

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 106

SPONSOR: Senator Campbell

SUBJECT: Grandparent Visitation

DATE: April 20, 2001 REVISED: \_\_\_\_\_

|    | ANALYST  | STAFF DIRECTOR | REFERENCE | ACTION    |
|----|----------|----------------|-----------|-----------|
| 1. | Matthews | Johnson        | JU        | Favorable |
| 2. |          |                |           |           |
| 3. |          |                |           |           |
| 4. |          |                |           |           |
| 5. |          |                |           |           |

## I. Summary:

This bill revises the substantive and procedural requirements underlying a petition for grandparent (and great-grandparent) visitation rights. The bill replaces the “best interest of the child” standard with the requisite determination of whether the minor is “suffering or threatened with suffering demonstrable significant mental or emotional harm” due to the parent’s prohibition against visitation, and whether court-ordered visitation would materially harm the parent-child relationship. Specifically, the bill:

- requires a preliminary evidentiary hearing to determine whether there is a threshold finding of specified harm due to the prohibition against grandparent visitation,
- provides for an award of attorneys’ fees and costs upon dismissal of a petition for lack of preliminary evidence of the specified harm to the minor,
- allows the court to appoint a guardian ad litem,
- requires court-ordered family mediation, and if the mediation is unsuccessful, court-ordered psychological evaluation of the minor,
- requires a final evidentiary hearing to determine whether to grant grandparent visitation under specified circumstances, and
- limits grandparent visitation rights actions to once every two years with an exception.

The bill also amends a few statutory provisions relating to existing grandparents rights in chapters 39, F.S., relating to dependency and delinquency, chapter 61, F.S., relating to dissolution, custody, and support, and chapter 63, F.S., relating to adoption, and extends those rights to great-grandparents.

The bill creates section 752.011, F.S., and amends the following sections of the Florida Statutes: 39.01, 39.509, 39.801, 61.13, 63.0425, 752.015, and 752.07. The bill also repeals s. 752.01, F.S.

## II. Present Situation:

All 50 states have some type of statutory provision allowing a grandparent or other third-party the right to petition for court-ordered visitation following the death of a parent, divorce or other specified circumstances. In Florida, grandparents have never had a common-law right to visit or to have custody of their grandchild. However, in 1978, the Florida Legislature enacted chapter 752, F.S., creating a free-standing statutory right to grandparents<sup>1</sup> to petition for visitation. That is, a grandparent or great-grandparent did not have to wait for a pending custody or other related legal matter in order to initiate a petition for visitation. The law required the court to grant visitation “when in the best interest of the child<sup>2</sup>,” and if one of the following parental or marital scenarios existed:

- a) one or both of the child’s parents are deceased;
- b) the parents are divorced;
- c) one parent has deserted the child;
- d) the child was born out of wedlock; or
- e) one or both parents, who are still married, have prohibited the formation of a relationship between the child and the grandparent(s).

In chapter 61, F.S., a statutory provision allows the court to award grandparents visitation rights with a child in a pending dissolution or custody proceeding if in the child’s best interest. See s. 61.13(2)(b), F.S. Moreover, grandparents may be awarded extra compensatory visitation time if the custodial parent denies visitation without proper cause (which is undefined in statute). In any case where the child is actually residing with the grandparent in a stable relationship, a grandparent is given the same statutory standing as a parent to evaluate a custody arrangement in the child’s best interest. See s. 61.13(7), F.S. Most of these statutory provisions have come under intense constitutional scrutiny in recent years.

Florida courts have held that certain provisions of chapter 752, F.S., are facially unconstitutional based on the finding that the provisions infringe on a *parent’s fundamental and constitutional right to parent a child free from governmental interference*. This right is protected under the Fourteenth Amendment of the *United States Constitution*, and under the explicit right of privacy provision in article 1, section 23 of the *Florida Constitution*. According to the Florida Supreme Court, parents have the right to limit or exclude a child’s association with a relative, including a grandparent, absent some showing of “substantial threat of demonstrable harm to the child’s health or welfare,” to warrant governmental intervention into a parent’s constitutional right of parenting. See *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998)(subsection (1)(a) of section 752.01, F.S. (1999), unconstitutional); *Beagle v. Beagle*, 678 So.2d 1271, 1272 (Fla. 1996)(subsection (1)(e) of section 752.01, F.S. (1999), unconstitutional); *Saul v. Brunetti*, 735 So.2d 1287(subsections (1)(a) and (1)(d) of section 752.01, F.S. (1999), unconstitutional).

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<sup>1</sup> Under chapter 752, F.S., the term grandparent included great-grandparent.

<sup>2</sup> In determining the “best interest of the child”, the court is required to consider: the grandparent’s willingness to encourage a close parent-child relationship, the nature and length of the prior grandparent-child relationship, the child’s preference, the child’s mental and physical health, and the grandparent’s mental and physical health.

In the 2000 legislative session, two bills relating to grandparent visitation rights were filed. The Legislature did not pass either of these two bills. *Consequently, the Florida court rulings declaring the provisions of Chapter 752, F.S., unconstitutional still stand.*

In June, 2000, the U.S. Supreme Court similarly held that a Washington statute granting grandparent right of visitation under a “best interest of the child” standard, without more, unconstitutionally infringed on a parent’s decision-making right regarding his or her child. See *Troxel v. Granville*, ---U.S.---, 120 S.Ct. 2054 (2000)(plurality opinion).

In August, 2000, the Florida Supreme Court found s. 61.13(7), F.S., relating to a grandparent’s custodial right, to be even more intrusive on a parent’s right to raise his or her child than the grandparent visitation statute. See *Richardson v. Richardson*, 25 Fla.L.Weekly S607 (Fla. Aug. 17, 2000). The Court held that *the provision vesting custody rights in grandparents was facially unconstitutional as it violated a natural parent’s fundamental right to rear his or her child as protected by the constitutionally recognized right of privacy in article I, section 23 of Florida’s Constitution.*

### III. Effect of Proposed Changes:

**Section 1** creates 752.011, F.S., to revise the substantive and procedural requirements underlying a petition for grandparent visitation rights.

Specifically, subsection (1) provides six scenarios under which a grandparent may petition for visitation rights: a) when one or both parents are deceased; b) when the parents are divorced or divorcing; c) when a parent has abandoned the minor; d) when a minor was born out of wedlock; e) when either or both parents have prohibited a relationship between the minor and the grandparent; and f) when a deceased parent executed a testamentary statement requesting grandparent visitation. A grandparent is able to pursue an action under the provisions of chapter 752, F.S., regardless of any other pending related matter.

Subsections (2) and (3) require the court to hold a preliminary evidentiary hearing on the petition. If the court finds that the minor is not suffering or threatened with suffering demonstrable significant mental or emotional harm due to the parental prohibition against contact or visitation with the grandparent, the court must dismiss the petition and award reasonable attorneys’ fees and costs to the prevailing party. If the court finds specified harm, the court may appoint a guardian ad litem. The matter must then be ordered to family mediation in accordance with chapter 44, F.S. (s.44.102)c), F.S.), and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure, relating to court-ordered mediation in family law matters but only in those circuits where family mediation programs or services are available. If the mediation is unsuccessful and no other comparable evaluative information is available, subsection (4) requires the court to order a minor to undergo a psychological evaluation in accordance with the Florida Family Law Rules of Procedure.

Subsection (5) allows the court to allow reasonable grandparent visitation rights after a final hearing. In contrast to the necessary findings in a preliminary hearing, the court must make two findings: a) clear and convincing evidence shows that the minor is “suffering or is threatened with suffering demonstrable significant mental or emotional harm” due to the parental decision to

prohibit visitation, and that the visitation will alleviate or mitigate the harm, and b) the visitation will not materially harm the parent-child relationship. Subsections (6) and (7) provide two extensive lists of criteria to consider in determining what constitutes “demonstrable significant mental or emotional harm,” and “material harm to the parent-child relationship,” respectively.

| <i>Factors to consider for finding existing or threatened demonstrable significant mental or emotional harm:</i>   | <i>Factors to consider for finding that visitation will not materially harm the parent-child relationship:</i>  |
|--|---|
| <ul style="list-style-type: none"> <li>C the existing love, affection and other emotional ties in the grandchild-grandparent relationship</li> <li>C the length and quality of prior grandchild-grandparent relationship, including care and support</li> <li>C established or attempted personal contacts with the grandchild</li> <li>C the reasons for the parental decision to end grandparent visitation previously permitted</li> <li>C the degree of support and stability of grandparent visitation in cases of significant mental or emotional harm caused by the disruption (death, divorce, disability, etc.) in the family unit</li> <li>C the existence or threat of mental harm</li> <li>C the impact of grandparent visitation in maintaining or facilitating contact between the child and a deceased parent=s extended family</li> <li>C the grandchild=s present mental, physical and emotional needs and health</li> <li>C a grandparent=s present mental, physical, and emotional health</li> <li>C guardian ad litem=s recommendation</li> <li>C a minor=s psychological evaluation</li> <li>C a grandchild=s expressed preference</li> <li>C a deceased parent=s written testamentary statement requesting grandparent visitation as helping to reduce or mitigate the grandchild=s mental or emotional harm resulting from a parent=s death.</li> <li>C other factors as the court deems necessary</li> </ul> | <ul style="list-style-type: none"> <li>C whether there have been previous disputes between grandparents and parents regarding the grandchild=s rearing or upbringing</li> <li>C whether grandparent visitation will materially interfere with parental authority</li> <li>C whether a grandparent visitation arrangement can be made to minimize material detraction from the quality and quantity of time in a parent-child relationship,</li> <li>C the primary purpose of seeking grandparent visitation is to continue or establish a beneficial relationship to the child,</li> <li>C the exposure of the child to conduct, experiences or other factors contrary to the parent=s influences</li> <li>C the nature of the parent-grandparent relationship</li> <li>C the reasons for the parental decision to end grandparent-grandchild visitation previously permitted</li> <li>C the psychological toll of the visitation disputes upon the child, and</li> <li>C other factors as the court deems necessary</li> </ul> |

Subsection (8) makes the Uniform Child Custody Jurisdiction Act applicable to grandparent visitation right actions brought under chapter 752, F.S.

Subsection (9) strongly encourages courts to consolidate separate actions brought independently under chapter 752, F.S., relating to independent grandparent visitation rights actions and chapter 61.13, relating to custody, support and visitation proceedings.

Subsection (10) allows for the modification of a grandparent visitation order upon a showing that the circumstances have changed substantially or that the visitation is materially harming the parent-child relationship.

Subsection (11) limits the frequency of actions for grandparent visitation to once in a 2-year period, except for good cause shown or imminent or existing demonstrable significant mental or

emotional harm caused by the parental decision to deny or limit visitation by the grandparent which was not known prior to the filing of an earlier action.

Subsection (12) is a verbatim restatement of the current subsection (3) under s. 752.01, F.S., which prohibits grandparent visitation rights for minors adopted under chapter 63, F.S., by someone other than a stepparent as provided in s. 752.07, F.S. Subsection (13) applies the provisions for attorney fees under s. 57.105, F.S., to actions brought under chapter 752, F.S.

**Section 2** repeals s.752.01, F.S., relating to the current provisions governing a grandparent's legal right to visitation.

**Section 3** amends s. 752.015, F.S., relating to public policy regarding mediation of grandparent visitation disputes, to incorporate the cross-reference to the new s. 752.011, F.S.

**Section 4** amends s.752.07, F.S., to incorporate the cross-reference to the newly created s. 752.011, F.S., so that the new criteria will apply to grandparents visitation rights as affected by the adoption of a child by a stepparent.

**Section 5** amends ss. 39.01(46) and (50), F.S, relating to definitions for purposes of dependency proceedings. Great-grandparents are added to the list of persons who qualify as "next of kin." It's only significance is that when a child is taken into custody under chapter 39, F.S., a parent, caregiver or legal custodian must now also provide (when requested) the department or the court with the names and addresses of the great-grandparents as are known. Great-grandparents are also added to the definition for "participant." This means that although not a party to a proceeding under chapter 39, F.S., great-grandparents (like grandparents) must be given notice of any hearings involving their great-grandchild.

**Section 6** amends s. 39.509, F.S., relating grandparents visitation rights in those cases where a grandchild has been adjudicated dependent and removed from parental custody. This section extends to great-grandparents visitation rights and obligations already accorded to grandparents under existing law.

**Section 7** amends subsection (3) of 39.801, F.S., relating to notice and service in termination of parental right proceedings. This section extends to great-grandparents the rights already accorded grandparents with priority adoption rights to receive notice and services relating to a petition to terminate parental rights.

**Section 8** amends s. 61.13, F.S., relating to child support, custody, and visitation. Specifically it amends subsection (2) to incorporate the cross-reference to the new s. 752.011, F.S. Therefore, the court shall use the criteria set forth in the s. 752.011, F.S., as the basis for awarding grandparent or great-grandparents visitation rights in lieu of the child's best interest standard. It also encourages the court to consolidate pending separate actions. In addition, subsections (4), (6), and (7) are amended to extend to great-grandparents the following rights already accorded grandparents:

Compensation for extra visitation time in the event a custodial parent does not honor a visitation right (subsection (4));

Prohibition against denial of visitation rights based on whether it is believed or the grandparent is actually infected with HIV (subsection (6)); and

Recognition that a grandparent with whom a child has resided has the same standing a parent to evaluate the custody arrangement in the child's best interest (subsection (7)).

**Section 9** amends s. 63.0425, F.S., relating to priority right to adopt to grandparents with whom a child has lived for at least 6 months. It extends to great-grandparents the priority right to adopt already accorded grandparents under existing law.

**Section 10** amends s. 63.172, F.S., relating to final judgments of adoption. It extends to great-grandparents the protection already accorded to grandparent against termination of visitation rights in those cases where a child is adopted by a surviving parent or a close relative.

**Section 11** provides for the act to take effect on July 1, 2001.

#### 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:

It is indeterminate whether this bill would be subject to and would survive a constitutional challenge. Although this bill stresses the importance of preserving the parent-child relationship, the bill allows a grandparent to petition for court-ordered visitation even in cases where the parents are fit, married and in a stable relationship. Both the federal and Florida courts have recognized that absent a finding of specified harm, a parent's fundamental right to raise his or her child free from governmental interference is protected under the Fourteenth Amendment of the *United States Constitution*, and in Florida, under the explicit right of privacy provision in article 1, section 23 of the *Florida Constitution*. In June 2000, the U.S. Supreme Court struck down a Washington state law on visitation as unconstitutional as applied. See *Troxel v. Granville* (99-0138) In *Troxel*, paternal grandparents had petitioned for expanded visitation rights to their deceased son's children. The biological mother had recently reduced the visitation from weekends to monthly visits. The Washington State Supreme Court had determined that although the grandparents had standing to petition for visitation under its state law, the state law, as written, *facially violated* a parent's constitutional right to raise a child without state interference. The U.S. Supreme Court subsequently agreed with the state supreme court that the statute violated the rights of parents to make decisions for what is best for their children free from governmental

interference. Finding the state statute ~~A~~breathtakingly broad,<sup>@</sup> the Court noted that the statute did not require a finding of harm and allows anyone to petition for forced visitation at any time under a best interest determination by the court. The Court added that no consideration was given to the decision of the parent, particularly noting that the parental fitness was not even at issue in the case. The Court avoided ruling that all nonparental visitation statutes would be facially unconstitutional and stated that that determination would need to be made on a case-by-case basis.

In addition, section 61.13(7), F.S., relating to grandparent custodial rights, is amended solely to extend those rights to great-grandparents. However, the provision remains constitutionally infirm for the reasons cited recently by the Florida Supreme Court. *See Richardson v. Richardson*, 25 Fla.L.Weekly S607 (Fla. Aug. 17, 2000). The Court in *Richardson* noted that the provision unconstitutionally gives grandparents equal standing with a child's natural parents simply based on the child's residence and stable relationship with the grandparent. Furthermore, it allows the custody dispute to be based solely on the "best interest of the child" without first determining whether the parent is unfit or whether there is any detriment or harm to the child. The Court held that *the provision violates a natural parent's fundamental right to rear his or her child* as protected by the constitutionally recognized right of privacy in article I, section 23 of Florida's Constitution.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

This bill could generate an increased number of filings for grandparent visitation since the bill restores a grandparents<sup>3</sup> (and great-grandparent's) right of visitation. However, the requisite threshold finding of harm and the sanctions for attorney's fees and costs may deter some of those filings.

### **C. Government Sector Impact:**

This bill may impact judicial workload and may necessitate additional judicial resources to conduct the preliminary and final evidentiary hearings, to appoint guardians ad litem, and to provide access to psychological evaluators in the pro-se or indigent cases. The bill does not address who will or should bear the costs associated with the discretionary appointment of a guardian ad litem, the court-ordered mediation, and the psychological evaluation if needed. Family court mediation programs are locally supported through county appropriations. The GAL program currently has limited resources to represent 50% of dependent children.

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<sup>3</sup> According to the 1997 March U.S. Census Survey Report, nearly 4 million children nationwide live in grandparent-maintained households. Florida-specific data is based on the 1990 U.S. Census, which reflected almost 200,000 grandchildren living in their grandparents' household. Official reports based on the 2000 U.S. Census will not be available until 2002.

The courts will also have to be educated as to when to apply the “best interest” standard or the “harm” standard for determining custodial rights and visitation rights depending on whether the proceeding arises under chapter 39, 61, or 752, F.S. In addition, family law rules and forms relating to this issue will have to be amended to reflect the changes in the bill.

## **VI. Technical Deficiencies:**

There may be a technical glitch in section 1 of the bill. Subsection (3) of the new section 752.011, F.S., refers to the court’s discretionary power to appoint a guardian ad litem but subsection (6) requires consideration of a minor’s guardian ad litem recommendations in determining the demonstrable significant mental or emotional harm. Similarly, subsection (6) requires a consideration of a psychological evaluation of the minor but a psychological evaluation of a child is only required if mediation fails under subsection (4). However, subsection (6)(j) of the new section 752.011, F.S., requires the court to consider the recommendations of a minor’s guardian ad litem report and the results of a psychological evaluation in assessing “demonstrable significant mental or emotional harm”, both of which may not be not ordered or available. [See p. 3, lines 15-22, and p. 6, lines 21-24.]

## **VII. Related Issues:**

Section 61.13(4), F.S., relating to grandparent visitation rights in pending dissolution and custody proceedings, is amended to include a general cross-reference to the criteria in the new section 752.011, F.S. However, it is not altogether clear exactly how much of the section must then be applied by the court to determine an award of grandparents or great-grandparents visitation in a dissolution or custody action arising under chapter 61, F.S. (e.g., whether the provisions governing the appointment, mediation and psychological evaluations apply). [See section 8, p. 14, line 28 through p. 15, line 13.]

Since the bill imposes a higher burden to prove harm sufficient to warrant government intervention into a parent’s constitutionally protected right to raise his or her child, the threshold finding of specified harm may actually trigger involvement by the Department of Children and Families, pursuant to chapter 39, F.S., relating to delinquency and dependency. The level of harm caused by a parent’s intentional decision to limit or deny grandparent visitation which is needed to petition and award grandparent visitation may approximate the level of harm requiring a report of abuse<sup>4</sup> under chapter 39, F.S.. Under the bill, there must be a finding of demonstrable significant mental or emotional harm. Moreover, one of the criteria used to make that determination is whether there is the “existence or threat of mental injury<sup>5</sup> to the minor as defined in s. 39.01, F.S.” Consequently, the proceeding would then be governed by chapter 39, F.S., which may activate a parent’s right to legal representation and other due process considerations.

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<sup>4</sup> Section 39.01(2), F.S., defines abuse as a willful or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.

<sup>5</sup> Mental injury is defined 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. See s. 39.01(43), F.S.



**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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