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 Committee on Children, Families, and Elder Affairs

BILL:	CS/SB 384
INTRODUCER:	Children, Families, and Elder Affairs Committee and Senator Abruzzo
SUBJECT:	Grandparent Visitation Rights
DATE:	April 1, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Preston	Hendon	CF	**Fav/CS**
2.			JU	
3.			RC	
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:

CS/SB 384 prescribes a procedure by which a grandparent of a minor child whose parent or parents are deceased, missing, or in a permanent vegetative state may petition for visitation with a grandchild, if the grandparent can demonstrate that the parent is unfit or there has been significant harm to the grandchild. The bill provides a list of factors for the court to consider in assessing best interest of the child and material harm to the parent-child relationship. The bill provides for mediation as a first resort and the court may appoint a guardian ad litem for the child.

The bill places a limit on the number of times a grandparent can file an original action for visitation, absent a real, substantial, and unanticipated change of circumstances. The bill also amends additional statutes that govern child custody and visitation, and provides for attorney's fees and costs to be paid by the petitioner to the respondent if a petition for visitation is dismissed.

The bill adds great-grandparents to statutes defining next of kin, and to statutes which require notice of legal proceedings to grandparents.

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 of a child by a stepparent.

The bill is not expected to have a significant fiscal impact on state government and has an effective date of July 1, 2013.

This bill substantially amends the following sections of the Florida Statutes: 39.01, 39.509, 39.801, 63.0425, 63.172 and 752.015. This bill creates sections 752.011 and 752.071, of the Florida Statutes. This bill repeals sections 752.01 and 752.07, of the Florida Statutes.

II. Present Situation:

History of Grandparent Visitation Rights

Under common law, a grandparent who was forbidden by his or her grandchild's parent from visiting the child was normally without legal recourse.[1] Nonparent visitation statutes which did not exist before the late 1960s, now allow grandparents to petition courts for the right to visit their grandchildren. Before the passage of these statutes, grandparents – like all other nonparents – had no right to sue for court-ordered visitation with their grandchildren.[2]

The common law rule against visitation by nonparents sought to preserve parental autonomy, as a value in and of itself, as a means of protecting children and to serve broader social goals:

- Courts historically expressed reluctance to undermine parents' authority by overruling their decisions regarding visitation and by introducing outsiders into the nuclear family.[3] This common law tradition received constitutional protection in the 1920s when the Supreme Court held that a parent's right to direct the upbringing of his or her children was a fundamental liberty interest.[4]
- Under common law, courts presumed that fit parents act in the child's best interests and recognized that conflicts regarding visitation are a source of potential harm to the children involved.[5]
- Common law tradition understood parental authority as the very foundation of social order. Courts generally relied on ties of nature to resolve family disagreements rather than imposing coercive court orders.[6]

In response, state legislatures began to enact statutes to permit grandparents and sometimes other nonparents to petition for visitation rights. State legislatures passed the first wave of grandparent

[1] 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). *Also see* Karen J. McMullen, *The Scarlet "N:" Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, ST. JOHN'S LAW REVIEW, 83 (2009).
[2] *Id*.
[3] *Id*.
[4] See *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[5] 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).
[6] *Id*.

visitation statutes between 1966 and 1986. By the early 1990s, all of the state legislatures had enacted grandparent visitation laws that expanded grandparents' visitation rights. Today, the statutes generally delineate who may petition the court and under what circumstances and then require the court to determine if visitation is in the child's best interests.[7]

The enactment of grandparent visitation statutes responded primarily to two trends: demographic changes in family composition and an increase in the number of older Americans and the concurrent growth of the senior lobby.[8] Grandparent visitation resonated with the public as well, who responded to sentimental images of grandparents in the popular media and the conclusions of social scientists who focused on the importance of intergenerational family ties. During the 1990s, many Americans also focused on drug abuse problems of parents, significant poverty levels, and increasing numbers of out-of-wedlock children. Also during this period, Americans looked less to traditional social institutions, such as churches, and more toward the legal system as a way to solve their family problems.[9]

Policy related to grandparent visitation enacted based on social science and politics soon led to constitutional concerns because grandparent visitation statutes implicate the Fourteenth Amendment in two ways:

- The substantive due process rights of parents to direct the upbringing of their children in as much as parents' decisions are challenged, and
- The right to equal protection because many grandparent visitation statutes differentiate among parents based upon family status.[10]

The pertinent clauses in the Fourteenth Amendment state that a state shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[11] 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.[12]

Grandparent Visitation Rights in Florida

Until 1978, Florida grandparents did not have any statutory right to visit their grandchild. Currently, provisions relating to grandparents‟ rights to visitation and custody are contained in chs. 752 and 39, F. S. Provisions previously in ch. 61, F.S., have been removed because they were ruled unconstitutional.

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[7] *Id*.
[8] Karen J. McMullen, *The Scarlet "N:" Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, ST. JOHN'S LAW REVIEW, 83 (2009).
[9] *Id.*
[10] *Id*.
[11] U.S. CONST. amend. XIV, § 1.
[12] Comm. on Judiciary, The Florida Senate, *Grandparent Visitation Rights*, (Interim Report 2009-120) (Oct. 2008). a*vailable at* http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf. (last visited February 28, 2013).

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, 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).[13]

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."[14] 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.[15]

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.[16]

[13] 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).
[14] *Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d DCA 2006) (quoting *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004)).
[15] 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.
[16] *Beagle*, 678 So. 2d at 1276 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

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."[17]

To date, almost all of the provisions in s. 752.01, F.S., have been found to be unconstitutional,[18] although these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

Chapter 61, Florida Statutes

The courts have also struck down two grandparent rights provisions in ch. 61, F.S., which governs dissolution of marriage 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.[19] 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.[20]

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.[21] 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."[22]

Chapter 39, 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.[23] 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.

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[17] *Id.*
[18] 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).
[19] 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).
[20] *Richardson*, 766 So. 2d at 1039.
[21] *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. . ."
[22] *Id*.
[23] Section 39.509, F.S.

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.[24]

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. Granville*, 530 U.S. 57 (2000), the Court found the Washington law[25] to be "breathtakingly broad" within the context of a "best interest" determination.[26] 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 agreed to some visitation.[27] 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."[28]

The grandparent visitation cases decided by state supreme courts after *Troxel* all seem to recognize that the legal landscape has changed. Although the *Troxel* Court may have endeavored to leave room for the states to resolve questions relating to grandparent visitation on a case-by-case basis, the plurality did provide guidance and clarification, as the state courts all acknowledge:[29]

- When they consider grandparents' visitation petitions, courts must presume a fit parent's decisions regarding visitation to be in his or her child's best interests, and they must accord some weight to these decisions. Likewise, in crafting statutes, legislatures must incorporate this presumption in favor of parents.
- Courts can no longer (at least explicitly) employ the contrary presumption that visitation with their grandparents generally benefits grandchildren. Statutes that presume grandparent visitation to be in a child's best interests violate parents' constitutional rights.
- Although there appears to have been a movement among some state supreme courts to strike down statutes as unconstitutional because they failed to require a showing of harm, other courts disagreed with this view and instead upheld the statutes' constitutionality and the use of the best-interests standard to determine if visitation was appropriate. In *Troxel*, the plurality neither condemned nor endorsed the harm standard, and it found the use of the best-interests standard alone, without some deference to parents, insufficient.[30]

[24] See *T.M. v. Department of Children and Families*, 927 So. 2d 1088 (1st DCA 2006).
[25] 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." WA. REV. CODE s. 26.10.160(3).
[26] *Troxel v. Granville,* 530 U.S. at 67.
[27] *Id*.
[28] *Id*.
[29] 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)
[30] *Id*.

The Effect of Court Ordered Visitation on Children and Their Families

Requests for visitation by third parties over parental objections raise a multitude of issues. Increasing attention appears to be focused on the effects of those requests for visitation on the children involved. In an analysis of *Troxel v. Granville,* one author stated:

> I am not suggesting that relationships must be conflict free in order to be viewed as being emotionally beneficial to those participating in them; however, when the relationships between members of the extended family and members of the nuclear family are so strained and when the ability to resolve those disputes is so impaired that one side or the other feels compelled to seek judicial intervention, the possibility that children will benefit from a court-imposed solution is remote. Where, over parental objection, visitation with a third party has been court ordered, the conflict between the parent and the individual whose bid for visitation the court has honored exacts a toll on the child(ren)....[31]

Another legal scholar has stated that while grandparents can be wonderful resources for children, parents, not courts, should decide with whom their children should spend time and that a court reversal of a parent's decision raises problems:

> Allowing courts to overrule parents is not good for children. The best interest of the child standard may sound appealing but, as an untethered guide to deciding where parental autonomy ends and the state's authority begins, it is not, in fact, in the best interest of the child. The main point here is that parental autonomy is not the enemy of the child; it is the best way this society knows to protect the child's best interest.[32]

One commentator recognizes that grandparent visitation is a highly sensitive issue, especially in Florida where the senior citizen population is so large. While there are some bad grandparents, the pervasiveness of the stereotype of loving grandparents makes it hard to envision a situation where a child would not benefit from contact with his or her grandparents. For that reason, many courts have succumbed to sentimentality when deciding whether or not to grant grandparents visitation rights.[33]

A more objective view has been taken by the Florida Supreme Court. Both the Federal and Florida constitutions convey rights of privacy. Among those privacy rights lies the right of parents to raise their child as they see fit. Case law has long addressed this right and, while it may seem unfair or unwise to deny loving grandparents the right to visit their grandchild, based on a long line of federal and state precedent it is clear that the Florida Supreme Court is correct in deciding that, absent some showing of harm to the child, a court cannot override a fit parent's decision. Case law shows that, absent a grandparent proving harm to the child, visitation is rarely granted.[34]

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[31] David A. Martindale, *Troxel v. Granville: A Nonjusticiable Dispute*, 41 FAM. CT. REV. 88 (Jan. 2003)
[32] Katharine T. Bartlett, *Grandparent Visitation: Best Interests Test in Not in Child's Best Interest*, WEST VIRGINIA LAW REVIEW. 102:723 (2000).
[33] Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know The Way To Carry The Sleigh Through The Wide And Drifting Law?* FLORIDA LAW REVIEW (Apr. 2001)
[34] *Id*.

A statute which demands such a showing of harm, while technically correct because it adheres to judicial rulings, will do little to help grandparents attain visitation with their grandchildren. The better solution would be to shift the focus away from judicial intrusions upon families and instead help families resolve their disputes themselves through mediation and counseling.[35]

Harm to a Child

As a result of court rulings that Florida's grandparent visitation statutes were unconstitutional because the state may not intrude upon the parents" fundamental right to raise their children except in cases where the child is threatened with harm", legislation filed for consideration during past legislative sessions seeking to grant grandparent visitation has required a showing of harm when a grandparent petitions the court for visitation.

Chapter 39, F.S., relating to proceedings relating to dependent children defines the term "abuse" as:

> any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or **harm** that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions…[36]

Chapter 39, F.S. defines provides that "harm"

> to a child's health or welfare can occur when any person inflicts or allows to be inflicted upon the child physical, mental, or emotional injury. In determining whether harm has occurred, the following factors must be considered in evaluating any physical, mental, or emotional injury to a child: the age of the child; any prior history of injuries to the child; the location of the injury on the body of the child; the multiplicity of the injury; and the type of trauma inflicted. Such injury includes, but is not limited to…[37]

Chapter 39, F.S., also provides that:

> Any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter… shall report such knowledge or suspicion… immediately to the department's central abuse hotline… Personnel at the department's central abuse hotline shall determine if the report received meets the statutory definition of child abuse, abandonment, or neglect. Any report meeting one of these definitions shall be accepted for the protective investigation…[38]

[35] *Id*.
[36] Section 39.01(2), F.S.
[37] Section 39.01(32), F.S.
[38] Section 39.201(1) and (2), F.S.

III. Effect of Proposed Changes:

While Florida presently has a statute providing grandparents a means to petition for visitation with their minor grandchildren, much of that law has been declared unconstitutional by the Florida Supreme Court. There is only one unchallenged criterion in the present law, providing that a grandparent may petition for visitation when a parent has deserted the child.

The bill repeals the current statute and creates a new and more detailed provision for such a petition in light of Florida Supreme Court decisions. Some related provisions in the dependency statute, the dissolution statutes, and the adoption statutes are changed to conform to the legislation.

The bill also places great-grandparents in the same position as grandparents in regard to notices affecting adoption, dependency, and next of kin status.

Section 1. of the bill delineates the procedure for filing a petition for visitation as follows:

- A grandparent of a minor child whose parent or parents are deceased, missing, or in a permanent vegetative state, may petition the court for visitation with the child;
- The court must hold a preliminary hearing to determine whether the grandparent has made a prima facie[39] showing of parental unfitness or that the child has suffered significant harm;
- If the court finds that there is no prima facie evidence of parental unfitness or harm to the child, 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 parental unfitness or that the child has suffered significant harm, the court may appoint a guardian ad litem and shall order the matter to mediation; and
- After conducting a final hearing, the court may award reasonable visitation to the grandparent, if the court finds by clear and convincing evidence that:
    - The parent is unfit or there is danger of significant harm to the child;
    - Visitation is in the best interest of the child; and
    - Visitation will not materially harm the parent-child relationship.

In assessing best interest of the child, the court must consider the totality of the circumstances affecting the mental and emotional well-being of the child, including:

- The love, affection, and other emotional ties existing between the child 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;

[39] 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).

- Whether there has been demonstrable significant mental or emotional harm to the minor as the result of some disruption in the family unit such as a divorce or the death of a parent;
- The existence or threat of mental injury to the child as defined in s. 39.01, F.S.;[40]
- The present mental, physical, and emotional 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 any psychological evaluation of the child;
- The preference of the child, if the child 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 child disagree on whether to allow, or the extent of, grandparent visitation; and
- Such other factors as the court considers necessary in making its determination.

In assessing material harm to the parent-child relationship, the court shall consider the totality of the circumstances affecting the parent-child relationship, including:

- Whether there have been previous disputes between the grandparent and the parent or parents over childrearing or other matters related to the care and upbringing of the minor child;
- Whether visitation would materially interfere with or compromise parental authority;
- Whether visitation can be arranged in a manner that does not materially detract from the parent-child relationship;
- Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the minor child with the intent that the child benefit from the relationship;
- Whether the requested visitation would expose the child to conduct, moral standards, experiences, or other factors that are inconsistent with influences provided by the parent;
- The nature of the relationship between the parent and the grandparent;
- The reasons that the parent made the decision to end contact or visitation between the minor child and the grandparent which was previously allowed by the parent;
- The psychological toll of visitation disputes on the minor child; and
- Such other factors as the court considers necessary in making its determination.

Additional provisions in section 1 of the bill include:

- Part II of ch. 61, the Uniform Child Custody Jurisdiction and Enforcement Act, applies to actions brought under s. 752.011, F.S., as created by the bill;
- The courts are encouraged 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;

[40] 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."

- An order for grandparent visitation may be modified if there has been a substantial change in circumstances and modification is found to be in the best interests of the child;
- 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 mental or emotional harm in a way that was not known to the grandparent at the time of a previous filing;
- 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; and
- Venue is in the county where the child primarily resides, unless venue is otherwise governed by chs. 39, 61, or 63, F.S.

Section 2. of the bill amends s. 752.015, F.S,. to make technical and conforming changes.

Section 3. of 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 pursuant to s. 752.011, F.S.

Section 4. of the bill amends s. 39.01, F.S., to include "great-grandparents" in the definition of the term "next of kin."

Section 5. of the bill amends s. 39.509, F.S., relating to grandparents' rights when a grandchild has been adjudicated dependent to include great-grandparents.

Section 6. of the bill amends s. 39.801, F.S., relating to termination of parental rights, to add great-grandparent to the list of persons that must be served notice of the date, time, and place of the advisory hearing for the petition to terminate parental rights.

Section 7. of the bill amends s. 63.0425, F.S., relating to grandparents' right to notice, to add great-grandparents to the persons who must be provided notice of a hearing on a petition for adoption.

Section 8. of the bill amends s. 63.172, F.S., to add great-grandparents to the list of individuals considered to be "close relatives" and to add great-grandparents to rights delineated under chapter 752, F.S., when a child is adopted.

Section 9. of the bill repeals ss. 752.01 and 752.07, F.S., relating to action by grandparent for right of visitation and the effect of adoption of the child by a stepparent on the right of visitation.

Section 10. of the bill provides an effective date of July 1, 2013.

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 court 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 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 significant mental or emotional harm to the child.

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.[41]

Additionally, Montana is one of 35 states with a valid grandparent visitation statute.[42] 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.

[41] MT. CONST. art II, s. 10.
[42] See MT. CODE ANN. s. 40-9-102.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

State Government

The bill authorizes the appointment of a guardian ad-litem under certain circumstances. The Guardian ad-Litem Program is funded by the state and currently only serves 70 percent of the eligible children. Increasing the workload of the program would create an indeterminate fiscal impact on the state. The State Courts System could see an increase in judicial hearings under the bill.

Local Government

Service of process is provided primarily by county sheriff's offices. The bill requires service of process to grandparents and great grandparents of children under certain proceedings. The bill is silent as to who would pay for this service. If it falls on the sheriff offices, the bill would create a fiscal impact on county governments.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Line 60 of the bill does not reference a "fit" parent.

Line 78 of the bill requires the court to order the family to mediation. It does not include an opt out for situations where there has been a history of domestic violence. The bill might be amended to add: 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.

Lines 79-80 of the bill provide that if mediation between involving the parents and the grandparent fails to yield a resolution, the court is required to order a psychological evaluation of the child absent the availability of comparable evidence of the findings expected from an evaluation. There does not appear to be a nexus between a failure of parents and grandparents to reach agreement during mediation and requiring the child to be psychologically evaluated.

The bill is silent on the fact that if a court finds that there is prima facie evidence that the minor child is suffering or is threatened with suffering demonstrable significant mental or emotional harm a result of not being allowed to visit a grandparent, the judge will be required to call the child abuse hotline under the provisions of ch. 39, F.S. This may result in the Department of Children and Families commencing a child protective investigation pursuant to s. 39.301, F.S.

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 April 1, 2013:

The CS makes a number of changes to the bill including:

- Narrowing the pool of grandparents who would be eligible to petition for visitation to those with a grandchild whose parent or parents are deceased, missing or in a permanent vegetative state;
- Removing the requirement that the child be psychologically evaluation if mediation fails,
- Removing the requirement that the court establish a rebuttable presumption that a parent's decision to deny visitation with a grandparent is in the child's best interest and that the court accord special weight to the parent's decision; and
- Renaming a list of factors in the bill to be considered by the court when determining harm to a child to a list of factors to be considered by the court when determining best interest of the child.

B. Amendments:

None.