

SENATE BILL REPORT

ESHB 1934

As of March 27, 2013

Title: An act relating to granting all persons who have an ongoing and substantial relationship with a child, including but not limited to grandparents, the right to seek visitation with that child through the courts.

Brief Description: Concerning visitation rights for persons, including grandparents, with an ongoing and substantial relationship with a child.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Pedersen, Nealey, Hope, Kagi, Goodman, Hansen, Orwall, Pollet, Roberts, Appleton, Hunt, Maxwell, Ormsby, Jinkins, Green, Morrell, Carlyle, Seaquist, Haigh, Hudgins, Pettigrew, Tarleton, Sells, Smith, Reykdal, Sawyer, Morris, Dunshee, Magendanz, Hunter, Wylie, Liias, Fitzgibbon, Fagan, Upthegrove, Farrell, Takko, Ryu, Riccelli, Bergquist, Freeman, Habib, Van De Wege, Haler, Clibborn, Sullivan, Walsh, Tharinger, Moeller, Blake, Cody, Springer, Lytton, McCoy, Stanford, Moscoso, Fey and Santos).

Brief History: Passed House: 3/07/13, 56-40.

Committee Activity: Human Services & Corrections: 3/26/13.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Staff: Shani Bauer (786-7468)

Background: Washington has two statutes allowing third parties to petition a court to seek visitation time with a minor child. One statute allows any person to petition for visitation at any time. The court may order visitation if it is in the best interest of the child.

The second statute allows a nonparent to petition for visitation with a minor child if the parents initiated a dissolution or legal separation action. The petitioner must show by clear and convincing evidence that a significant relationship exists with the child and that visitation would be in the best interests of the child. Visitation with a grandparent is presumed to be in the child's best interest when there is a significant relationship between the grandparent and the child. This presumption may be overcome if the court finds that visitation would endanger the child's physical, mental, or emotional health.

Washington's third-party visitation statutes have been found unconstitutional by both the Supreme Court of the United States (Supreme Court) and the Washington Supreme Court

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.

(Court). In *Troxel v. Granville*(2000), the Supreme Court found that Washington's statute allowing any person to petition for visitation at any time violated the fundamental liberty interest of parents to make decisions concerning the care and upbringing of 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 Court in two cases, *In re Custody of Smith* – 1998, and *In the Matter of the Parentage of C.A.M.A* – 2005, also held that parents have a fundamental right to raise their children without state interference. State interference with a parent's fundamental right is subject to strict scrutiny and therefore is justified only if it is narrowly drawn to meet a 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 criticized the lack of other safeguards in Washington's visitation statute, including that it does not require the petitioner to show a substantial relationship between the child and the petitioner, nor require the court to take into consideration the parent's reasons for denying visitation.

Summary of Bill: Current statutes regarding third-party visitation actions are repealed, and new procedures and standards are established for a person who is not a parent to petition the court for visitation with a child.

Requirements for Filing a Petition. A person may petition for visitation if the person established an ongoing and substantial relationship with the child. An ongoing and substantial relationship means the person and the child had a relationship formed and sustained through interaction, companionship, and mutuality of interest and affection, without expectation of financial compensation, with substantial continuity for at least two years unless the child is under age two, in which case there must be substantial continuity for at least half of the child's life, and with a shared expectation of and desire for an ongoing relationship. An ongoing and substantial relationship may not be established based solely on a relationship that results from the person's role as a paid or volunteer service provider, such as a teacher, counselor, coach, or child care provider.

The petitioner must file an affidavit with the petition alleging that an ongoing and substantial relationship with the child exists, or existed before interference by the respondent, and that the child would likely suffer harm or the substantial risk of harm if visitation is not granted. The petitioner must serve notice of the petition on each person having custody or court-ordered residential time with the child, and these parties may serve affidavits opposing the petition.

A person may not petition for visitation more than once unless at least two years passed since the final order issued in a previous visitation petition, and was a substantial change in circumstances of the child or the nonmoving party.

Court Hearing on the Petition. The court must hold a hearing on the petition if it finds based on the petition and the affidavits that visitation will, more likely than not, be granted. The court may not enter a temporary order establishing, enforcing, or modifying visitation.

The court must consider the respondent's reasons for denying visitation to the petitioner. A presumption is created that a fit parent's decision to deny visitation is in the best interests of the child and does not create a likelihood of harm or a substantial risk of harm to the child. To rebut this presumption, the petitioner must show by clear and convincing evidence that the child would likely suffer harm or the substantial risk of harm if visitation is not granted.

The petitioner must also 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:

- the love, affection, and strength of the current relationship between the child and the petitioner and how the relationship is beneficial to the child;
- the length and quality of the prior relationship between the child and petitioner before the respondent denied visitation;
- the relationship between the petitioner and the respondent;
- the love, affection, and strength of the current relationship between the child and respondent;
- the nature and reason for the respondent's objection to granting visitation;
- the effect visitation will have on the relationship between the child and respondent;
- the residential time-sharing arrangements between the parties who have residential time with the child;
- the good faith of the petitioner and respondent;
- any history of physical, emotional, or sexual abuse or neglect by the petitioner or a person residing with the petitioner;
- the child's reasonable preference, if the court considers the child to be of sufficient age to express a preference;
- the fact that the respondent has not lost parental rights by being adjudicated as an unfit parent; and
- any other relevant factor.

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

Modifying or Terminating a Visitation Order. If visitation is granted, a court may not modify or terminate the order unless there is a substantial change of circumstances of the child or nonmoving party based on facts that arose 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. Upon a motion by the respondent, the court must require the petitioner to pay a reasonable amount for costs and reasonable attorneys' fees to the respondent in advance unless the court finds it would be unjust considering the financial resources of the parties. Regardless of the financial resources of the parties, the court must order the petitioner to pay a reasonable amount for costs and reasonable attorneys' fees if the court finds that the petition was brought in bad faith or without reasonable basis. In proceedings for a modification or termination of the visitation order, the court may award

reasonable attorneys' fees and costs to either party. If visitation is granted, the court must order the petitioner to pay all transportation costs associated with visitation.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: The House struggled with this issue for a matter of years. Washington is the only state that does not allow the court to consider harm to a child from the denial of visitation. This is a limited proposal to address the situation where visitation is being arbitrarily denied. The statute requires three things: a substantial relationship; risk of harm to the child; and that visitation must be in the best interests of the child. If necessary, the bill could be narrowed in two ways. One, the right to revisit the decision every two years could be removed; and second, the definition of ongoing and substantial can be expanded to require the petitioner to have a blood relationship with the child. Some children are taken from the only home they ever knew. A third party or grandparent has absolutely no recourse when they have been the primary caregiver and the biological parent decides that person should no longer be in the child's life. This bill would give children a chance to rebuild relationships that have been taken from them. The only current option in the law is to petition for custody which would entail attacking the parent's ability to parent rather than finding ways to build the parent up and assist in parenting. This bill would provide a construct for petitioning for visitation rather than trying to take away parental rights. Grandparents whose child is deployed should have the ability to be a positive influence in the child's life when the remaining parent is not amenable to visitation.

CON: The constitution protects the fundamental rights of parents to make decisions regarding visitation. In the absence of evidence that a parent is unfit, the court should not be able to substitute its judgment for that of the parent. This bill proposes to give government yet another way to have oversight in our lives. Grandparenting is a privilege, not a right. This bill could foster more harm to the child as a result of conflict between grandparents and the parents. The Legislature is very focused on adopting evidence-based practice models recommended by the Washington State Institute for Public Policy. This bill takes the opposite of a research-based approach and adopts a legal response.

Persons Testifying: PRO: Representative Pedersen, prime sponsor; Mary Jo Sweeney, Vicki Morgan, Jody Page, Share DeWess, Michael Mischenko, Nyla Cauble, Bob Rudolph, Janet Sofie, Grandparents Rights of WA State; David Ward, Legal Voice.

CON: Hilary Snodgrass, Parental Rights of WA; Mary Ellen Ward, Christy Curry, WA Families United; Max Bruk, Evelyn Raymond, citizens; DiAnna Brannan, Christian Homeschool Network; Danille Tursinni, Family Policy Institute.