
Judiciary Committee

HB 2193

Title: An act relating to third-party visitation.

Brief Description: Concerning third-party visitation.

Sponsors: Representatives Pedersen, Nealey, Kagi, Rivers, Orwall, Walsh, Eddy, Goodman, Roberts, Fagan, Ladenburg, Green, Ormsby and Kenney.

<p style="text-align: center;">Brief Summary of Bill</p> <ul style="list-style-type: none">• Establishes procedures for a third party to petition the court for visitation with a child if certain conditions are met.

Hearing Date: 1/11/12

Staff: Trudes Tango (786-7384).

Background:

Washington has two statutes that allow a person who is not the parent of a child to petition for court-ordered visitation. Both statutes have been held unconstitutional.

The broader of the two statutes allows any person to petition the court for visitation at any time. The court may order visitation if it is the best interest of the child. The second statute allows any person to petition for visitation if the child's parents have commenced an action for dissolution or legal separation. The petitioner must establish by clear and convincing evidence that a significant relationship exists between the petitioner and the child. The court may order visitation if it is in the child's best interest. Under this second statute, visitation with a grandparent is presumed to be in the child's best interest when a significant relationship between the child and grandparent exists.

Cases from both the United States Supreme Court and the Washington Supreme Court address the constitutionality of Washington's third party visitation statutes.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

In In re Custody of Smith (1998), the Washington Supreme Court held that parents have a fundamental right to raise their children without state interference. This liberty interest is protected as a matter of substantive due process under the Fourteenth Amendment. State interference with a parent's fundamental right is subject to strict scrutiny and therefore is justified only if there is a compelling state interest and the interference is narrowly drawn to meet only compelling state interest. The court recognized that the state may interfere with a parent's fundamental right in order to prevent harm to the child. Short of preventing harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest. The court also criticized Washington's broader visitation statute because it fails to require the petitioner to show a substantial relationship existed between the child and the petitioner and because it does not require the court to take into consideration the parent's reasons for denying visitation.

Smith was a consolidation of cases that included the Troxel case. Troxel was appealed to the United States Supreme Court, and in Troxel v. Granville (2000) the Supreme Court affirmed that parents have a fundamental right to raise their children. The Court also stated that a fit parent is presumed to act in the child's best interest and that courts must give special deference to a fit parent's decision. The Court did not address the Smith court's ruling that harm to the child is a necessary factor before the court can award third party visitation.

In 2005, the Washington Supreme Court decided In the Matter of the Parentage of C.A.M.A., which affirmed that a court may not award third party visitation with a child of a fit parent unless denial of visitation would result in harm to the child.

Summary of Bill:

Procedures are established for a person who is not the parent of the child to petition the court for visitation under certain circumstances.

Requirements for Filing a Petition

A person who is not the parent of the child may petition for visitation if the person has established an ongoing and substantial relationship with the child. However, a person may not petition if the child's two parents, living together with the child, agree that visitation should not be granted.

An ongoing and substantial relationship means the person and the child have had a relationship with substantial continuity for at least one year through interaction, companionship, and mutuality, without expectation of financial compensation.

The person may not petition for visitation more than once, unless:

(1) at least two years have passed since the final order issued in a previous visitation petition; and

(2) the person shows that there has been a substantial change in circumstances of the child or of the nonmoving party based on facts that have arisen since the order or facts that were unknown to the court at the time the order was entered.

Procedural Requirements

The person must file the petition with an affidavit alleging that a sufficient relationship with the child exists or existed before interference by the respondent and the child would likely suffer harm or the substantial risk of harm if visitation were not granted.

The person must serve notice of the filing to persons having legal custody or court-ordered residential time with the child, and those persons may file opposing affidavits.

Court Hearing on the Petition

If, based on the petition and affidavits, the court finds that it is more likely than not that visitation will be granted, the court must hold a hearing. The court may not enter any temporary orders establishing, enforcing, or modifying visitation.

It is presumed that a fit parent's decision to deny visitation is in the child's best interest and does not create a likelihood of harm or a substantial risk of harm to the child. To rebut the presumption, the petitioner must prove by clear and convincing evidence that the child would likely suffer harm or the substantial risk of harm if visitation were not granted. If the petitioner has rebutted that presumption, or if there is no presumption because the child is not in the custody of a parent, the court must consider whether it is in the child's best interest to grant visitation. The petitioner must prove by clear and convincing evidence that visitation is in the child's best interest.

In determining the child's best interest, the court must consider the following nonexclusive factors:

- (1) the love, affection, and strength of the current relationship between the child and the petitioner and how the relationship is beneficial to the child;
- (2) the length and quality of the prior relationship between the child and petitioner before the respondent denied visitation, including the role performed by the petitioner and the emotional ties between the child and petitioner;
- (3) the relationship between the petitioner and the respondent;
- (4) the nature and reason for the respondent's objection to granting visitation;
- (5) the effect visitation will have on the relationship between the child and respondent;
- (6) the residential time-sharing arrangements between the parties who have residential time with the child;
- (7) the good faith of the petitioner and respondent;
- (8) any history of physical, emotional, or sexual abuse or neglect by the petitioner or a person residing with the petitioner if visitation would involve contact with that person;
- (9) the child's reasonable preference, if the court considers the child to be of sufficient age to express a preference; and
- (10) any other relevant factor.

The court must enter an order granting visitation if it finds that the child would likely suffer harm or the substantial risk of harm if visitation were not granted and visitation is in the child's best interest. A visitation order does not confer upon the person the rights and duties of a parent.

Modifying or Terminating a Visitation Order

If visitation is granted, a court may not modify or terminate the order unless there has been a substantial change of circumstances of the child or nonmoving party based on facts that have arisen since the order was entered or that were unknown to the court at the time it entered the

order, and a modification or termination is in the child's best interest. The court must hold a hearing if, based on the petition and affidavits submitted, it finds that it is more likely than not that a modification or termination will be granted.

Attorneys' Fees and Transportation Costs

Regarding petitions for visitation, upon a motion by the respondent, the court must order the petitioner to pay reasonable attorneys' fees to the respondent in advance and prior to any hearing, unless the court finds that no financial hardship will be imposed on the respondent. Upon a respondent's motion or on its own, the court may order the petitioner to pay reasonable attorneys' fees and costs to the respondent regardless of the outcome of the petition.

If visitation is granted, the court must order the petitioner to pay all transportation costs associated with visitation.

In proceedings for a modification or termination of the visitation order, the court may award reasonable attorneys' fees and costs to either party.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.