

HOUSE BILL REPORT

HB 2193

As Reported by House Committee On:
Judiciary

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.

Brief History:

Committee Activity:

Judiciary: 1/11/12, 1/19/12 [DPS].

Brief Summary of Substitute Bill

- Establishes procedures for a third party to petition the court for visitation with a child if certain conditions are met.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Eddy, Hansen, Nealey, Orwall and Roberts.

Minority Report: Do not pass. Signed by 4 members: Representatives Shea, Assistant Ranking Minority Member; Kirby, Klippert and Rivers.

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 in the best interest of the child. The second

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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.

In *In re Custody of Smith* (1998), the Washington Supreme Court (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 (Supreme Court), and in *Troxel v. Granville* (2000) the Supreme Court affirmed that parents have a fundamental right to raise their children. The Supreme 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 Supreme 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 Substitute 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.

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.

Substitute Bill Compared to Original Bill:

The original bill prohibited a third party from petitioning for visitation if the child's two parents, living together with the child, agreed that visitation should not be granted.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) Washington is in a very small number of states, if not the only state, that does not have a process for a nonparent to petition for visitation. Although parents have a right to decide what is best for their children, there are circumstances when decisions are made that can harm children by denying contact with people who have been involved in the child's life. This bill is a modest measure and tightly prescribed. It builds in a number of protections for the parents. It walks a fine line between protecting the fundamental rights of parents and on the other hand recognizing circumstances when children can be harmed. There are over 600 grandparents who are suffering. The bill gives grandchildren the opportunity to be loved. Sometimes a new partner or spouse of the parent does not want the grandparents to be involved. Sometimes the grandparent helps raise the child and then when that help is no longer needed, the child is removed from the grandparents' lives. The children no longer have access to entire parts of their family. This bill does not take away the rights of parents. A petition in court is going to be the last resort.

(With concerns) The requirement that the relationship exist without expectation of financial compensation is a concern. The bill does not require that there be a professional evaluation of the child. The factors in the bill are subjective. The attorney fees provision discriminates against low-income relatives. It would make it impossible for a low-income petitioner to file a petition because they would have to advance attorney's fees. The prohibition when there are two parents means a petition can only be brought against single or divorced parents. The focus should be on the child not the status of the parents. There are times when families live apart due to military duties or work obligations. That provision creates a disproportionate impact on women, who make up a large number of families.

(Opposed) Parental rights is a top priority. This bill allows anyone who has developed a relationship with the child to petition for visitation. It discriminates against single parents. The bill undermines a parent's fundamental right to make decisions for their children. It will overburden the courts. The state should not be ruling in family disputes and determining whether a child has a relationship with another person. The bill will impact families trying to re-build unity. It is in the state's interest to let families work out disputes outside of court. If parties go to court, it is only going to make the situation worse. This bill does not allow a parent to cut off unhealthy relationships. It creates an incentive for parents to not work things out with other family members. If there is going to be harm to the child, then Child Protective Services should get involved. The bill is unconstitutional.

Persons Testifying: (In support) Bob Rudolph, Geraldine Laemmle, Linda Stephens, Dale Neumann, and Doris Brownfield, Grandparent's Rights of Washington State.

(With concerns) Jan Smith; David Ward, Legal Voice; Lonnie Johns-Brown, National Organization of Women; and Rick Bartholomew, Family Law Section, Washington State Bar Association.

(Opposed) Scott Brannan and Dianna Brannan, Christian Homeschool Network; Hilary Snodgrass, Parents Rights of Washington; Mary Ellen Ward, Washington Families United; William Zimmerman; Evelyn Mae Raymond; Thomas Hann; Max Bruk; and Kirk Groenig.

Persons Signed In To Testify But Not Testifying: None.