Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

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

Proposal #: P 64

Relating to: DECLARATION OF RIGHTS, Right of privacy

Introducer(s): Commissioner Rouson

Article/Section affected: Article I, Section 23 – Right of privacy.

Date: December 11, 2017

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	JU	

I. SUMMARY:

Article I, Section 23 of the Florida Constitution, Florida's Privacy Clause, protects the fundamental right of fit parents to direct the care, custody, and control of their children free from unreasonable governmental interference. Any law that infringes this right is subject to the highest level of judicial scrutiny and must serve a compelling state interest through the least intrusive means.

The Florida Supreme Court has held that Grandparent visitation statutes, which authorize a court to order visitation with a grandchild over parental objection when in the "best interests of the child," fail to demonstrate a compelling state interest unless the state acts to prevent demonstrable harm to the child. As a result, grandparents may petition for visitation with a grandchild under very limited circumstances in Florida.

This proposal amends Article I, Section 23, Florida's Privacy Clause, to provide that the right of privacy may not be construed to limit the right of grandparents to seek visitation with their grandchildren if there is a compelling state interest relating to the best interests of the child. The proposal appears to abrogate the current requirement that demonstrable harm to the child be shown to demonstrate a compelling state interest. Thus, the proposal may increase the circumstances under which a court may order grandparent visitation with a grandchild over the objection of parents.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

American jurisprudence has a long history of preserving a fit parents' power over the care, custody, and control of their children. Pursuant to this power parents may raise their children as they see fit, free from unreasonable government interference. Judicial affirmation of such broad parental rights is rooted in the desire to preserve parental autonomy and the presumption that fit parents will act in their child's best interest.[1]

However, the evolving structure of the American family has created a friction between these well-established parental rights and the interests of extended family members who maintain, or desire to maintain, a significant relationship with a child over the objection of the child's parents. Nowhere has this emerging conflict been demonstrated more clearly than in the legal landscape of grandparent-grandchild visitation rights. Grandparent visitation rights, established by state statutes in all 50 states, have been challenged on the grounds that they interfere with a parent's constitutional rights. The result of such challenges had led to varied decisions around the country regarding the constitutionality of such statutes and ongoing controversy between supporters of parental rights and advocates for grandparents.[2]

Development of Grandparent Visitation Rights

The development on nonparent visitation statutes, which allow grandparents to petition courts for the right to visit their grandchildren, begin in the late 1960s.[3] Before the passage of these statutes, grandparents – like all other nonparents – had no right to sue for court-ordered visitation with children.[4] 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:[5]

- Courts historically expressed reluctance to undermine parents' authority by overruling their decisions regarding visitation and by introducing outsiders into the nuclear family.
- 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.
- 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.

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.[6] Grandparent visitation resonated with the public as well,

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[1] *Grandparent Visitation Rights: Interim Report 2009-120,* THE FLORIDA SENATE COMMITTEE ON JUDICIARY (October 2008), available at http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf.

[2] Sarah Elizabeth Culley, *Troxel v. Granville and its Effect on the Future of Grandparent Visitation Statutes; Legislative Reform*, JOURNAL OF LEGISLATION, Vol. 27:1, at 238, available at http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1151&context=jleg.

[3] Fla. S. Comm. On Judiciary, SB 368 (2015) Staff Analysis 2 (Mar. 25, 2015), available at http://flsenate.gov/Session/Bill/2015/368/Analyses/2015s0368.pre.cf.PDF.

[4] *Id*.

[5] *Id.*

[6] *Id.*

who responded to sentimental images of grandparents in the popular media and the conclusions 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. Americans began to look less to traditional social institutions, such as churches, and more toward the legal system as a way to solve family disputes.[7]

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."[8] These statutes have led to a number of constitutional concerns.

Grandparent Visitation Rights under the U.S. Constitution

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[9] The U.S. Supreme Court has consistently held that the "liberty" protected by the due process clause includes a parents interest in the nurture, upbringing, companionship, care, and custody of their children.[10] In fact, this interest is "perhaps the oldest of the fundamental liberty interests recognized" by the Court.[11] Thus, the Court has held that:

> So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Under this clear precedent, the U.S. Supreme Court considered the constitutionality of Washington's nonparental visitation statute in *Troxel v. Granville*, 530 U.S. 57 (2000). The Washington nonparental visitation statute permitted any person to petition a court for visitation rights with a minor child at any time, and authorized a court to grant such visitation rights whenever "visitation may be in the best interests of the child."[12] Pursuant to the statute, paternal grandparents

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[7] *Id.* at 3.

[8] Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. "Best interests" determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Determining the Best Interests of the Child,* available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

[9] U.S. CONST. amend. XIV

[10] See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923)(holding that the liberty protected by the Due Process Clause includes the rights of parents to establish a home and bring up children and to control the education of their own); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (stating that "the history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition); *Quillon v. Walcott*, 434 U.S. 246 (1978)(stating that the court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected).

[11] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

[12] *Id*. at 60.

petitioned to expand visitation rights with their deceased son's children after the children's biological mother (who had remarried) reduced visitation from every weekend to once a month.

In holding that the statute unconstitutionally infringed on the mother's fundamental parental rights as applied, the Court noted that the statute was "breathtakingly broad" and subjected any decision by a parent concerning visitation of their children to state-court review:[13]

> The Washington Statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.[14]

The Court determined that no consideration had been given to the mother's decision regarding visitation nor was there any allegation she was an unfit parent. Further, the court noted that no weight had been given to the fact the mother had assented to some visitation.[15] The Court explained that 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.[16]

However, the court explicitly refrained from deciding whether the Due Process Clause requires *all* nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation, stating:

> Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[17]

Post-*Troxel*, debate continues in state courts regarding grandparent visitation due, in part, to the lack of clear guidance from the U.S. Supreme Court. Florida, however, has consistently construed its Constitution to require a showing of harm or potential harm to the child as a condition of granting grandparent visitation over parental objection. This standard has proved fatal to most grandparent visitation statutes enacted in the state.

[13] *Id.* at 67.
[14] *Id.*
[15] *Id.* at 71.
[16] *Id.* at 72.
[17] *Id*. at 73-74.

Grandparent Visitation Rights under the Florida Constitution

Development of Grandparent Visitation Rights in Florida

Prior to 1978, Florida law afforded grandparents no avenue through which to seek visitation of their grandchildren if the child's parents opposed the visitation.[18] That year, the Florida legislature amended s. 61.13, F.S.,[19] to allow a court to award grandparent visitation as part of a dissolution of marriage proceeding, as well s. 68.08, F.S., in circumstances involving the death or desertion of a parent.[20] However, in practice, the change did not produce the intended effect because Florida courts ruled that grandparents, for the most part, did not have standing to petition for visitation because they were not parties to the divorce proceeding.[21] Essentially grandparents had to interject themselves into the divorce proceedings in order to petition for visitation.[22]

Grandparent visitation rights expanded significantly in Florida in 1984 when the Florida Legislature enacted stand-alone visitation relief for grandparents, ch. 752, F.S., entitled "Grandparental Visitation Rights." Chapter 752, F.S., gave 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).[23]

In 1993, the Florida Legislature further amended ch. 61, F.S., adding a provision that awarded reasonable grandparent visitation in a dissolution of marriage proceeding if the court found that the visitation would be in the child's best interest.

In the ensuing years, the Florida Supreme Court has struck down all the grandparent visitation provisions in ch. 61, F.S., and almost all the provisions in ch. 752, F.S., as unconstitutional under Article I, Section 23 of the Florida Constitution, the Right of Privacy.[24]

Grandparent Visitation Statutes and Article I, Section 23-Right of Privacy

In *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), the Court held s. 752.01(1)(e), F.S., which authorized grandparent visitation over the objection of a child's intact family if visitation was in

[18] *See Parker v. Gates*, 103 So. 126 (Fla. 1925).
[19] Chapter 61, F.S., governs dissolution of marriage and parental responsibility for minor children.
[20] Ch. 78-5, Laws of Fla.
[21] *See e.g. Shuler v. Shuler*, 371 So. 2d 588 (Fla. 1st DCA 1979).
[22] *Supra* note 1, at 2.
[23] *See* ch. 93-279, Laws of Fla. (s. 752.01, F.S. (1993)). Subsequent amendments by the Legislature removed most of these criteria.
[24] *See Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996)(striking down visitation where married parents prohibited formation of relationship); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998)(striking down visitation where one parent deceased); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000)(striking down visitation where child born out of wedlock); *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000)(striking down custodial rights of grandparents in custody or dissolution of marriage proceedings); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004)(striking down request of grandparental visitation in paternity suit).

the "best interests of the child", facially unconstitutional under Article I, Section 23 of the Florida Constitution.

The Court recognized the fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism, and declared that such fundamental interest is specifically protected by Article I, Section 23 of the Florida Constitution.[25] 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.[26]

The Court found that the imposition by the state of grandparental visitation rights implicates a parent's privacy rights under Article I, Section 23 of the Florida Constitution. Based upon Article I, Section 23, the Court held that the State may not intrude upon a parent's fundamental right to raise their children except in cases where child is threatened with harm, and any best interest test without such requirement does not demonstrate a compelling state interest.[27]

Two years later, in *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), the Court struck down s. 752.01(1)(a), which permitted visitation when one or both parents were deceased, on the same grounds. The Court explained the inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family, rather than requiring a showing of demonstrable harm to the child:

> It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose "its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions."[28]

The Court acknowledged that there may be many beneficial relationships for a child, but firmly held that it is the not for the government to decide with whom the child builds those relationships.[29] In fact, the court found it "irrelevant to the constitutional analysis that it might in many instances be 'better' or 'desirable' for a child to maintain contact with a grandparent."[30] The unassailable proposition, according to the Court, is that "otherwise fit parents ... who have neither abused,

[25] *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).
[26] *Id*. at 1276.
[27] *Id.*
[28] *Von Eiff v. Azicri*, 720 So. 2d 510, 516 (Fla. 1998)
[29] *Id.*
[30] *Id.*

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."[31]

The Court has also struck down two provisions in ch. 61, F.S., which granted grandparents custodial rights in custody or dissolution of marriage proceedings, on the same grounds.[32] In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Court recognized that when a custody dispute is between two fit parents, 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.[33] The Court held that s. 61.13(7), F.S., "is unconstitutional on its face because it equates grandparents with natural parents and permits courts to determine custody disputes utilizing solely the "best interest of the child" standard without first determining detriment to the child."[34] The Court found this statutory provision to be even more intrusive on a parent's right to raise his or her child than the grandparent visitation statute in ch. 752, F.S.[35]

Nevertheless, Grandparents have been successful in enforcing visitation orders established in other states.[36] The Florida Supreme Court recently held that the Full Faith and Credit Clause of the United States Constitution requires enforcement of another state's judgment ordering grandparent visitation with minor children despite the fact that a similar order by a Florida court would be may be prohibited under Article I, Section 23.[37]

Current Florida Grandparent Visitation Rights

The Florida Supreme Court's vigilant protection of childrearing autonomy under Article I, Section 23 of the Florida Constitution still provides avenues for grandparent visitation under Florida law. Primarily, in accordance with *Ledoux-Nottingham v. Downs*[38], Florida courts will enforce another state's judgment ordering grandparent visitation with minor children despite the fact entry of a similar judgment by a Florida Court under the same circumstances may be prohibited by the Florida Constitution.[39]

Additionally, in 2015, the Florida Legislature substantially revised ch. 752, F.S., relating to grandparent visitation. The revision repealed grandparent visitation provisions declared unconstitutional by the Florida Supreme Court and crafted a new limited Florida grandparent visitation statute within the framework provided by the controlling case law.[40]

Currently, under s. 752.011, F.S., a grandparent[41] may petition a Florida court for visitation with a minor grandchild if:

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[31] *Id.* at 515.
[32] *See Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000); *Sullivan v. Sapp* 866 So. 2d 28 (Fla. 2004).
[33] *Richardson v. Richardson*, 766 So. 2d 1036, 1039 (Fla. 2000).
[34] *Id*. at 1043.
[35] *Id.* at 1040.
[36] *See Ledoux-Nottingham v. Downs*, 210 So. 3d 1217 (Fla. 2017).
[37] *Id.* at 1223.
[38] 210 So. 3d 1217 (Fla. 2017).
[39] *Id*. at 1223.
[40] Ch. 2015-134, Laws of Fla.
[41] The term "grandparent" includes great-grandparents. s. 752.001(1), F.S.

- Both parents of the child are deceased, missing,[42] or in a persistent vegetative state[43]; or
- One parent of the child is deceased, missing, or in a persistent vegetative state and the other parent has been convicted of a felony offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare.

The grandparent must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child; and if made, the court must direct the family to mediation and move toward a final hearing.[44] The court may award a grandparent reasonable visitation with a minor grandchild if the court finds by clear and convincing evidence that a parent is unfit or that there is significant harm to the child, that visitation is in the best interest of the minor child, and that the visitation will not materially harm the parent-child relationship.[45]

In assessing the "best interests of the child", the court must consider the totality of the circumstances affecting the mental and emotional well-being of the minor child, including:[46]

- The love affection, and other emotional ties existing between the minor 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 prior to the death, vegetative state, or disappearance of the parent;
- The reasons cited by the surviving parent to end contact or visitation;
- Whether there has been significant and demonstrable mental or emotional harm to the minor child as a result of the disruption in the family unit, whether the child derived support and stability from the grandparent, and whether the continuation of such support and stability is likely to prevent further harm;
- 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 (absence of such a statement is not evidence of an objection to grandparent visitation); and
- Such other factors as the court considers necessary in making its determination.

[42] "Missing" means having whereabouts which are unknown for a period of at least 90 days and not being able to be located after a diligent search and inquiry. Such search and inquiry for a missing person must include, at a minimum, inquiries of all relatives of the person who can reasonably be identified by the petitioner, inquiries of hospitals in the areas where the person last resided, inquiries of the person's recent employers, inquiries of state and federal agencies likely to have information about the person, inquiries of appropriate utility and postal providers, a thorough search of at least one electronic database specifically designed for locating persons, and inquiries of appropriate law enforcement agencies. s. 752.001(2), F.S.

[43] "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is the absence of voluntary action or cognitive behavior of any kind; and an inability to communicate or interact purposefully with the environment. s. 765.101(15), F.S.

[44] s. 752.011, (1)-(2), F.S.

[45] s. 752.011(3), F.S.

[46] s. 752.011(4), F.S.

In determining material harm to the parent-child relationship, the court must consider the totality of the circumstances affecting the parent-child relationship, including:[47]

- 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 routines of the parent and the minor 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.[48] A stepparent or close relative who adopts the minor child may also petition the court to terminate an order granting visitation that was in place before the adoption.[49] The court may terminate the order unless the grandparent shows that the criteria authorizing visitation continue to be satisfied.[50]

A grandparent may only file an action for visitation once in a two-year period, unless a real, substantial, and unanticipated change of circumstances has occurred relating to the mental or emotional harm caused by the parental decision to deny visitation between the minor and grandparent.[51]

Florida appellate courts have not yet considered the constitutionality of this new limited grandparent visitation statute.[52] Thus it is currently a valid mechanism to award grandparent visitation.

B. EFFECT OF PROPOSED CHANGES:

This proposal amends Article I, Section 23, Florida's Privacy Clause, to provide that the right of privacy may not be construed to limit the right of grandparents to seek visitation with their grandchildren if there is a compelling state interest relating to the best interests of the child. The proposal appears to abrogate the current requirement that demonstrable harm to the child be shown

[47] s. 752.011(5), F.S.
[48] s. 752.011(8), F.S.
[49] s. 752.071, F.S.
[50] *Id.*
[51] s. 752.011(9), F.S.
[52] *See Ledoux-Nottingham v. Downs*, 210 So. 3d 1217, FN 3 (Fla. 2017) (stating "We have not considered the constitutionality of the current limited grandparent visitation provision, section 752.011, Florida Statutes (2015)).

to demonstrate a compelling state interest. Thus, the proposal may increase the circumstances under which a court may order grandparent visitation with a grandchild over the objection of parents.

If approved by the voters, the proposal will take effect on January 8, 2019.[53]

C. FISCAL IMPACT:

The bill does not appear to have a fiscal impact on state or local government.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

It is unclear if the proposal is intended to relate to the "right to seek visitation", which implicates procedural rights, or the "right to visitation" which would implicate substantive rights.

D. Related Issues:

None.

[53] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.)