

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 696

SPONSOR: Senator Campbell

SUBJECT: Grandparent (and Great-Grandparent) Visitation Rights

DATE: March 23, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill provides new requirements for the determination of visitation rights extended to grandparents (and great-grandparents). It requires the court to apply extensive criteria to make certain findings before granting visitation: whether the denial of such visitation would materially harm the child's health or welfare, whether it is in the minor child's best interest, and whether the granting of such visitation would materially harm the parent-child relationship.

This bill substantially amends the following sections of the Florida Statutes: 61.13 and 752.01.

II. Present Situation:

Under common law, neither grandparents (or great-grandparents) had the legal right to visit their grandchild (or great-grandchild). However, in 1978, the Florida Legislature enacted chapter 752, Florida Statutes, which established a grandparent's¹ freestanding legal right to exercise visitation with his or her grandchild (or great-grandchild). See §752.001, F.S. Without a pending legal action related to or involving a grandchild, section 752.01, F.S., provides that a grandparent *may* petition the court and the court is *required* to grant grandparent visitation "when in the best interest of the child", and if one of the following parental or marital scenarios exist:

- 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).

¹For purposes of chapter 752, F.S., the term "grandparent" is also meant to include "great-grandparent" such that the same rights afforded to grandparents under the chapter extend to great-grandparents. Therefore, when referring to the rights of grandparents in this staff analysis hereinafter, it is to be construed as applying to great-grandparents as well.

In determining the “best interest of the child”, section 752.01(2), F.S., requires the court 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.²

In recent court cases, the Florida courts have found certain provisions of section 752.01, Florida Statutes, to be facially unconstitutional. *See Von Eiff v. Azicri*, 23 Fla. L. Weekly S583, (Fla. Nov. 12, 1998)(subsection (1)(a) of section 752.01); *Beagle v. Beagle*, 678 So.2d 1271, 1272 (Fla. 1996)(subsection (1)(e) of section 752.01, F.S.); *Brunette v. Saul*, 23 Fla. L. Weekly D2619 (4th DCA Dec. 2, 1998)(subsections (1)(a) and (1)(d) of section 752.01). The courts have held that these provisions unconstitutionally infringe on a parent’s right of privacy protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under article I, section 23 of the Florida Constitution.

In *Von Eiff*, the grandchild’s mother had died, the father had remarried, and the second wife had adopted the child but the relations between the new couple and the grandchild’s biological maternal grandparents became strained and visitation was restricted. The maternal grandparents petitioned for unsupervised visitation with their deceased daughter’s child. In overturning the ruling upholding the unsupervised visitation, the Florida Supreme Court noted the inherent problem in permitting governmental interference into a family’s private life on a threshold finding of “best interest of the child” absent a showing of “demonstrable harm to the child’s health or welfare.” *Von Eiff* at S586. The Court noted that the trial court had found the Von Eiffs to be “loving, nurturing and fit parents, whose parenting decisions d[id] not constitute a substantial threat of demonstrable harm to the child’s health or welfare.” *Id.* Consequently, the Court found that the death of one or both parents and the preservation of the familial bond between grandparents and grandchildren, despite its potential benefits, do not give rise to a compelling state interest which would warrant government intervention in parental privacy rights to rear children.

Other statutory provisions govern grandparent visitation in the context of ongoing proceedings in which the health and welfare of the child is already at issue. For example, chapter 39, F.S., relating to dependency, provides that a grandparent is entitled to reasonable visitation with a grandchild who has been adjudicated a dependent child and already removed from parental, custodial or legal custody. *See* §39.509, F.S. Additionally, chapter 61, F.S., relating to proceedings involving dissolution of marriage and child support and custody, provides that the court *may* award grandparent visitation rights, but that does not automatically entitle a grandparent 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. *See* §61.13, F.S.

²Without making its determination as to what constitutes “best interests” of a child, the Florida Supreme Court has intimated its preference for alternative non-adversarial types of services such as mediation or counseling to better facilitate grandparent visitation and build stronger intergenerational family relationships rather than litigation for dealing with grandparental visitation disputes. *Von Eiff v. Azicri*, 23 Fla. L. Weekly S583, (Fla. Nov. 12, 1998) at n. 4.

III. Effect of Proposed Changes:

Section 1 amends s.752.01, F.S., relating to a grandparent's legal right to visitation, to require the consideration of material harm to a child and material harm to the parent-child relationship in the determination of grandparents visitation rights.

Specifically, subsection (1) provides that in addition to the existing law which requires the court to award reasonable grandparent visitation rights when in the best interest of the child under any one of the enumerated categories of parental or marital scenarios, the court must also find that the child's health or welfare would be materially harmed if visitation was denied, and that the parent-child relationship would not be materially harmed if visitation was granted. The bill also adds the category of deceased parents who have made written testamentary statements requesting grandparent visitation with the surviving child as one of the parental scenarios under which a court may determine whether to grant grandparent visitation.

Subsection (2) expands the list of criteria for the courts to consider in determining the best interest of the child and also the material harm that might result if grandparent visitation rights are denied. The seven added criteria to consider include:

- the extent of prior grandparental care and support,
- the extent to which the grandparent has established or attempted to establish personal contact with the child,
- the extent to which grandparent visitation would improve or promote the child's mental health and development,
- the desirability of grandparent visitation in order to maintain or facilitate contact between the child and a deceased parent's extended family,
- the degree of support and stability that grandparent visitation would provide in the cases of disruption (death, divorce, disability, etc.) in the family unit,
- the enhancement of the parent-child relationship if there is grandparent visitation, and
- the written testamentary statement (if any) of a deceased parent to request grandparent visitation as being in the child's best interest.

Subsection (3) is created to provide an extensive list of criteria for determining whether grandparent visitation will materially harm the parent-child relationship. The court must consider:

- whether there have been prior disputes between the parents and the grandparents over child rearing or upbringing,
- whether grandparent visitation will materially interfere with parental authority
- whether a grandparent visitation arrangement can be made to minimize material detraction from the quality and quantity of time in a parent-child relationship,
- whether the primary purpose of seeking grandparent visitation is to continue or establish a beneficial relationship to the child,
- whether the grandparent visitation will expose the child to conduct, experiences or other factors contrary to the positive influences by the parents,
- whether the grandparents are willing and able to encourage a close and continuing relationship between the child and the parents,
- the nature of the relationship between the parents and grandparents,
- the psychological toll upon the child relating to visitation disputes, and

- such other factors as necessary in particular circumstances.

Subsection (4) limits the frequency of actions for grandparent visitation to once in a 2-year period, and precludes the filing of an independent action for grandparent visitation during any year in which a custody action has already been filed.

Subsection (5) makes the provisions relating to the award of attorney fees under s. 57.105, F.S., applicable to actions brought under chapter 752, F.S.

Section 2 amends subsection (2) of section 61.13, F.S., to incorporate by reference the new criteria in s. 752.01, F.S., to apply in determinations of grandparent visitation rights in custody and support proceedings arising under chapter 61, F.S., and to encourage the courts to address the determination of grandparent visitation rights in dissolution of marriage proceedings.

Section 3 provides for the act to take effect on July 1, 1999.

As noted earlier, all rights and privileges afforded to grandparents by this bill extend and are applicable to great-grandparents.

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:

This bill may still raise constitutional concerns regarding a parent's fundamental right to parent a child free from governmental interference as 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. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996). The Florida Supreme Court has made it clear that the State can not satisfy a compelling state interest standard absent a showing of "a substantial threat of demonstrable harm to the child's health or welfare" to warrant government intervention into a parent's constitutional right of privacy in his or her decision to limit or exclude a grandparent's visitation with a grandchild. *See Von Eiff v. Azicri*, 23 Fla. L. Weekly S583, S584 (Fla. Nov. 12, 1998)]. Although this bill provides an extensive list of factors to consider in making certain findings before grandparent visitation is granted, it is not known whether these findings would satisfy the compelling state interest

threshold to warrant government intervention in a parent's decision regarding the relationships a child may form.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill could result in an increased number of filings for petitions for grandparent visitation since the bill restores grandparent (and great-grandparent) rights to assert visitation rights albeit under a more extensive statutory framework intended to overcome existing facially unconstitutional statutory provisions.

C. Government Sector Impact:

The potential for increased filings of petitions for grandparent (and great-grandparent) visitation may result in additional judicial workload, ranging from the number of files maintained to the number of hearings held.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill creates an extensive list of factors to consider in finding “the best interest of the child” in grandparent visitation matters which may or may not conflict with standards established on a case-by-case basis in other child custody matters arising under chapters 39 and 61, Florida Statutes. Specific criteria are set forth in s. 39.810, F.S., for determining the “manifest best interest of the child” in termination of parental rights proceedings, and in s. 61.13(10), F.S., for determining the “best interest of the child” in proceedings regarding shared parental responsibility and primary residency. These lists of criteria are not identical.

VIII. Amendments:

None.