

**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.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

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BILL: PCS/SB 368 (934880)

INTRODUCER: Appropriations Subcommittee on Criminal and Civil Justice; and Senators Abruzzo and Smith

SUBJECT: Rights of Grandparents and Great-grandparents

DATE: April 10, 2015

REVISED: \_\_\_\_\_

|    | ANALYST                 | STAFF DIRECTOR  | REFERENCE  | ACTION                   |
|----|-------------------------|-----------------|------------|--------------------------|
| 1. | <u>Brown</u>            | <u>Cibula</u>   | <u>JU</u>  | <b>Favorable</b>         |
| 2. | <u>Preston</u>          | <u>Hendon</u>   | <u>CF</u>  | <b>Favorable</b>         |
| 3. | <u>Harkness/Preston</u> | <u>Sadberry</u> | <u>ACJ</u> | <b>Recommend: Fav/CS</b> |
| 4. | _____                   | _____           | <u>FP</u>  | _____                    |

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**I. Summary:**

PCS/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 danger of 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 danger of 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 creates definitions for the terms “missing” and “persistent vegetative state.”

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.

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

## 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.<sup>1</sup> 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.<sup>2</sup>

The common law rule against visitation by nonparents sought to preserve parental autonomy, as a value in and of itself, as a means of protecting children and to serve broader social goals:

- Courts historically expressed reluctance to undermine parents' authority by overruling their decisions regarding visitation and by introducing outsiders into the nuclear family.<sup>3</sup> This common law tradition received constitutional protection in the 1920s when the Supreme Court held that a parent's right to direct the upbringing of his or her children was a fundamental liberty interest.<sup>4</sup>
- Under common law, courts presumed that fit parents act in the child's best interests and recognized that conflicts regarding visitation are a source of potential harm to the children involved.<sup>5</sup>
- Common law tradition understood parental authority as the very foundation of social order. Courts generally relied on ties of nature to resolve family disagreements rather than imposing coercive court orders.<sup>6</sup>

In response, 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.<sup>7</sup>

The enactment of grandparent visitation statutes responded primarily to two trends: demographic changes in family composition and an increase in the number of older Americans and the concurrent growth of the senior lobby.<sup>8</sup> Grandparent visitation resonated with the public as well, who responded to sentimental images of grandparents in the popular media and the conclusions

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<sup>1</sup> 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). Also see 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*, ST. JOHN'S LAW REVIEW, 83 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>5</sup> 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).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Karen 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*, ST. JOHN'S LAW REVIEW, 83 (2009).

of social scientists who focused on the importance of intergenerational family ties. During the 1990s, many Americans also focused on drug abuse problems of parents, significant poverty levels, and increasing numbers of out-of-wedlock children. Also during this period, Americans looked less to traditional social institutions, such as churches, and more toward the legal system as a way to solve their family problems.<sup>9</sup>

Policy related to grandparent visitation soon led to constitutional concerns because grandparent visitation statutes implicate the Fourteenth Amendment in two ways:

- The substantive due process rights of parents to direct the upbringing of their children in as much as parents' decisions are challenged, and
- The right to equal protection because many grandparent visitation statutes differentiate among parents based upon family status.<sup>10</sup>

The pertinent clauses in the Fourteenth Amendment state that a state shall not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>11</sup> As of 2007, 23 state supreme courts have ruled on the constitutionality of their grandparent visitation statutes, with the majority finding their statutes constitutional; however, courts in several large states, Florida included, have held their grandparent visitation statutes unconstitutional.<sup>12</sup>

### **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 removed because they were ruled unconstitutional.

### **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. At its broadest, s. 752.01(1), F.S., required visitation to be granted when the court determined it to be in the best interests of the child and one of the following situations existed:

- One or both of the child's parents were deceased;
- The parents were divorced;
- One parent had deserted the child;
- The child was born out of wedlock; or
- One or both parents, who were still married, had prohibited the formation of a relationship between the child and the grandparent(s).<sup>13</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. CONST. amend. XIV, s. 1.

<sup>12</sup> Comm. on Judiciary, The Florida Senate, Grandparent Visitation Rights, (Interim Report 2009-120) (Oct. 2008), available at [http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim\\_reports/pdf/2009-120ju.pdf](http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf). (last visited March 23, 2015).

<sup>13</sup> See ch. 93-279, Laws of Fla. (s. 752.01, F.S. (1993)). Subsequent amendments by the Legislature removed some of these criteria. See s. 752.01, F.S. (2008).

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.”<sup>14</sup> The courts’ rulings are premised on the fact that the fundamental right of parenting is a long-standing liberty interest recognized by both the United States and Florida constitutions.<sup>15</sup>

In 1996, the Florida Supreme Court addressed its first major analysis of s. 752.01, F.S., in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). In *Beagle*, the 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. The Court announced the standard of review applicable when deciding whether a state’s intrusion into a citizen’s private life is constitutional:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least restrictive means.<sup>16</sup>

The Court held that “[b]ased upon the privacy provision in the Florida Constitution, . . . the State may not intrude upon the fundamental right of parents to raise their children except in cases where the child is threatened with harm.”<sup>17</sup>

To date, almost all of the provisions in s. 52.01, F.S., have been found to be unconstitutional,<sup>18</sup> although these provisions are still found in the Florida Statutes because they have not been repealed by the Legislature.

### **Chapter 61, Florida Statutes – Dissolution of Marriage and Parental Responsibility**

The courts have also struck down two grandparent rights provisions in ch. 61, F.S., which governs dissolution of marriage and parental responsibility for minor children. In 2000, the Florida Supreme Court struck down s. 61.13(7), F.S., which granted grandparents custodial rights in custody or dissolution of marriage proceedings.<sup>19</sup> In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Court recognized that when a custody dispute is between two fit parents,

<sup>14</sup> *Cranney v. Coronado*, 920 So. 2d 132, 134 (Fla. 2d DCA 2006) (quoting *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004)).

<sup>15</sup> In 1980, Florida’s citizens approved the addition of a privacy provision in the state constitution, which provides greater protection than the federal constitution. Specifically, Florida’s right to privacy provision states: “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.” FLA. CONST. art. I, s. 23.

<sup>16</sup> *Beagle*, 678 So. 2d at 1276 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

<sup>17</sup> *Id.*

<sup>18</sup> 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).

<sup>19</sup> The subsection read that “[i]n any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, 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.” Section 61.13(7), F.S. (1997).

it is proper to use the best interests of the child standard. However, when the dispute is between a fit parent and a third party, there must be a showing of detrimental harm to the child in order for custody to be denied to the parent.<sup>20</sup>

In 2004, the Florida Supreme Court struck down the statutory provision that awarded reasonable grandparent visitation in a dissolution proceeding if the court found that the visitation would be in the child's best interest.<sup>21</sup> Based on the rationale of earlier Florida cases, the Court declared the provision "unconstitutional as violative of Florida's right of privacy because it fails to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation into the parental privacy rights."<sup>22</sup>

### **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.<sup>23</sup> 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.<sup>24</sup>

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 DCF goals of permanency planning for the child.<sup>25</sup> Before the court may terminate parental rights, notice must be provided to certain persons, including any grandparent entitled to priority for purposes of adoption.<sup>26</sup>

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.<sup>27</sup>

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<sup>20</sup> *Richardson*, 766 So. 2d at 1039.

<sup>21</sup> *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004). Specifically, s. 61.13(2)(b)2.c., F.S. (2001), provided: "The court may award the grandparents visitation rights with a minor child if it is in the child's best interest. Grandparents have legal standing to seek judicial enforcement of such an award. This section does not require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor do grandparents have legal standing as contestants. . ."

<sup>22</sup> *Id.*

<sup>23</sup> Section 39.509, F.S.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 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 six out of 24 months immediately preceding the filing of a petition for termination of parental rights pending adoption. Section 63.0425(1), F.S.

<sup>27</sup> Sections 39.6221(2)(d) and 39.6231(3)(d), F.S.

## U.S. Supreme Court – *Troxel v. Granville*

The U.S. Supreme Court ruled on the issue of grandparent visitation and custody rights in 2000 when the Court struck down a Washington state law as unconstitutional as applied. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court found the Washington law<sup>28</sup> to be “breathtakingly broad” within the context of a “best interest” determination.<sup>29</sup> The Court noted that no consideration had been given to the decision of the parent, the parent’s fitness to make decisions had not been questioned, and no weight had been given to the fact that the mother had agreed to some visitation.<sup>30</sup> Based on these observations, the Court found the Washington statute unconstitutional as applied because “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made.”<sup>31</sup>

The grandparent visitation cases decided by state supreme courts after *Troxel* all seem to recognize that the legal landscape has changed. Although the *Troxel* Court may have endeavored to leave room for the states to resolve questions relating to grandparent visitation on a case-by-case basis, the plurality did provide guidance and clarification, as the state courts all acknowledge:<sup>32</sup>

- When they consider grandparents' visitation petitions, courts must presume a fit parent's decisions regarding visitation to be in his or her child's best interests, and they must accord some weight to these decisions. Likewise, in crafting statutes, legislatures must incorporate this presumption in favor of parents.
- Courts can no longer (at least explicitly) employ the contrary presumption that visitation with their grandparents generally benefits grandchildren. Statutes that presume grandparent visitation to be in a child's best interests violate parents' constitutional rights.
- Although there appears to have been a movement among some state supreme courts to strike down statutes as unconstitutional because they failed to require a showing of harm, other courts disagreed with this view and instead upheld the statutes' constitutionality and the use of the best-interests standard to determine if visitation was appropriate. In *Troxel*, the plurality neither condemned nor endorsed the harm standard, and it found the use of the best-interests standard alone, without some deference to parents, insufficient.<sup>33</sup>

## The Effect of Court Ordered Visitation on Children and Their Families

Requests for visitation by third parties over parental objections raise a multitude of issues. Increasing attention appears to be focused on the effects of those requests for visitation on the children involved. In an analysis of *Troxel v. Granville*, one author stated:

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<sup>28</sup> The Washington statute provided that “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” WA. REV. CODE s. 26.10.160(3).

<sup>29</sup> *Troxel v. Granville*, 530 U.S. at 67.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 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)

<sup>33</sup> *Id.*

I am not suggesting that relationships must be conflict free in order to be viewed as being emotionally beneficial to those participating in them; however, when the relationships between members of the extended family and members of the nuclear family are so strained and when the ability to resolve those disputes is so impaired that one side or the other feels compelled to seek judicial intervention, the possibility that children will benefit from a court-imposed solution is remote. Where, over parental objection, visitation with a third party has been court ordered, the conflict between the parent and the individual whose bid for visitation the court has honored exacts a toll on the child(ren)....<sup>34</sup>

Another legal scholar has stated that while grandparents can be wonderful resources for children, parents, not courts, should decide with whom their children should spend time and that a court reversal of a parent's decision raises problems:

Allowing courts to overrule parents is not good for children. The best interest of the child standard may sound appealing but, as an untethered guide to deciding where parental autonomy ends and the state's authority begins, it is not, in fact, in the best interest of the child. The main point here is that parental autonomy is not the enemy of the child; it is the best way this society knows to protect the child's best interest.<sup>35</sup>

One commentator recognizes that grandparent visitation is a highly sensitive issue, especially in Florida where the senior citizen population is so large. While there are some bad grandparents, the pervasiveness of the stereotype of loving grandparents makes it hard to envision a situation where a child would not benefit from contact with his or her grandparents. For that reason, many courts have succumbed to sentimentality when deciding whether or not to grant grandparents visitation rights.<sup>36</sup>

A more objective view has been taken by the Florida Supreme Court. Both the Federal and Florida constitutions convey rights of privacy. Among those privacy rights lies the right of parents to raise their child as they see fit. Case law has long addressed this right and, while it may seem unfair or unwise to deny loving grandparents the right to visit their grandchild, based on a long line of federal and state precedent it is clear that the Florida Supreme Court is correct in deciding that, absent some showing of harm to the child, a court cannot override a fit parent's decision. Case law shows that, absent a grandparent proving harm to the child, visitation is rarely granted.<sup>37</sup>

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<sup>34</sup> David A. Martindale, *Troxel v. Granville: A Nonjusticiable Dispute*, 41 FAM. CT. REV. 88 (Jan. 2003)

<sup>35</sup> Katharine T. Bartlett, *Grandparent Visitation: Best Interests Test is Not in Child's Best Interest*, WEST VIRGINIA LAW REVIEW. 102:723 (2000).

<sup>36</sup> Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know The Way To Carry The Sleigh Through The Wide And Drifting Law?* FLORIDA LAW REVIEW (Apr. 2001)

<sup>34</sup> Id.

<sup>37</sup> Id.

A statute which demands such a showing of harm, while technically correct because it adheres to judicial rulings, will do little to help grandparents attain visitation with their grandchildren. The better solution would be to shift the focus away from judicial intrusions upon families and instead help families resolve their disputes themselves through mediation and counseling.<sup>38</sup>

### **Harm to a Child**

As a result of court rulings that Florida's grandparent visitation statutes were unconstitutional because the state may not intrude upon the fundamental right of parents to raise their children except in cases where the child is threatened with "harm," legislation filed for consideration during past legislative sessions seeking to grant grandparent visitation has required a showing of harm when a grandparent petitions the court for visitation.

Chapter 39, F.S., relating to proceedings relating to dependent children defines the term "abuse" as:

any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions...<sup>39</sup>

Chapter 39, F.S. provides that "harm"

to a child's health or welfare can occur when any person inflicts or allows to be inflicted upon the child physical, mental, or emotional injury. In determining whether harm has occurred, the following factors must be considered in evaluating any physical, mental, or emotional injury to a child: the age of the child; any prior history of injuries to the child; the location of the injury on the body of the child; the multiplicity of the injury; and the type of trauma inflicted. Such injury includes, but is not limited to...<sup>40</sup>

Chapter 39, F.S., also provides that:

Any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter... shall report such knowledge or suspicion... immediately to the department's central abuse hotline... Personnel at the department's central abuse hotline shall determine if the report received meets the statutory definition of child abuse, abandonment, or neglect. Any report meeting one of these definitions shall be accepted for the protective investigation...<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Section 39.01(2), F.S.

<sup>40</sup> Section 39.01(32), F.S.

<sup>41</sup> Section 39.201(1) and (2), 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 a definition 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 or 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.

If 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 danger of 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.

At the final hearing, the court will determine by clear and convincing evidence whether the parent is unfit or a danger of 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 will consider factors such as:

- 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;
- The reasons that the parent ended contact or visitation with the grandparent;
- Whether there has been demonstrable significant mental or emotional harm to the child and whether the support and stability of the grandparent has benefitted the child;
- Mental, physical, and emotional health of both the minor child and the grandparent;
- The recommendation of a guardian ad litem; and
- The preference of the minor child if he or she is sufficiently mature.

In assessing material harm to the parent and child relationship, the court must look at the totality of the circumstances.

The Uniform Child Custody Jurisdiction and Enforcement Act, which governs the resolution of child custody between states, applies to determination of grandparent visitation. 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.

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

**Section 4** repeals s. 752.07, F.S., relating to the effect of the adoption of a child by stepparent on 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, 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, 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:

Various provisions of ch. 752, F.S., have been challenged as unconstitutional a number of times since becoming law in 1984. In 1996, the Florida Supreme Court reviewed the issue of whether it is proper for the government to impose grandparent visitation on an intact family, absent evidence of demonstrated harm to the child.<sup>42</sup> In applying Article I, s. 23 of the Florida Constitution, the court found that parents have a fundamental right to be free from governmental interference. Further, the court found that the state failed to show a compelling interest.<sup>43</sup> For these reasons, the court ruled that part of the law unconstitutional.

In 1998, the Florida Supreme Court again struck down part of the grandparent visitation law.<sup>44</sup> The court noted that the United States Supreme Court had recognized an implicit right of person privacy in the liberty interest protected by the Due Process Clause of the

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<sup>42</sup> *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

<sup>43</sup> *Id.* at 1276.

<sup>44</sup> *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

Fourteenth Amendment. Along with the implicit right of privacy, the State Constitution provides the explicit right of privacy to citizens under Article I, s. 23.<sup>45</sup> Here the court found that the law suffered the same infirmity, namely the part of the law that mandated grandparent visitation under a best interest of the child standard, without a showing of proof of demonstrable harm to the child.<sup>46</sup>

Again, in 2004, the Florida Supreme Court reviewed a statute which authorized a court to award grandparent visitation rights to a child if it is in the child's best interest. The statutory provision challenged was not in ch. 752, F.S., but in ch. 61, F.S., dealing with custody time-sharing, and paternity (s. 61.13(2)(b)2.c., F.S.)<sup>47</sup> Here, the child's mother filed a motion for rehearing in a paternity action and subsequently died in a car accident. The case was before the court on a motion to intervene filed by the grandmother.<sup>48</sup> Although the court resolved the case on the issue of the motion to intervene, the court reiterated the unconstitutionality of any provision of law which would impose grandparent visitation absent a showing of harm to the child.<sup>49</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

In its review of the original bill (SB 368), the Department of Children and Families (DCF) 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 private adoption attorneys and 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.

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<sup>45</sup> *Id.* at 513-514.

<sup>46</sup> *Id.* at 514.

<sup>47</sup> *Sullivan v. Sapp*, 866 So.2d 28, 38 (Fla. 2004). Section 61.13(2)(b)2.c., F.S. (2003), provided, "The court may award the grandparents visitation rights with a minor child if it is in the child's best interest. Grandparents have legal standing to seek judicial enforcement of such an award."

<sup>48</sup> *Id.* at 30-31.

<sup>49</sup> *Id.* at 38-39.

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.<sup>50</sup>

Additionally, the Office of the State Courts Administrator (OSCA) 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.<sup>51</sup>

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:**

From an operational perspective, it's difficult to see how some provisions of the bill will work. For example, if both parents are deceased, missing or in a persistent vegetative state, how will the court find them unfit, award them attorney fees and court costs, or order them to mediation. How would these circumstances apply to the child's then-current caregiver?

The court is required to examine the effect of grandparent visitation with a child on the parent-child relationship. A number of factors the court is to consider assume a parent-child relationship exists. 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 two 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.

The bill does not address a situation where a court finds that there is prima facie evidence that the minor child is suffering or is threatened with suffering demonstrable significant mental or emotional harm as a result of not being allowed to visit a grandparent, a judge would be required to call the child abuse hotline under the provisions of ch. 39, F.S. 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.

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<sup>50</sup> 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.

<sup>51</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement* (March 10, 2015); on file with the Senate Judiciary Committee.

**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 Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**Recommended CS by Appropriations Subcommittee on Criminal and Civil Justice on April 8, 2015:**

The committee substitute:

- 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.

**B. Amendments:**

None.