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 Judiciary Committee

BILL:	CS/CS/SB 1052
INTRODUCER:	Judiciary Committee, Children, Families, and Elder Affairs Committee, and Senator Joyner
SUBJECT:	Grandparental Visitation
DATE:	April 16, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Walsh	CF	**Fav/CS**
2.	Daniell	Maclure	JU	**Fav/CS**
3.			JA	
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:

This bill prescribes a procedure by which a grandparent may be awarded reasonable visitation with a minor 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 has been found largely unconstitutional by Florida courts. The bill also repeals s. 752.07, F.S., relating to grandparental rights after adoption by a stepparent.

This bill substantially amends section 752.015, Florida Statutes. This bill creates sections 752.011 and 752.071, Florida Statutes. This bill repeals sections 752.01 and 752.07, Florida Statutes.

II. Present Situation:

Development of Grandparent Visitation Rights[1]

Under the United States' common law, there was no legal right to nonparent visitation. The concept behind the common law was to preserve parental autonomy. There was also a common law presumption that parents act in their child's best interest. Changes in family composition, combined with an increase in the lobbying power for the elderly, led state legislatures to begin prescribing grandparent visitation rights in the 1960s. By 1994, all 50 states had some form of grandparent visitation statute.[2] To date Congress has not enacted a uniform grandparent visitation rights law, which has left in place a "potpourri" of state laws.[3] 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. As of 2007, 23 state supreme courts had ruled on the constitutionality of their grandparent visitation statutes, with the majority finding their statutes constitutional; however, courts in several large states, Florida included, have held their grandparent visitation statutes unconstitutional 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.

Grandparent Visitation Rights in Florida

The Florida Legislature first addressed grandparent visitation in 1978 by amending ch. 61, F.S., to allow courts to award grandparent visitation in a dissolution of marriage proceeding.[4] However, in practice the changes did not did not produce the intended effect because Florida courts ruled that grandparents, for the most part, did not have standing to petition for visitation.[5]

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

Chapter 752, Florida Statutes

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,

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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 on how grandparent rights might be constitutionally legislated. This analysis draws substantially from this report. Comm. on Judiciary, Fla. Senate, *Grandparent Visitation Rights* (Interim Report 2009-120) (Oct. 2008), *available at* http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf (last visited April 9, 2009).

[2] Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 16 (Jan. 2003); Maegen E. Peek, *Grandparent Vistitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 FLA. L. REV. 321, 326 (2001).

[3] Maegen E. Peek, *supra* note 1, at 333.

[4] Maegen E. Peek, *supra* note 1, at 354. The first statute was s. 61.13(2)(b), F.S., which later became the equivalent to s. 61.13(2)(b)2.c., F.S. The same year, the Legislature enacted s. 68.08, F.S., which allowed courts to grant grandparent visitation upon the death or desertion of one of the parents.

[5] *See Shuler v. Shuler*, 371 So. 2d 588 (Fla. 1st DCA 1979).

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).[6]

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.'"[7] 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.[8]

In 1996, the Florida Supreme Court addressed its first major analysis of s. 752.01, F.S., in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). In *Beagle*, the Court determined that s. 752.01(e), F.S., which allowed grandparents to seek visitation when the child's family was intact, was facially unconstitutional. The Court announced the standard of review applicable when deciding whether a state's intrusion into a citizen's private life is constitutional:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least restrictive means.[9]

The Court held that "[b]ased upon the privacy provision in the Florida Constitution, . . . the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."[10]

To date, almost all of the provisions in s. 752.01, F.S., have been found to be unconstitutional,[11] although these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

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[6] 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).
[7] *Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d DCA 2006) (quoting *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004)).
[8] 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.
[9] *Beagle*, 678 So. 2d at 1276 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).
[10] *Id*.
[11] See *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d DCA 1999); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000).

Chapter 61, Florida Statutes

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., which granted grandparents custodial rights in custody or dissolution of marriage proceedings.[12] In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Court recognized that when a custody dispute is between two fit parents, it is proper to use the best interests of the child standard. However, when the dispute is between a fit parent and a third party, there must be a showing of detrimental harm to the child in order for custody to be denied to the parent.[13]

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.[14] 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."[15]

Section 39.509, Florida Statutes

When a child has been adjudicated dependent and is removed from the physical custody of his or her parents, the child's grandparents are entitled to reasonable visitation, unless visitation is not in the best interests of the child.[16] Section 39.509(4), F.S., 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.

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., where the issue of the child's health and welfare and possibly the parents' fitness is already at issue before the court.[17]

Troxel v. Granville

The U.S. Supreme Court ruled on the issue of grandparent visitation and custody rights in 2000 when the Court struck down a Washington state law as unconstitutional as applied. In *Troxel v.*

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[12] 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).

[13] *Richardson*, 766 So. 2d at 1039.

[14] *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' . . ."

[15] *Id.* at 37-38.

[16] Section 39.509, F.S.

[17] *See T.M. v. Department of Children and Families*, 927 So. 2d 1088 (1st DCA 2006).

Granville, 530 U.S. 57 (2000), the Court found the Washington law[18] to be "breathtakingly broad" within the context of a "best interest" determination.[19] The Court noted that no consideration had been given to the decision of the parent, the parent's fitness to make decisions had not been questioned, and no weight had been given to the fact that the mother had assented to some visitation.[20] Based on these observations, the Court found the Washington statute unconstitutional as applied because "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[21] The Court did not hold, however, that all nonparental visitation statutes were facially unconstitutional, instead leaving such a determination to be made by the states on a case-by-case basis.[22]

After the *Troxel* decision there continues to be debate in state courts regarding grandparent visitation due, in part, to the lack of a concrete standard because of the plurality decision by the Court.

III. Effect of Proposed Changes:

This bill prescribes a procedure by which a grandparent of an unmarried minor may petition the court for reasonable visitation with the minor when a parent has denied visitation. The bill specifies that there is a rebuttable presumption that a fit parent's decision to deny visitation is in the child's best interest. 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," and include the specific facts and circumstances upon which visitation is sought;
- The court must hold a preliminary hearing to determine whether the grandparent has made a *prima facie*[23] showing of demonstrable harm resulting from the denial of visitation;
- If the court finds that there is no *prima facie* evidence of demonstrable harm resulting from the denial of visitation, the court must dismiss the petition and award reasonable attorney's fees and costs to be paid by the petitioner to the respondent;
- If the court finds that there is *prima facie* evidence of demonstrable harm resulting from the denial of visitation, the court may appoint a guardian ad litem and shall order the matter to mediation. However, upon motion or request of a party, the court shall not refer the case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process;
- If mediation fails or mediation is not ordered, the court may order a home-study investigation or a professional evaluation of the child; and

[18] The Washington statute provided that "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code s. 26.10.160(3).
[19] *Troxel*, 530 U.S. at 67.
[20] *Id*. at 67-69, 71.
[21] *Id*. at 72-73.
[22] *Id*. at 73.
[23] 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).

- After conducting a hearing, the court may award reasonable visitation to the grandparent, if the court finds by clear and convincing evidence that the denial of visitation has caused, or is likely to cause, demonstrable harm to the minor's health, safety, or welfare, and that visitation will mitigate or alleviate the harm.

In assessing demonstrable harm, the court must consider the totality of the circumstances affecting the physical, mental, and emotional well-being of the minor, including:

- 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 that 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.;[24]
- 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, material, and unanticipated change in circumstances and modification is found to be in the best interests of the child.

[24] Section 39.01(42), F.S., defines "mental injury" as "an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior."

A grandparent may only file a petition requesting visitation once during any two-year period, unless good cause is shown that the denial of visitation has or is likely to cause demonstrable 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 minor's parent unreasonably denies or interferes with visitation that has been granted to the grandparent. The bill specifies that upon the filing of the motion, the court shall direct the parties to mediation and set a hearing for the motion. However, upon motion or request of a party, the court shall not refer the case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process, and the case would proceed directly to hearing. After mediation, if it is ordered, 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 the parties do not reach an agreement in mediation, the issue proceeds to a hearing. If, after the hearing, the court finds that visitation has been unreasonably denied or interfered with, the court shall enter an order providing for one or more of the following:

- A specific visitation schedule;
- Visitation that compensates for the visitation denied or otherwise interfered with; or
- Assessment of reasonable attorney's fees, mediation costs, and court costs against the parent.

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

The bill provides that grandparent visitation cannot be granted subsequent to a final order of adoption, except as provided in s. 752.071, F.S., which is created by the bill. The bill provides 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 pursuant to s. 752.011, F.S. The bill does not define the term "close relative."

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

The bill amends s. 752.015, F.S., to provide that upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process. The bill also makes technical and conforming changes.

The bill repeals s. 752.01, F.S., which prescribes the current law on grandparent visitation rights, and 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 an effective date of October 1, 2009.

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 fundamental right of parenting is a long-standing liberty interest recognized by both the United States and Florida constitutions. Because child-rearing – inherent in Florida's right to privacy – is considered a fundamental right, when determining whether something unconstitutionally infringes on that right, courts have used the highest standard of review available: the strict scrutiny standard. As explained in the Present Situation of this analysis, Florida courts have consistently held all statutes that compel visitation or custody with a grandparent based solely on the best interests of the child standard to be unconstitutional. However, this bill does not compel visitation based on the best interests of the child standard, but instead appears to codify certain aspects of Florida courts' opinions by:

- Allowing any grandparent to be able to petition for visitation, regardless of the parents' marital status;
- Creating a rebuttable presumption that a fit parent acts in the best interests of the child when denying or allowing visitation; and
- Requiring the grandparent to prove by clear and convincing evidence that the failure to allow visitation has caused or is likely to cause demonstrable harm to the child's health, safety, or welfare.

The United States Supreme Court has not held that all grandparent visitation statutes are unconstitutional, instead leaving such a determination to be made by the states on a case-by-case basis. Because Florida has a specific right to privacy, it has a higher hurdle to cross than many other states in enacting a valid grandparent visitation rights statute. Montana also has an explicit right to privacy in its state constitution. Specifically, the Montana Constitution provides:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.[25]

[25] MT. CONST. art II, s. 10.

Additionally, Montana is one of 35 states with a valid grandparent visitation statute.[26] It appears, based on Montana, that a state may be able to have a constitutional grandparent visitation statute, even if the state has an explicit right to privacy.

The constitutionality of the bill will likely turn on whether the court believes the bill strikes the proper balance between a parent's fundamental right to child-rearing and a grandparent's showing of demonstrable harm to the child if visitation is not granted.[27]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Courts Administrator (OSCA), this bill may increase the number of preliminary hearings the court must schedule and conduct, as well as the number of guardians ad litem and mediators assigned by the court. Additionally, the bill does not specify who will pay for the home-study investigation or professional evaluation if one is required by the court. Pursuant to Rule 12.200(a)(1)(M) of the Florida Family Law Rules of Procedure, the court may allocate the initial expense for the study.[28]

The fiscal impact of this legislation, however, cannot be accurately determined due to the unavailability of data needed to establish with specificity the increase in judicial and court workload.[29]

VI. Technical Deficiencies:

None.

VII. Related Issues:

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. Additionally, Rule 12.363 of the Family Law Rules provides guidelines for the evaluation of a minor child, including appointment of a mental health professional or other

[26] *See* Mont. Code Ann. s. 40-9-102.
[27] See Comm. on Judiciary, *supra* note 1, for a detailed explanation of the constitutionality of grandparent visitation statutes.
[28] Office of the State Courts Administrator, *Judicial Impact Statement, SB 1052* (Feb. 9, 2009) (on file with the Senate Committee on Judiciary).
[29] *Id.*

expert and providing specified reports. The term home study is also used in the context of child welfare proceedings (s. 39.521(2)(r), F.S.), and adoption proceedings (s. 63.092(3), F.S.), where the requirements of the home study are specified. The nature of the evaluation contemplated by the bill may be unclear because of the many references that are in current law.

VIII. Additional Information:

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

CS/CS by Judiciary on April 15, 2009:
The committee substitute:

- Changes a reference from "grandparent" to "petitioner" to conform to other provisions in the bill;
- Changes a reference from "grandchild" to "minor" to conform to other provisions in the bill;
- Amends the standard for modifying a visitation order to codify current case law, requiring a "substantial, material, and unanticipated change in circumstances";
- Adds language requiring a court to not order the parties to mediation if it finds that there has been a history of domestic violence that would compromise the mediation process;
- Changes the effective date to October 1, 2009, in order to allow the Florida Supreme Court time to amend family law forms; and
- Makes technical and conforming changes.

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

B. Amendments:

None.