

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 149 Rights Of Grandparents and Great-Grandparents

SPONSOR(S): Rouson and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm	Bond
2) Children, Families & Seniors Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Grandparents are denied visitation with their minor grandchildren in a variety of situations. Historically, however, no relief was available for grandparents in such situations. 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, allowing grandparents to petition for visitation with their 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 due process and 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 and it may only regulate the conduct in the least restrictive means. 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. It 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 of parental unfitness or 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 a guardian ad litem, the potential disruption to the family, the consistency of values between the grandparent and the parent, and the reasons visitation ended.

The bill places a limit on the number of times a grandparent can file for visitation, absent a real, substantial, and unanticipated change of circumstances.

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, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 752, F.S., currently provides that grandparents and great-grandparents may petition for visitation rights with their minor grandchildren; however, the Florida Supreme Court and other Florida District Courts have declared much of this law unconstitutional.¹ The only provision in current law that has not been addressed by an appellate court provides that a grandparent may petition for visitation when a parent has deserted the child.²

Effect of the Bill

The bill repeals the current grandparent and great-grandparent visitation statute and creates a new, more detailed provision for grandparent visitation proceedings 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., provides that a grandparent or great-grandparent may petition for visitation rights when visitation is in the best interest of the minor child, and:

- The marriage of the child's parents has been dissolved;³
- A parent has deserted the child; or
- The child was born out of wedlock and not later determined to have been born within wedlock.⁴

Florida courts have declared two of current the statutory grounds for awarding grandparent visitation unconstitutional: when the marriage of the child's parents has been dissolved⁵ and when the child was born out of wedlock.⁶ However, these two provisions remain in the statute.

The decisions finding these two provisions unconstitutional were based on a consistent line of Florida Supreme Court decisions that struck down as unconstitutional, "statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child, without the required showing of harm to the child" ⁷ In *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla. 1996), the court held that a former provision to s. 752.01(1), F.S., which allowed for grandparent visitation when either of the child's parents prohibited a relationship between the child and grandparent, was unconstitutional, explaining 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."

The Florida Supreme Court extended the *Beagle* reasoning to hold another former provision to s. 752.01(1), F.S., unconstitutional in *Von Eiff v. Azicri*, 720 So.2d 510 (Fla.1998). The *Von Eiff* court 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 a provision that

¹ Section 752.01, F.S.; see Grandparent and Great-grandparent Visitation Rights - Petition section below for discussion.

² Section 752.01(1)(b), F.S.

³ Formerly s. 752.01(1)(b), F.S.

⁴ Formerly s. 752.01(1)(d), F.S.

⁵ *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So. 2d 1105 (Fla. 5th DCA 2005).

⁶ *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000).

⁷ *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004).

allowed for grandparent visitation when one or both parents of the child are deceased failed that test because the circuit court must order visitation based on the “best interest” of the child, and cannot award such visitation “without first requiring proof of demonstrable harm to the child.”

The constitutional infirmity identified in *Beagle* and *Von Eiff* and subsequent decisions finding other grandparent visitation provisions of s. 752.01, F.S., unconstitutional - specifically, the requirement that grandparental visitation be based solely on a best interest of the child analysis without first showing proof of harm to the child from the denial of visitation - remains in s. 752.01, F.S.

The bill repeals s. 752.01, F.S., and creates a new grandparent visitation provision in 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. A grandparent may also 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. If the petitioner makes such a preliminary showing, the court must direct the family to mediation and move toward a final hearing.

At the final hearing, 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 will not harm the parent-child relationship. In determining the best interest of the child, the court must consider:

- The love, affection, and other emotional ties existing between the child and the grandparent;
- The length and quality of the previous relationship between the 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 child prior to the death of the parent;
- The reasons that the surviving parent cited to end contact between the child and the grandparent;
- Whether there has been demonstrable significant mental or emotional harm to the 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 child of mental injury;
- The present mental, physical, and emotional health of the child and the grandparent;
- The recommendations of the child'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 mature enough to express a preference;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent. The absence of a testamentary statement does not provide evidence that the deceased parent would have objected to visitation; and
- Such other factors as the court considers necessary in making its determination.

In determining harm to the parent-child relationship, the court must 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 child;
- Whether visitation would interfere with or compromise parental authority;
- Whether visitation can be arranged in a manner that does not 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 child;

- Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the 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 child and the grandparent which was previously allowed by the parent;
- The psychological toll of visitation disputes on the child; and
- Such other factors as the court considers necessary in making its determination.

The term "clear and convincing evidence" creates a burden of proof that is greater than is normally required in a civil action.⁸ The Florida Supreme Court has explained,

clear 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.⁹

An order granting grandparent visitation may be modified if a substantial change circumstances has occurred and the modification is in the best interest of the child.

A grandparent can only file an original action for visitation once in a two-year period, unless a real, substantial, and unanticipated change of circumstances has occurred.

The bill also addresses other statutes that govern child custody and visitation:

- Part II of ch. 61, F.S., the Uniform Child Custody Jurisdiction and Enforcement Act,¹⁰ applies to actions brought under the provisions of the bill.
- Courts are encouraged to consolidate actions pending under s. 61.13, F.S.,¹¹ with those brought under s. 752.011, F.S.
- The new section does not apply in cases where a child is placed for adoption except in cases where the child is adopted by a step parent or a close relative.¹²

Additionally, s. 752.015, F.S., relating to mediation of visitation disputes, is amended to provide a cross-reference to the new section.

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 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 child by a stepparent or close relative, the adoptive parent may petition to terminate a previous order

⁸ The burden of proof in civil actions is generally the "greater weight of the evidence" standard. See Phillip J. Padovano, 5 Fla. Prac., Civil Practice § 16:1 (2014-2015 ed.).

⁹ *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

¹⁰ The Uniform Child Custody Jurisdiction and Enforcement act governs multi-state child custody disputes.

¹¹ Section 61.13, F.S., governs child support obligations and custodial arrangements for minor children in a dissolution proceeding.

¹² See Grandparent Visitation Rights - Remarriage or Adoption section below.

granting grandparent visitation. The burden is on the grandparent to show satisfaction of the criteria that would satisfy an original petition for visitation.

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

Generally, the bill adds great-grandparents to the definition of next of kin and to statutes that 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."¹³
- Currently, s. 39.509, F.S., entitles a grandparent to 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. 63.0425, F.S., provides that a grandparent who has had the child for at least six months within the 24-month period preceding the petition for termination 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 the petition for termination is also entitled to notice of the hearing on the petition to terminate parental rights.
- Currently, s. 39.801(3)(a)5, F.S., provides that prior to termination of parental rights, notice must be given to any grandparent entitled to priority for adoption under s. 63.0425, F.S. The bill adds that a great-grandparent entitled to priority for adoption under s. 63.0425, F.S., is also entitled to notice.
- Currently, s. 63.087(4), F.S., provides that a petition to terminate parental 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 child by a new spouse, or a close relative, does not terminate grandparental visitation. The bill adds great-grandparent visitation to those visitation rights that are not terminated in such cases.
- Currently, s. 39.6221(2), F.S., requires the court, in establishing a permanent guardianship, to include in its order the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court must also 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., requires the court, in establishing permanent placement with a fit and willing relative to include the frequency and nature of visitation or contact between a child and his or her grandparents. The bill provides that the court must 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, 2015.

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 actions by grandparent for right of visitation and when a petition shall be granted.

¹³ Chapter 39, F.S., relates to child abuse, dependency, and termination of parental rights proceedings.

Section 6 creates s. 752.011, F.S., relating to petitions 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 proceedings 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, 2015.

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 direct economic impact on the private sector.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic 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.¹⁴ 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.¹⁵ 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.¹⁶

The Florida Supreme Court has consistently held that the imposition, by the State, of grandparental visitation rights implicates a parent's privacy rights under the Florida Constitution.¹⁷ The Court has held that because the current provisions in the grandparent visitation statute did not require a finding of demonstrable harm to the child, it did not satisfy the compelling state interest standard.¹⁸

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

N/A

¹⁴ *E.g., Troxel v. Granville*, 530 U.S. 57, 65; *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁵ *Beagle*, 678 So.2d at 1275. Art. I, s. 23, Fla. Const. provides " 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. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

¹⁶ *See, e.g., Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 637 (Fla. 1980); *Belair v. Drew*, 776 So.2d 1105, 1107 (Fla. 5th DCA 2001); *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

¹⁷ *Beagle*, 678 So. 2d at 1275-76;

¹⁸ *Id.*; *Von Eiff*, 720 So.2d 510; *Saul*, 753 So. 2d 26 (Fla. 2000); *Sullivan*, 866 So. 2d 28.