

STORAGE NAME: h0233.jo.doc
DATE: April 10, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 233
RELATING TO: Grandparent Visitation
SPONSOR(S): Representative Weissman and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
 - (2) FISCAL POLICY AND RESOURCES
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (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 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 includes great-grandparents within the circle of interested family members who may be awarded visitation rights, adoption rights such as priority in adoptions, and standing for evaluating custody arrangements in situations involving dependent children. This bill gives great-grandparents the same rights and preferences as grandparents in these areas.

This bill has an effective date of July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain: The bill provides authority to the court to award visitation to grandparents and great-grandparents under certain circumstances, over the objection of the parents of the child, even in intact families. The bill has the potential to create government interference in the right of parents to raise their children as they wish. The bill may adversely affect family relationships as a result of involvement by the courts in family decisions related to children.

B. PRESENT SITUATION:

History of Grandparent Visitation Laws in Florida

Prior to 1978, grandparents did not have any common law or statutory right to visit their grandchild. In 1978, the Florida Legislature provided for the courts to award grandparents visitation rights in an existing action for dissolution of marriage. See chapter 78-5, LOF. Grandparents, however, could not be made parties and had no legal standing as contestants to the action for dissolution of marriage.

In 1984, the Legislature enacted chapter 752, Florida Statutes, which established a grandparent's freestanding statutory right to exercise visitation with his or her grandchild. See chapter 84-64, LOF. That is, a grandparent could initiate an independent action to exercise grandparent visitation rights. The law required the court to grant visitation "when in the best interest of the child," and if one of the following parental or marital scenarios exists:

- M one or both parents are deceased [¹ 752.01(a), Florida Statutes (1999)];
- M the marriage of the parents has been dissolved [¹ 752.01(b), Florida Statutes (1999)]; or
- M a parent has deserted the child [¹ 752.01(c), Florida Statutes (1999)].

In 1990, the law was amended to provide an additional circumstance under which grandparents could seek visitation:

- M if the child was born out of wedlock and not later determined to be a child born within wedlock [¹ 752.01(d), Florida Statutes (1999)].

Factors were also provided for the court to consider in the determination of the best interest of the child, including: the grandparent's willingness to encourage a close parent-child relationship, the length and quality of the prior grandparent-child relationship, the child's preference, the child's mental and physical health, the grandparent's mental and physical health, and other such factors as are necessary in each case (chapter 90-273, LOF).

The chapter was further amended in 1993, to add another scenario under which grandparents could petition for visitation rights:

M if the minor child was living with both natural parents who were still married to each other and one or both parents have used their parental authority to prohibit a relationship between the child and the grandparents [' 752.01(e), Florida Statutes (1999)].

In 2000, the law was once again amended to remove two of the five situations in which grandparents could seek visitation with grandchildren as a result of court decisions holding those provisions unconstitutional.

There are other statutory provisions, unconnected with chapter 752, Florida Statutes, that govern grandparent visitation rights. These provisions apply to ongoing proceedings in which the health, welfare, paternity, or custody of a child is already at issue. For example, ' 39.509, Florida Statutes., relating to dependency and child protection, states that a grandparent is entitled to reasonable visitations with a grandchild who has been adjudicated a dependent child and already removed from parental, custodial, or legal custody. Additionally, ' 61.13(2)(b)2.c., Florida Statutes, relating to proceedings involving dissolution of marriage, child support and custody, provides for court-ordered visitation rights. However, a grandparent is not automatically entitled to be made a party to the proceedings, to be given notice of the dissolution of marriage proceedings, or to require the court to order that a child remain in the state for purposes of allowing grandparent visitation. Section 61.13(7), Florida Statutes, further provides that in a case where a child is actually residing with a grandparent in a stable relationship, 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.

Current Status of the Law

In recent years, the Florida Supreme Court has systematically ruled that certain provisions of chapter 752, Florida Statutes, are facially unconstitutional. The courts have consistently determined that grandparent visitation rights as currently established in chapter 752, Florida Statutes, infringe on a parent's fundamental and constitutional right to parent a child free from governmental interference as implicitly protected under the Fourteenth Amendment of the United States Constitution, and more explicitly protected under the right of privacy provision in article 1, section 23 of the Florida Constitution. The only occasion where states may interfere with privacy rights is when there is a compelling state interest. The statute must be given "strict scrutiny," the highest level of scrutiny given to state legislation, to determine whether the interest rises to the level of a compelling state interest warranting governmental intrusion on a fundamental right. The Court expressly found an inherent problem in using the "best interest" standard in lieu of a showing of "demonstrable harm to the child's health or welfare" as the basis for warranting government interference into a parent's constitutional right of privacy in a parenting decision such as grandparent visitation. Only where there is demonstrable harm to the child is the state interest sufficiently compelling to warrant governmental intrusion. See *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

M Paragraph (e) of subsection (1) of ' 752.01, Florida Statutes, relating to grandparent visitation rights within an intact family, was determined to be unconstitutional in 1996. The Florida Supreme Court determined that only in the event where the child is threatened with demonstrable harm would the countervailing interest of the state be compelling against the wishes of the parents and their right to raise their child free from governmental intrusion. See *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

M Paragraph (a) of subsection (1) of ' 752.01, Florida Statutes, relating to grandparent visitation rights when one or both of the parents are deceased, was determined to be unconstitutional in 1998. The Florida Supreme Court held that the privacy rights of an intact

family are not greater than the privacy rights of a family where one or both of the parents are deceased. Relying on the Beagle decision, the Court found that there was no compelling interest, absent harm or threatened harm to the minor that would outweigh the interests of the remaining parent to decide how to raise their child. The Court held that the privacy rights of a parent did not depend on whether or not the family was intact. In the words of the Von Eiff court, "We agree with Judge Green's dissenting opinion in Von Eiff [below] that 'it appears to be an unassailable proposition that otherwise fit parents...who have neither abused, neglected or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exclude or limit the grandparents' visitation with their child.'" See Von Eiff, 720 So.2d 510 (Fla. 1998), quoting Von Eiff v. Azicri, 699 So.2d 772, 781 (Green, J. dissenting).

M Paragraph **(b)** of subsection (1) of ' 752.01, Florida Statutes, was declared unconstitutional by the Second District Court of Appeal in 1999. The Court reasoned that a divorced parent should have no lesser privacy rights than a married or widowed natural parent. See Lonon v. Ferrell, 739 So. 2d 650 (Fla. 2d DCA 1999).

M Paragraph **(d)** of subsection (1) of ' 752.01, Florida Statutes, providing for grandparent standing to petition for visitation in cases where the child was born out of wedlock, was found unconstitutional in 2000. The Florida Supreme Court stated that "the fact the parents of the child in Brunetti were never married should not change this Court's analysis of the constitutionality of this statute. Section 752.01(1)(d) suffers from the same constitutional infirmity as subsection (a) in Von Eiff." See Saul v. Brunetti, 753 So.2d 26 (Fla. 2000).

M Section 61.13(7), Florida Statutes, relating to grandparent rights to a child involved in a custody, support, or visitation proceeding, was found to be unconstitutional in 2000 by the Florida Supreme Court. The Court stated that, "hence, we find no valid basis to distinguish the custody statute we consider here from the visitation statute we considered in Von Eiff and Beagle, except for the fact that the custody statute is even more intrusive upon a parent's rights". See Richardson v. Richardson, 734 So.2d 1063 (Fla. 2000).

Traditionally, those interests which have been found to be compelling involve the health and safety of children, protection from sexual exploitation and abuse, and education of children. See Wisconsin v. Yoder, 406 U.S. 205 (1972). In these areas, states may make laws regulating parental conduct (e.g. state may compel attendance in school until a certain age, states may require that parents inoculate their children in order to attend school). The U.S. Supreme Court has historically found parental rights to be protected, even in the face of a child's illness, giving the parents the right to free exercise of their religious beliefs as concerning their children, and allowing parents, not government, to make the essential choices about how to raise their children. However, several of the privacy cases, even in these areas, accede to the wishes of the parents. For instance, in Wisconsin v. Yoder, an Amish father was allowed to remove his child from school, even though he was within the age where school attendance was compulsory.

Harm to a child as defined in ' 39.01(30), Florida Statutes, has been found to be a compelling state interest by the Florida Supreme Court. See Padgett v. HRS, 577 So.2d 565 (Fla. 1991). Examples of harm to the child which rise to the level of a compelling state interest and therefore may warrant governmental interference are abuse, abandonment, and neglect of the child. Any lower standard of harm is in danger of rendering a statute constitutionally infirm. See Beagle at 1271.

Great-Grandparents

The Department of Elder Affairs estimates that the population of great-grandparents in the state of Florida is approaching 1.4 million. This is obviously a significant population and their needs and rights are not clearly addressed in all areas of the statute. There is little case law in which a great-grandparent petitioned for either visitation rights or the right to adopt their great-grandchild.

However, as the population of grandparents grows younger, so will the population of great-grandparents, and as they become more willing and able to accept the responsibility of raising or having visitation with a young child, the issue of the role of great-grandparents in the lives of their great-grandchildren may be raised more frequently. The case law in which great-grandparents are mentioned, assumes their rights are on par with grandparents. See *Meeks v. Garner*, 598 So.2d 261 (Fla. 1st DCA 1992). See also *Schilling v. Wood*, 532 So.2d 12 (Fla. 4th DCA 1988).

Chapter 752.001, Florida Statutes, states, "For purposes of this chapter, the term 'grandparent' shall include great-grandparent." The Florida Supreme Court in Footnote 2 of *Von Eiff v. Azicri* stated, "Section 752.001, Florida Statutes (1993), broadly defines grandparent to include a great-grandparent." See *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998).

C. EFFECT OF PROPOSED CHANGES:

The bill revises the substantive and procedural requirements underlying a petition for grandparent and great-grandparent visitation rights. Specifically, the bill:

M expands the existing categories of circumstances when grandparents or great-grandparents may petition for visitation rights to include situations: where one or both parents of the child are deceased; where a deceased parent has made a written testamentary statement requesting that grandparent visitation be permitted with the surviving minor; and where the child is living with both natural parents and either or both parents have used their parental authority to prohibit a relationship between the child and the grandparent or great-grandparents.

M requires the court to hold a preliminary evidentiary hearing to determine whether the minor is "suffering or is threatened with suffering demonstrable significant mental or emotional harm" due to the parental decision to prohibit the grandparent or great-grandparent visitation. If no finding is made at the preliminary hearing, the court must dismiss the petition and may award reasonable attorneys' fees and costs to the prevailing party.

M provides that if a finding of the specified harm is made at the preliminary hearing, the court may appoint a guardian ad litem. The court must then order the matter to family mediation in accordance with chapter 44, Florida Statutes, relating to court-ordered mediation, and Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure.

M provides that if mediation is unsuccessful and there is no other comparable psychological evaluative evidence available, the court must order a psychological evaluation of the minor pursuant to the Florida Family Law Rules of Procedure.

M provides that a court may award reasonable grandparent or great-grandparent visitation rights after a final hearing if the court has found that: (a) the minor is suffering or is threatened with suffering demonstrable significant mental or emotional harm due to the parental decision to prohibit visitation that could be alleviated or mitigated by allowing the visitation, and (b) the visitation will not materially harm the parent-child relationship.

M provides two expansive and different lists of factors for the court to consider in determining whether there is evidence of existing or threatened demonstrable significant mental or emotional harm due to the parental decision to prohibit the visitation and whether granting the petition will cause material harm to the parent-child relationship, respectively.

Factors for the court to consider for finding existing or threatened demonstrable significant mental or emotional harm include:

- M the existing love, affection and other emotional ties in the grandchild-grandparent relationship;
- M the length and quality of prior grandchild-grandparent relationship, including care and support;
- M established or attempted personal contacts with the grandchild;
- M the reasons for the parental decision to end grandparent visitation previously permitted;
- M the degree of support and stability of grandparent visitation in cases of demonstrable significant mental or emotional harm caused by the disruption (death, divorce, disability, etc.) in the family unit;
- M the existence or threat of mental harm to the child;
- M the impact of grandparent visitation in maintaining or facilitating contact between the child and a deceased parent's extended family;
- M the grandchild's present mental, physical and emotional needs and health;
- M a grandparent's present mental, physical, and emotional health;
- M guardian ad litem's recommendation;
- M the results of the minor's psychological evaluation;
- M a grandchild's expressed preference;
- M a deceased parent's written testamentary statement requesting grandparent visitation as helping to reduce or mitigate the grandchild's demonstrable significant mental or emotional harm resulting from a parent's death;
- M other factors as the court deems necessary.

Factors for the court to consider for finding that visitation will not materially harm the parent-child relationship include:

- M whether there have been previous disputes between grandparents and parents regarding the grandchild's care or upbringing;
- M whether grandparent visitation will materially interfere with parental authority;
- M whether a grandparent visitation arrangement can be made to minimize material detracting from the quality and quantity of time in a parent-child relationship;
- M the primary purpose of seeking grandparent visitation is to continue or establish a beneficial relationship to the child;
- M the exposure of the child to conduct, experiences or other factors contrary to the parent's influences;
- M the nature of the parent-grandparent relationship;
- M the reasons for the parental decision to end grandparent-grandchild visitation previously permitted;
- M the psychological toll of the visitation disputes upon the child;
- M other factors as the court deems necessary.

M makes the Uniform Child Custody Jurisdiction Act applicable to grandparent visitation actions brought under chapter 752, Florida Statutes.

M strongly encourages courts to consolidate separate actions brought independently under chapter 752, Florida Statutes, relating to independent grandparent visitation actions and ' 61.13, Florida Statutes, relating to custody, support and visitation proceedings.

M allows for the modification of an order granting grandparent visitation upon a showing that there is a substantial change in circumstances or that the visitation is materially harming the parent-child relationship.

M limits the frequency of actions for grandparent visitation to once in a two year period, except for good cause shown that the minor is suffering or is threatened with suffering 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 the earlier action.

M makes the provisions relating to the award of attorneys fees under ' 57.105, Florida Statutes, applicable to actions brought under chapter 752, Florida Statutes.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates ' 752.011, Florida Statutes, to revise the substantive and procedural requirements relating to a petition for grandparent or great-grandparent visitation rights. See "effect of proposed changes" for details.

Section 2. Repeals ' 752.01, Florida Statutes, relating to the existing provisions governing a grandparent's legal right to visitation.

Section 3. Amends ' 752.015, Florida Statutes, relating to mediation of visitation disputes, to incorporate the cross-reference to the newly created s. 752.011, Florida Statutes.

Section 4. Amends ' 752.07, Florida Statutes, to incorporate cross-references to the newly created ' 752.011, Florida Statutes.

Section 5. Amends ' 39.01, Florida Statutes, to include great-grandparent in the definition of "next of kin." In addition, this section adds great-grandparents to the definition of "participant" or those persons who are not a party to any proceedings under ch. 39, but who should receive notice of hearings involving the child.

Section 6. Amends ' 39.509, Florida Statutes, relating to grandparent visitation with a dependent child. The section includes great-grandparents among those who may petition for visitation rights where there has been an adjudication of dependency or removal of the child from the physical custody of the parent or legal guardian.

Section 7. Amends ' 39.801, Florida Statutes, relating to proceedings for termination of parental rights. This section provides great-grandparents with the right to notice of a hearing on the petition for termination of parental rights.

Section 8. Amends ' 61.13, Florida Statutes, relating to custody, support, and visitation. This section extends to great-grandparents the same rights held by grandparents in the event of a dissolution of a marriage between the parents of the child.

Section 9. Amends ' 63.0425, Florida Statutes, relating to grandparent's right to adopt. The section provides great-grandparents with the same rights as grandparents related to priority in adoption when a child has lived with the grandparent for at least six months.

Section 10. Amends subsection (2) of ' 63.172, Florida Statutes, relating to the effect of judgment of adoption. This section provides great-grandparents with the same rights as grandparents as delineated under chapter 752, Florida Statutes and includes great-grandparents as close relatives for purposes of the subsection.

Section 11. Provides for the act to take effect on July 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could result in an increased number of petitions being filed by grandparents and great-grandparents seeking visitation with grandchildren and great-grandchildren. This may be offset by the proposed sanctions for attorney's fees and associated costs and the higher requisite burden of proof.

D. FISCAL COMMENTS:

According to the Office of the State Courts Administrator, the potential for increased filings of petitions for grandparent (and great-grandparent) visitation may result in additional judicial workload and the need for additional judicial resources to conduct the preliminary and final evidentiary hearings.

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 in those cases where the parties do not have the financial ability to pay. Currently, the family court mediation programs are locally supported through county appropriations.

Additionally, since the preliminary threshold finding of specified harm needed to allow a grandparent to petition for visitation under the bill may approximate the threshold finding of specified harm needed to initiate involvement or action by the Department of Children and Families under chapter 39, F.S., relating to delinquency and dependency, there may be other costs incurred including the cost of representing indigent parents in subsequent custody actions brought by the Department of Children and Families.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of state sales tax shared with municipalities.

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V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

See Present Situation.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

Since ' 752.001, Florida Statutes, states, "For purposes of this chapter, the term 'grandparent' shall include great-grandparent", several sections of the bill may be unnecessarily redundant.

The bill amends ' 61.13(7), Florida Statutes, which has been ruled unconstitutional by the Florida Supreme Court. See Richardson v. Richardson, 734 So. 2d 1063 (Fla. 2000).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

Carol Preston

Lynne Overton