

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

SPONSOR(S): Judiciary Committee; Children, Families & Seniors Subcommittee; Rouson and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N	Malcolm	Bond
2) Children, Families & Seniors Subcommittee	10 Y, 0 N, As CS	Tuszynski	Brazzell
3) Judiciary Committee	18 Y, 0 N, As CS	Malcolm	Havlicak

SUMMARY ANALYSIS

Chapter 752, F.S., states that grandparents and great-grandparents may petition for visitation rights with their minor grandchildren and great-grandchildren; however, the Florida Supreme Court and other Florida District Courts have declared much of this law unconstitutional.

This bill repeals the unconstitutional language from chapter 752, F.S., and creates a limited grandparent visitation statute. It allows a grandparent of a minor child whose parents are deceased, missing, or in a persistent vegetative state to 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 persistent vegetative state and the other has been convicted of a felony or certain violent crimes. The bill requires the grandparent to make a preliminary showing of parental unfitness or significant harm to the child.

The bill requires that grandparents first attempt mediation. If that is ineffective, the court may, if it deems necessary, appoint a guardian ad litem for the child. The bill lists 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.

This bill appears to have no fiscal impact on state or local government.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Grandparent Visitation Rights in Florida

Currently, section 752.01(1), F.S., provides that a grandparent or great-grandparent may petition for visitation rights with their grandchildren or great-grandchildren when visitation is in the best interest of the minor child, and:

- The marriage of the child's parents has been dissolved;¹
- A parent has deserted the child; or
- The child was born out of wedlock and not later determined to have been born within wedlock.²

However, two of current the statutory grounds for awarding grandparent visitation have been ruled unconstitutional: when the marriage of the child's parents has been dissolved³ and when the child was born out of wedlock.⁴ Yet 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 . . ."⁵ The Florida Supreme Court has held that 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."⁶

The Florida Supreme Court has also 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 current statute that allowed for grandparent visitation when one or both parents of the child are deceased but did not evaluate harm to the child 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."⁷

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. Those opinions state that a grandparent of a minor child whose parents are deceased, missing, or in a persistent 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 persistent vegetative state and the other has been convicted of a felony or an offense of violence. However, the grandparent must make a preliminary showing of parental unfitness or significant harm to the child.

The bill is drafted to address these constitutional concerns, including language that the grandparent must make a preliminary showing of parental unfitness or significant harm to the child, and the specific instances in which a petition can be filed conforming with case law.

¹ s. 752.01(1)(b), F.S.

² s. 752.01(1)(d), F.S.

³ *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So. 2d 1105 (Fla. 5th DCA 2005).

⁴ *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000).

⁵ *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004).

⁶ *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).

⁷ *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

Remarriage or Adoption

Currently, s. 752.07, F.S., provides that in the event of a remarriage by a parent (when the other parent is deceased) or if there is an adoption by a stepparent, any existing visitation order in favor of a grandparent is unaffected, unless the grandparent has notice and an opportunity to be heard.

Effect of the Bill

Grandparent Visitation Rights

The bill repeals s. 752.01, F.S., and creates s. 752.011, F.S. This new section allows a grandparent of a minor child whose parents are deceased, missing, or in a persistent vegetative state to 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 persistent vegetative state and the other has been convicted of a felony or an offense of violence evincing behavior that poses a substantial risk of harm to the child. A parent is considered missing if his or her whereabouts are unknown for at least 90 days and a diligent search and inquiry into his or her location has occurred.

The grandparent must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child; if made, 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 the grandparent meets that burden, the court may grant visitation only if it is in the best interest of the child and will not harm the parent-child relationship. The bill requires the court to consider the totality of circumstances and lists multiple factors the court must consider in determining the best interest of the child. Some of those factors are:

- 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;
- Whether the grandparent established ongoing personal contact with the child;
- The reasons that the respondent parent cited to end contact;
- 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;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent; 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 routine 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.

An order granting grandparent visitation may be modified if a substantial change of 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:

- The bill clarifies that Part II of ch. 61, F.S., the Uniform Child Custody Jurisdiction and Enforcement Act,⁸ applies to custody actions brought under the provisions of s. 752.011, F.S. (the grandparent visitation statute created by the bill).
- Courts are encouraged to consolidate actions pending under s. 61.13, F.S.,⁹ with those brought under s. 752.011, F.S.

Remarriage or Adoption

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

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 752.001, F.S., relating to definitions.
- Section 2:** Repeals s. 752.01, F.S., relating to actions by grandparent for right of visitation and when a petition shall be granted.
- Section 3:** Creates s. 752.011, F.S., relating to petitions for grandparent visitation with a minor child.
- Section 4:** 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 5:** Creates s. 752.071, F.S., relating to effect of adoption by stepparent or close relative.
- Section 6:** Amends s. 752.015, F.S., relating to mediation of visitation disputes.
- Section 7:** Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
None.

⁸ The Uniform Child Custody Jurisdiction and Enforcement act governs multi-state child custody disputes.

⁹ Section 61.13, F.S., governs child support obligations and custodial arrangements for minor children in a dissolution proceeding.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The United States Supreme Court has recognized the fundamental liberty interest parents have in the 'care, custody and management' of their children.¹⁰ 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.¹¹ 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.¹²

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.¹³ The Court has held that because the current provisions in the grandparent visitation statute do not require a finding of demonstrable harm to the child, it does not satisfy the compelling state interest standard.¹⁴ The Court has consistently held that there must be a showing of demonstrable harm, not simply best interest of the child, to satisfy the compelling state interest standard.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

¹⁰ *E.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹¹ *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."

¹² *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).

¹³ *Beagle*, 678 So. 2d at 1275-76;

¹⁴ *Id.*; *Von Eiff*, 720 So. 2d 510; *Saul*, 753 So. 2d 26 (Fla. 2000); *Sullivan*, 866 So. 2d 28.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Children, Families & Seniors Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment made the following changes:

- Removes all sections that added “great-grandparents” to statutes referencing “grandparents”,
- Changes the requirement of awarding reasonable attorney fees from “shall” to “may”,
- Changes the prima facie evidence required in a Petition for Grandparent Visitation from ‘. . . there is danger of significant harm . . .’ to ‘. . . there is significant harm. . .’, and
- Makes technical language changes for clarity.

On March 19, 2015, the Judiciary Committee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Provide definitions for "missing" and "persistent vegetative state" that are consistent with current law;
- Specify the types of violent crimes a surviving or remaining parent must be convicted of before a grandparent can apply for visitation;
- Clarify that the court must send the parties to mediation before proceeding to a final hearing;
- Clarify that the factors used in determining grandparent visitation related to the grandparent's prior contact with the child and the lack of a testamentary statement from a parent apply in all cases; and
- Make technical and conforming changes.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.