

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 789 Rights Of Grandparents And Great-Grandparents

**SPONSOR(S):** Rouson

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 750

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 0 N	Cary	Bond
2) Healthy Families Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Grandparents are denied visitation with their minor grandchildren in a variety of situations. Historically, no relief was available for grandparents were denied contact with their minor grandchildren. Any third-party intrusion into matters concerning a family unit of parents and children was disfavored, including grandparent visitation, since the common law recognized parents as the ultimate family authority. Changes in the traditional family, however, prompted Florida to address grandparent visitation as early as 1978, when grandparents were first taken into consideration in dissolution proceedings. In 1984, the Legislature expanded grandparents' visitation, giving an independent right of action to grandparents for visitation with their minor grandchildren, outside of a dissolution proceeding.

Since the first grandparent visitation law was enacted, both the United States Supreme Court and the Florida Supreme Court have considered grandparents' visitation statutes in light of constitutional privacy concerns. Since the Florida Constitution has an express right of privacy provision, the Florida Supreme Court has determined that such statutes will be reviewed using the highest level of scrutiny - the 'compelling state interest' standard. In other words, the state must show a 'compelling state interest' in regulating the conduct governed by the statute. As a result, the courts have struck down most of current law devoted to grandparents' visitation rights on privacy grounds for failure to meet this standard. At the same time, in the context of those cases, the court has provided a framework within which a statute creating grandparents' visitation rights might be enacted.

This bill creates a limited grandparent visitation statute. The bill provides that 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. The petitioner must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child. The bill provides for mediation as a first resort. If that is ineffective, the court may, if it deems necessary, appoint a guardian ad litem for the child. The bill supplies a list of factors for the court to consider in its final determination, including the previous relationship the grandparent had with the child, the findings of the guardian ad litem, the potential disruption to the family, the consistency of values between the grandparent and the parent, the reasons visitation ended, and other considerations.

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 addresses other statutes that govern child custody and visitation, and provides for attorney fees.

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

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

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.<sup>1</sup> 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.

#### Effect of the Bill

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 technical provisions in the dependency statute, the dissolution statutes, and the adoption statutes are changed to conform to the new law.

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

#### Grandparent Visitation Rights - Petition

Section 752.01(1), F.S., currently provides that a grandparent may petition for visitation rights when:

- Visitation is in the best interest of the minor child, and
- A parent of the child has deserted the child.<sup>2</sup>

Subsection (1) also includes two grounds for awarding grandparent visitation which have been determined to be unconstitutional, but remain in the statute:

- Section 752.01(1)(a), F.S.,<sup>3</sup> was determined to be unconstitutional by the decision in *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998).<sup>4</sup>
- Section 752.01(1)(c), F.S.,<sup>5</sup> was determined to be unconstitutional by the decision in *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).<sup>6</sup>

The bill repeals s. 752.01, F.S., and creates in lieu thereof, s. 752.011, F.S.

The new section provides that a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state may petition the court for visitation. Likewise, a grandparent may petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. The petitioner must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child.

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<sup>1</sup> See subsequent sections for discussion.

<sup>2</sup> Section 752.01(1)(b), F.S.

<sup>3</sup> Formerly s. 752.01(1)(b), F.S.

<sup>4</sup> The court held that the right of privacy in the Florida Constitution is a fundamental right and any statute that infringes on that right is subject to the "compelling state interest" test, the highest standard of review. The court determined that section (a), which provided for grandparent visitation in the event of dissolution of the parents, failed that test, because the standard set out in the statute was determination of the "best interest" of the child, without determining "proof of demonstrable harm to the child." *Von Eiff v. Azicri*, 720 So.2d 510, 514 (Fla. 1998).

<sup>5</sup> Formerly s. 752.01(1)(d), F.S.

<sup>6</sup> The section is facially unconstitutional "because it constitutes impermissible state interference with parental rights protected" by the Florida Constitution. *Beagle v. Beagle*, 678 So.2d 1271, 1272 (Fla.1996).

The new section also directs the family to mediation, furnishes adjudication standards, and directs procedures for a petition seeking grandparent visitation with a minor 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.<sup>7</sup> Additionally, s. 752.015, F.S., is amended to provide a cross-reference to the new statute.

At the final hearing on whether to grant or deny grandparent visitation, the grandparent must show by clear and convincing evidence that the parent is unfit or there has been significant harm to the child. If so, then visitation may only be awarded if visitation is in the best interest of the child and if it will not harm the parent-child relationship. In determining best interest, the court is directed to consider:

- The love, affection, and other emotional ties existing between the minor child and the grandparent, including those resulting from the relationship that had been previously allowed by the child's parent;
- The length and quality of the previous relationship between the minor child and the grandparent, including the extent to which the grandparent was involved in providing regular care and support for the child;
- Whether the grandparent established ongoing personal contact with the minor child prior to the death of the parent;
- The reasons that the surviving parent cited to end contact or visitation between the minor child and the grandparent;
- Whether there has been demonstrable significant mental or emotional harm to the minor child as a result of disruption in the family unit from which the child derived support and stability from the grandparental relationship, and whether the continuation of that support and stability is likely to prevent further harm;
- The existence or threat to the minor child of mental injury as defined in s. 39.01, F.S.;
- The present mental, physical, and emotional health of the minor child;
- The present mental, physical, and emotional health of the grandparent;
- The recommendations of the minor child's guardian ad litem, if one is appointed;
- The results of any psychological evaluation of the minor child;
- The preference of the minor child if the child is determined to be of sufficient maturity to express a preference;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent. The absence of such a testamentary statement does not provide evidence that the deceased parent would have objected to the requested visitation; and
- Such other factors as the court considers necessary in making its determination.

In determining material harm to the parent-child relationship, the court is directed to consider:

- Whether there have been previous disputes between the grandparent and the parent 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, including the quantity of time available for enjoyment of the parent-child relationship, and any other consideration related to disruption of the schedule and routines of the parent and the minor child;
- 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 minor 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;

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<sup>7</sup> Recommendations of the Committee on Judiciary, The Florida Senate, *Interim Report 2009-120*, Grandparent Visitation Rights (October 2008).

- The psychological toll of visitation disputes on the minor child; and
- Such other factors as the court considers necessary in making its determination.

The term "clear and convincing evidence" creates a higher requirement for proof than is normally required in a civil action. The term means:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.<sup>8</sup>

The bill also addresses other statutes that govern child custody and visitation, and provides for attorney fees:

- Article II of ch. 61, F.S., the Uniform Child Custody Jurisdiction and Enforcement Act,<sup>9</sup> applies to actions brought under the provisions of the bill.
- Courts are encouraged to consolidate actions pending under s. 61.13, F.S.,<sup>10</sup> with those brought under s. 752.011, F.S.

#### Grandparent Visitation Rights - Remarriage or Adoption

Currently, s. 752.07, F.S., provides that in the event of a remarriage (in the case of one deceased parent) or if there is an adoption by a step parent, any existing visitation order in favor of a grandparent is unaffected, unless the grandparent has notice and an opportunity to be heard. It is currently silent as to who would be the proper party to bring any request to change visitation before the court. It also does not address adoption by a "close relative" under s. 63.172, F.S. The bill addresses these two issues in that it repeals s. 752.07, F.S., and creates s. 752.071, F.S. The new section provides that after adoption of a minor child by a stepparent or close relative, the adoptive parent may petition to terminate a previous order granting grandparent visitation. The burden is on the grandparent to show satisfaction of the criteria which would satisfy an original petition for visitation.

#### Great-Grandparents - Included as Next of Kin and Interested Parties

Generally, the bill adds great-grandparents to statutes defining next of kin, and to statutes which require notice of legal proceedings to grandparents:

- Currently, s. 39.01(45), F.S., defines "next of kin" to include an adult relative of a child who is a sibling, grandparent, aunt, uncle, or first cousin. The bill adds "great-grandparent" to the definition of "next of kin."
- Currently, s. 39.509, F.S., establishes a grandparent's reasonable visitation and other contact with a child who has been adjudicated a dependent child and taken from the parent's custody. The bill expands this entitlement to great-grandparents.
- Currently, s. 39.801(3)(a)5, F.S., provides that prior to termination of parental rights, notice must be given to a grandparent. The bill adds to existing law that a great-grandparent entitled to priority for adoption under s. 63.0425, F.S., is also entitled to notice.
- Currently, s. 63.0425, F.S., provides that a grandparent is entitled to notice concerning a termination of parental rights pending adoption. The bill adds to existing law that a great-grandparent who has had the child for at least 6 months within the 24 month period preceding

<sup>8</sup> *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

<sup>9</sup> Sections 61.501 - 61.520, F.S.

<sup>10</sup> Section 61.13, F.S., governs child support obligations and custodial arrangements for minor children in a dissolution proceeding.

the petition for termination is also entitled to notice of the hearing on the petition to terminate parental rights.

- Currently, s. 63.087(4), F.S., provides that a petition to terminate paternal rights pending an adoption must include, among other things, a certification of compliance with the requirements of s. 63.0425, F.S., regarding notice to grandparents of an impending adoption. The bill requires a certification of compliance regarding notice to great-grandparents of an impending adoption.
- Currently, s. 63.172(2), F.S., provides that the death of a parent and subsequent adoption of a minor child by a new spouse, or a close relative, does not terminate grandparental visitation.
- Currently, s. 39.6221(2), F.S., provides the court with guidance in establishing a permanent guardianship, including the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court may provide for the frequency and nature of visitation or contact between a child and his or her great-grandparents.
- Currently, s. 39.6231(3), F.S., provides the court with guidance in establishing permanent placement with a fit and willing relative, including the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court may provide for the frequency and nature of visitation or contact between a child and his or her great-grandparents.

The bill provides an effective date of July 1, 2014.

#### B. SECTION DIRECTORY:

Section 1 amends s. 39.01, F.S., relating to definitions.

Section 2 amends s. 39.509, F.S., relating to visitation rights of grandparents and great-grandparents.

Section 3 amends s. 39.801, F.S., relating to procedures and jurisdiction, notice, and service of process.

Section 4 amends s. 63.0425, F.S., relating to grandparent's or great-grandparent's right to notice.

Section 5 repeals s. 752.01, F.S., relating to action by grandparent for right of visitation and when a petition shall be granted.

Section 6 creates s. 752.011, F.S., relating to petition for grandparent visitation of a minor child.

Section 7 repeals s. 752.07, F.S., relating to effect of adoption of child by stepparent on right of visitation and when a right may be terminated.

Section 8 creates s. 752.071, F.S., relating to effect of adoption by stepparent or close relative.

Section 9 amends s. 39.6221, F.S., relating to permanent guardianship of a dependent child.

Section 10 amends s. 39.6231, F.S., relating to permanent placement with a fit and willing relative.

Section 11 amends s. 63.087, F.S., relating to a proceeding to terminate parental rights pending adoption and general provisions.

Section 12 amends s. 63.172, F.S., relating to effect of judgment of adoption.

Section 13 amends s. 752.015, F.S., relating to mediation of visitation disputes.

Section 14 provides an effective date of July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The United States Supreme Court has recognized the fundamental liberty interest parents have in the 'care custody and management' of their children.<sup>11</sup> The Florida Supreme Court has likewise recognized that decisions relating to child rearing and education are clearly established as fundamental rights within the Fourteenth Amendment of the United States Constitution.<sup>12</sup> These rights may not be intruded upon absent a compelling state interest.<sup>13</sup>

According to the Florida Supreme Court, when analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny:

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 intrusive means.<sup>14</sup>

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<sup>11</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>12</sup> *Beagle*, 678 So.2d at 1275. See also *Padgett v. Department of Health & Rehabilitative Servs.*, 577 So.2d 565, 570 (Fla. 1991).

<sup>13</sup> See, e.g., *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 637 (Fla. 1980) and *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. 5th DCA 2001).

<sup>14</sup> *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

The Florida Supreme Court has unequivocally announced that “the imposition, by the State, of grandparental visitation rights implicates the privacy rights of the Florida Constitution.”<sup>15</sup> Based on Florida’s constitutional privacy right, the Court then held that “the State may not intrude upon the parents’ fundamental right to raise their children except in cases where the child is *threatened with harm* . . .”<sup>16</sup> [Emphasis in original].

Furthermore, the Florida Supreme Court has held that privacy is a fundamental right and any statute that infringes on that right is subject to the ‘compelling state interest’ test, the highest standard of review. . . . It concluded that section 752.01(1)(a) failed that test because the circuit court must order visitation based on the best interest of the child, “without first requiring proof of demonstrable harm to the child.”<sup>17</sup>

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

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<sup>15</sup> *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

<sup>16</sup> *Von Eiff* at 514.

<sup>17</sup> *Belair v. Drew*, 776 So.2d 1105, 1106 (Fla. 5th DCA 2001).