;
- If the court finds that there is *prima facie* evidence of harm resulting from denial of visitation, the court may appoint a guardian ad litem and must order the matter to **mediation**;
- If mediation fails, the court may order a **home-study investigation or a professional evaluation** of the child, unless such information is already available; and
- After conducting a **hearing**, if the court finds by clear and convincing evidence that the denial of visitation is likely to cause harm and that visitation will mitigate or alleviate the harm, the court may award reasonable visitation to the grandparent.

In assessing demonstrable harm, the court must consider the totality of the circumstances, including the following factors:

- The love, affection, and other emotional ties existing between the minor and the grandparent;
- The length and quality of the prior relationship between the minor and the grandparent;
- Whether the grandparent established, or attempted to establish, ongoing personal contact with the minor;
- The reasons the parent made the decision to end contact or visitation which had been previously allowed by the parent;
- Whether there has been demonstrable significant mental or emotional harm to the minor as the result of disruption in the family unit;
- The existence or threat of mental injury to the minor as defined in s. 39.01, F.S.;
- The present mental, physical, and emotional needs and health of the minor;
- The present mental, physical, and emotional health of the grandparent;
- The recommendations of the minor's guardian ad litem, if one is appointed;
- The results of the home study investigation or professional evaluation of the minor;
- The preference of the minor, if the minor is determined to be of sufficient maturity to express a preference;
- If a parent is deceased, any written testamentary statement by the deceased parent requesting that visitation with the grandparent be granted, although the absence of such a testamentary statement does not provide evidence that the deceased parent would have objected to the requested visitation;
- Whether the parents of the minor disagree on whether to allow, or the extent of, grandparent visitation;
- Whether the visitation will materially harm the parent-child relationship; and
- Such other factors as the court considers necessary in making its determination.

The bill encourages courts to consolidate grandparent visitation matters with separate but concurrently pending matters relating to child support and parenting plans (s. 61.13, F.S.) in order to minimize the burden of litigation on the minor and the parties.

An order for grandparent visitation may be modified if there has been a substantial change in circumstances and modification is in the best interests of the child.

A grandparent may only file a petition requesting visitation once during any 2-year period, except for good cause shown that denial of visitation has or is likely to cause harm in a way that was not known to the grandparent at the time of a previous filing.

The bill allows a grandparent to file a motion for enforcement of visitation if the child's parent unreasonably denies or interferes with visitation that has been granted to the grandparent. The bill specifies the following procedure:

- The court must direct the parties to mediation and set a hearing on the motion;
- After mediation, the mediator must submit a record of the mediation termination and a summary of the parties' agreement, if any, to the court, and the court must enter an order reflecting the agreement, if any;
- After hearing, if the court finds that visitation has been unreasonably denied or interfered with, the court must enter an order providing one or more of the following:
    - A specific visitation schedule;
    - Visitation that compensates for the visitation denied or otherwise interfered with;
    - Assessment of reasonable attorney's fees, mediation and court costs against the parent.

If the court finds that the motion for enforcement has been unreasonably filed, it may assess fees and costs against the grandparent.

The bill provides that grandparent visitation cannot be granted subsequent to a final order of adoption except as provided in the bill. The bill creates s. 752.071, F.S., to provide that, following the adoption of a minor child by a stepparent or close relative, the stepparent or close relative may petition the court to terminate an order granting grandparent visitation and the court may terminate the order unless the grandparent demonstrates that visitation continues to be justified.

The bill specifies that actions for grandparent visitation are governed by s. 57.105, F.S., relating to attorney's fees and sanctions, and that venue is in the county where the child primarily resides, unless venue is otherwise governed by Florida statute.

The bill repeals s. 752.01, F.S., which prescribes the current law on grandparent visitation rights, and which has been found to be largely unconstitutional by Florida courts. The bill also repeals s. 752.07, F.S., relating to grandparent rights after adoption by a stepparent.

The bill provides that it is to become effective upon becoming law.

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 the fundamental right of a parent to raise his or child free from governmental interference and, as such, it may be subject to constitutional scrutiny, under the highest standard of review available: the strict scrutiny standard.[13]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office if the State Courts Administrator (OSCA), this bill will increase (1) judicial workload; (2) the number of preliminary hearings to be scheduled and conducted; and (3) the potential assignment of additional guardians ad litem and mediators. In addition, the bill will require family law forms to be updated. Also, although the bill does not specify who will pay for the proposed home-study investigation or professional evaluation, the court may be required to allocate the initial expense of such evaluation. (See Rule 12.200(a)(1)(M) of the Florida Family Law Rules of Procedure).[14]

The fiscal impact of this legislation cannot be accurately determined due to the unavailability of data needed to establish with specificity the increase in judicial and court workload.[15]

VI. Technical Deficiencies:

None.

[13] See Senate Committee on Judiciary, *supra* note 1, for a detailed explanation of the constitutionality of grandparent visitation statutes.
[14] Office of the State Courts Administrator, *Judicial Impact Statement, SB 1052* (February 9, 1009).
[15] *Id.*

VII. Related Issues:

At line 73, the bill permits the court to order a "home-study investigation" or a "professional evaluation" of the minor pursuant to the Florida Family Law Rules of Procedure (Family Law Rules). Rule 12.200(a)(1)(M) of the Family Law Rules allows a court at a case management conference to, *inter alia*, "refer the cause for a home study or psychological evaluation," but neither term is defined. The term home study is also used in the context of child welfare proceedings (s. 39.521, F.S.) and adoption proceedings (s. 63.092, F.S.), where the requirements are specified. The nature of the evaluation contemplated by the bill may be unclear.

In *Wade v. Hirschman*, 903 So.2d 928 (Fla. 2005), the Florida Supreme Court held that in all cases of modification of a custody order, a two-part "substantial change test" should be applied. The substantial change test requires the petitioner to show that there has been a substantial, material and unanticipated change in circumstances since the original custody determination *and* that the child's best interests justify changing custody. The bill does not appear to require the application of this test for the modification of a grandparent visitation order.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families and Elder Affairs on March 11, 2009
The CS for SB 1052 makes clarifying amendments with respect to the appointment of guardians ad litem and to family mediation.

B. Amendments:

None.