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 Fiscal Policy

BILL:	CS/SB 368
INTRODUCER:	Fiscal Policy Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice) and Senators Abruzzo and Smith
SUBJECT:	Rights of Grandparents and Great-grandparents
DATE:	April 17, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Favorable**
2.	Preston	Hendon	CF	**Favorable**
3.	Harkness/Preston	Sadberry	ACJ	**Recommend: Fav/CS**
4.	Jones	Hrdlicka	FP	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 368 provides that a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state may petition for visitation with a grandchild. If only one parent is deceased, missing, or in a permanent vegetative state, the other parent must have been convicted of a felony or a violent offense in order for a grandparent to be able to petition for visitation. The court must find the grandparent has made a prima facie showing of parental unfitness or significant harm to the child, and if not, must dismiss the petition.

If the court finds that there is prima facie evidence that a parent is unfit or that there is significant harm to the child, the bill allows the court to appoint a guardian ad litem for the child and requires the court to order the family to mediation.

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 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 repeals s. 752.01, F.S., relating to grandparent visitation rights, which 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.

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]

States began to enact statutes to permit grandparents and sometimes other nonparents to petition for visitation rights. States passed the first wave of grandparent visitation statutes between 1966 and 1986. By the early 1990s, all states 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.[3]

In 2000, the U.S. Supreme Court found that a Washington statute providing for the petition of visitation at any time was unconstitutional because the Due Process Clause of the Fourteenth Amendment "protects the fundamental right that parents have to make the decision concerning the care, custody and control of their children."[4]

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 repealed because they were ruled unconstitutional.[5]

Chapter 752, Florida Statutes – Grandparent Visitation

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. Florida courts have considered the constitutionality of s. 752.01, F.S., on numerous 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."[6]

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[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). *See also* Karin 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*, 83 St. John's L. Rev. 83 (2009).
[2] *Id*.
[3] 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).
[4] *Id*. *Troxel v.Granville*, 530 U.S. 57, 66 (2000).
[5] Chapter 2008-61, L.O.F.
[6] *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004).

When a court reviews a statute granting grandparents visitation rights, it must determine if it meets a compelling state interest and does so through the least intrusive means. In 1996, the Florida Supreme 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.[7] The Court held that "the State may not intrude upon the parents' fundamental right of parents to raise their children except in cases where the child is threatened with harm."[8]

To date, almost all of the provisions in s. 752.01, F.S., have been found to be unconstitutional,[9] although these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

Chapter 39, Florida Statutes – Dependent Children

When a child has been adjudicated dependent and is removed from the physical custody of his or her parents, the child's grandparents have the right to unsupervised, reasonable visitation, unless visitation is not in the best interests of the child or would interfere with the goals of the case plan.[10] The court may deny grandparent visitation if it is not in the child's best interest or based on the grandparent's prior criminal history.

When the child is returned to the custody of his or her parent, the visitation rights granted to a grandparent must be terminated.[11]

Existing grandparent visitation with a child who has been adjudicated dependent does not automatically terminate if the court enters an order for a termination of parental rights. Grandparent visitation rights will only terminate if the court finds that continued grandparent visitation is not in the best interest of the child or visitation would interfere with the Department of Children and Families' goals of permanency planning for the child.[12] Before the court may terminate parental rights, notice must be provided to certain persons, including any grandparent entitled to priority for purposes of adoption.[13]

If the court determines that reunification with a parent and adoption are not in the best interest of the child, the child can be placed with a permanent guardian or with a fit and willing relative. The court must address a number of factors in the order for permanent guardianship or placement with a fit and willing relative, including the frequency and nature of visitation or contact between the child and his or her grandparents.[14]

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[7] *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).
[8] *Id*.
[9] *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).
[10] Section 39.509, F.S.
[11] *Id*. at (4).
[12] *Id*.
[13] Section 39.801(3)(a), F.S. A grandparent has the right to notice by the court if a child has lived with the grandparent for at least 6 out of 24 months immediately preceding the filing of a petition for termination of parental rights pending adoption. s. 63.0425(1), F.S.
[14] Sections 39.6221(2)(d) and 39.6231(3)(d), F.S.

III. Effect of Proposed Changes:

The bill makes numerous changes to laws relating to contact between grandparents and grandchildren.

Section 1 amends s. 752.001, F.S., to create definitions for the terms "missing" and "persistent vegetative state."

Section 2 repeals s. 752. 01, F.S, relating to action by grandparent for right of visitation.

Section 3 creates s. 752.011, F.S., relating to a petition for grandparent visitation of a minor child, to specify limited circumstances under which a grandparent may petition for visitation with a child. The newly created section authorizes grandparents to file a petition for visitation with a child if:

- The parents are deceased, missing, or in a permanent vegetative state; or
- At least one parent is deceased, missing, or in a permanent vegetative state and the other parent has been convicted of a felony or a violent offense.

When a petition for grandparent visitation is filed, the court will hold a preliminary hearing to determine whether a prima facie showing of parental unfitness or significant harm to the minor child exists. If the petitioner establishes a prima facie case, the court will order the case to family mediation and may appoint a guardian ad litem. If mediation does not successfully resolve the issue of grandparent visitation, the court shall proceed with a final hearing.

At the final hearing, the court will determine by clear and convincing evidence whether the parent is unfit or significant harm to the child exists, visitation is in the best interest of the minor child, and visitation will not materially harm the parent-child relationship.

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

- The love, affection, and other emotional ties between the child and the grandparent;
- The length and quality of the previous relationship between the child and the grandparent;
- Whether the grandparent established ongoing personal contact with the child before the death of the parent, before the onset of the parent's persistent vegetative state, or before the parent was missing;
- The reasons that the parent ended contact or visitation with the grandparent;
- Whether there has been significant and demonstrable mental or emotional harm to the minor child as a result of the disruption in the family unit, whether the child derived support and stability from the grandparent, and whether the continuation of such support and stability is likely to prevent further harm;
- The existence or threat to the minor child of mental injury;
- The present mental, physical, and emotional health of both the minor child and the grandparent;
- The recommendation of a guardian ad litem, if appointed;
- The result of any psychological evaluation of the minor child;
- The preference of the minor child if he or she is sufficiently mature;

- A written testamentary statement by the parent regarding visitation with the grandparent. The absence of a testamentary statement is not deemed to provide evidence that parent would have objected to the requested visitation; and
- Other factors that the court considers necessary in making its determination.

In assessing material harm to the parent and child relationship, the court must look at the totality of the circumstances affecting the parent-child relationship, including:

- Whether there have been previous disputes between the grandparent and the parent over childbearing 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 material 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 the disruption of the schedule and routine of the parent and 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 will 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 child's parent and the grandparent;
- The reasons cited by the parent in ending contact or visitation between the minor child and grandparent that was previously allowed by the parent;
- The psychological toll of visitation disputes on the minor child; and
- Other factors the court considers necessary in making its determination.

The Uniform Child Custody Jurisdiction and Enforcement Act, which governs the resolution of child custody between states, applies to determination of grandparent visitation.[15] The bill encourages consolidation of court determination of grandparent visitation and child custody, parenting, and time-sharing actions to minimize the burden of litigation on the parties. An order for grandparent visitation may be modified by showing that a substantial change in circumstances has occurred and the modification is in the best interests of the child.

The grandparent may file a petition once every 2 years, except on good cause shown that the minor child is suffering or may suffer harm caused by a parent's denial of grandparent visitation.

The bill does not provide for grandparent visitation with a minor child placed for adoption except as provided in s. 752.071, F.S., with respect to adoption by a stepparent or close relative.

Section 4 repeals s. 752.07, F.S., relating to the effect of the adoption of a child by a stepparent on a grandparent's right of visitation and when that right may be terminated.

Section 5 creates s. 752.071, F.S., relating to the effect of adoption by a stepparent or close relative, to authorize the stepparent to petition the court to terminate grandparent visitation,

[15] Part II, ch. 61, F.S.

unless the grandparent can show that the criteria authorizing visitation with a child who remains in parental custody still applies.

Section 6 amends s. 752.015, F.S., relating to mediation of visitation disputes, to replace rules promulgated by the Supreme Court with the Florida Family Law Rules of Procedure.

Section 7 provides an effective date of July 1, 2015.

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 United States Supreme Court has recognized the fundamental liberty interest parents have in the "care, custody and management" of their children.[16] 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 and that the fundamental liberty interest in parenting is specifically protected by the privacy provision in the Florida Constitution.[17] Consequently, any statute that infringes these rights is subject to the highest level of scrutiny and must serve a compelling state interest through the least intrusive means necessary.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Possible increased costs for private adoption attorneys due to adding great-grandparents to the list of relatives entitled to service of process on a notice of a petition to terminate parental rights.

[16] *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982).
[17] *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).

C. Government Sector Impact:

In its review of the original bill (SB 368), the Department of Children and Families identified a potential fiscal impact related to:

- Possible increased costs for Community-based Care lead agencies, subcontracted agencies, dependency case managers, and foster parents, associated with transporting or supervising great-grandparent visitation; and
- Possible increased costs for Children's Legal Services due to adding great-grandparents to the list of relatives entitled to service of process on a notice of a petition to terminate parental rights.

The department also estimated an increase in personal service of process costs. These costs are approximately $35 within the state, up to $180 for out-of-state, and $280 or higher internationally.[18]

Additionally, the Office of the State Courts Administrator indicated that the impact of the original bill (SB 368) on judicial workload was difficult to determine as the number of petitions to be filed as a result of the bill was unknown.[19]

The committee substitute narrows the circumstances under which a grandparent or may petition for visitation with a child. As a result, the bill does not have a discernable fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

There may be difficulty in implementing the provisions of the bill as they relate to a parent that is deceased, missing, or in a persistent vegetative state. For example:

- If both parents are deceased, missing, or in a persistent vegetative state, it may be moot for the court to award them attorney fees and court costs or order them to mediation.
- A number of factors the court is required to consider assume that a parent-child relationship exists. However, if the parents are deceased, missing, or in a persistent vegetative state, there is no parent-child relationship.
- The bill provides that a grandparent can only file a petition for visitation once during any 2-year period unless there has been a change in circumstances related to a parental decision to deny visitation. This appears unlikely to happen unless a missing parent returns or a parent in a persistent vegetative state recovers.

A judge would be required to call the child abuse hotline under the provisions of ch. 39, F.S., if the court finds that there is prima facie evidence that the minor child is suffering or is threatened

[18] Department of Children and Families, *2015 Agency Legislative Bill analysis for SB 368* (January 9, 2015); on file with the Senate Committee on Children, Families and Elder Affairs.
[19] Office of the State Courts Administrator, *2015 Judicial Impact Statement* (March 10, 2015); on file with the Senate Judiciary Committee.

with suffering demonstrable significant mental or emotional harm as a result of not being allowed to visit a grandparent, This may result in the department commencing a child protective investigation pursuant to s. 39.301, F.S.

The bill requires mediation, but does not contain an opt-out clause which provides protection against being ordered to mediation when there is evidence of domestic violence in the family as provided in s. 44.102(2)(c), F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 752.001 and 752.015.

This bill creates the following sections of the Florida Statutes: 752.011 and 752.071.

This bill repeals the following sections of the Florida Statutes: 752.01 and 752.07.

IX. Additional Information:

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

CS by Fiscal Policy on April 15, 2015:
As recommended by the Appropriations Subcommittee on Criminal and Civil Justice, the CS does the following:

- Creates a definition for the terms "missing" and "persistent vegetative state."
- Removes all of the provisions relating to grandparent visitation with minor children who are dependent under chapter 39, F.S.
- Makes technical changes to the bill.

B. Amendments:

None.