MEMORANDUM

TO: Drafting Committee for the Non-Parental Child Custody and Visitation Act

FROM: Jeff Atkinson, Reporter

DATE: March 25, 2016

RE: Constitutional issues

This memo discusses constitutional issues regarding the Non-Parental Child Custody and Visitation Act and describes the different criteria that states have used to determine the constitutionality of acts that grant rights to non-parents who seek visitation or custody.

We have (of course) drafted the act to be constitutional, particularly under the standards of the U.S. Supreme Court opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), which struck down Washington State's grandparent visitation statute as applied. The act includes the following procedures and standards to protect the rights of parents and increase the likelihood that the act will be held to be constitutional:

(1) **Pleadings –** A requirement of verified, specific pleadings.

(2) **Presumption –** In actions by a non-parent, there is a rebuttable presumption that the parent's or de facto parent's decision about custody and visitation is in the best interests of the child.

(3) **Burden of proof –** The burden of proof on the petitioner is clear and convincing evidence. In the case of an individual seeking status as a de facto parent, the court needs to find by clear and convincing evidence that individual is a de facto parent. In the case of a non-parent seeking custody or visitation, the non-parent "must establish by clear and convincing evidence that: (1) denial of custody or visitation to the petitioner is a detriment to the child,[1] and (2) custody or visitation to petitioner is the best interests of the child." However, in actions by non-parents, "Proof of parental unfitness is not required to rebut the presumption" in favor of the decision by the parent or de facto parent.

Courts in many states have upheld non-parent visitation statutes when the statutes established a presumption in favor of the parent's decision and placed the burden of proof on the party seeking visitation.[2] Other states have upheld non-parental visitation statutes when the statute (or court opinion construing the statute) required the party seeking visitation to prove their case by clear and convincing evidence.[3]

In addition, courts have upheld non-parental visitation statutes when by statute or court opinion there was a requirement of "urgent circumstances,"[4] "exceptional circumstances,"[5] or "compelling circumstances."[6]

On the other hand, approximately eleven states – by court opinion or by statute – require a showing that the child will be harmed without visitation before visitation can be granted.[7]

The Supreme Court of Connecticut, for example, held that in order to grant visitation to non-parent, the following requirements must be met:

> First, the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, namely, that the child is "neglected, uncared-for or dependent." The degree of specificity of the allegations must be sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition.
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> Second, once these high jurisdictional hurdles have been overcome, the petitioner must prove these allegations by clear and convincing evidence. Only if that enhanced burden of persuasion has been met may the court enter an order of visitation. These requirements thus serve as the constitutionally mandated safeguards against unwarranted intrusions into a parent's authority.[8]

Similarly, the Supreme Court of Florida has held: "Without a finding of harm, we are unable to conclude that the State demonstrates a compelling interest. We hold that, in the absence of an explicit requirement of harm or detriment, the challenged paragraph is facially flawed."[9]

As noted in earlier memos, the U.S. Supreme Court in *Troxel* did not rule on the issue of whether the constitution requires a showing or harm or potential harm. In her plurality opinion, Justice O'Connor said:

> Because we rest our decision on the sweeping breadth of [Washington Code] § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—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. We do not, and need not, define today

> the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 2079 (dissenting opinion). 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.[10]

In those states requiring a showing of harm, the level of harm varies. In Georgia, the harm can be at a comparatively low level – including "emotional harm" from loss of contact with a grandparent.[11] In Connecticut, the harm is at a high level – analogous to the harm found in neglect and dependency cases.[12] Iowa requires a finding of parental unfitness.[13]

The Pennsylvania Supreme Court, after reviewing *Troxel* concluded that a showing of harm was not required because such a requirement "would set the bar too high, vitiating the purpose of the statute and the policy expressed in [the state statute], which is to assure the continued contact between grandchildren and grandparents when a parent is deceased, divorced, or separated."[14]

I believe our act, as drafted, would be held to be constitutional under *Troxel* and the standards applied by a majority of states. However, there are a few states in which the act probably would not be held to be constitutional.

Based on our pior discussions, I assume we do not wish to adopt a standard similar to Connecticut or Iowa that would require findings of parental unfitness, neglect, or dependency before visitation or custody could be granted to a non-parent. Such a standard would severely limit the circumstances in which visitation or custody could be granted to a non-parent and would be harmful to the interests of children who have close relationship with a non-parent or de facto parent.

I offer this memo to facilitate further discussion of the proper standards for granting custody and visitation to de facto parents and non-parents, particularly with regard to constitutional issues.

Endnotes

1. Under our act, § 2(4), "'Detriment to the child' means adverse effect to the child's physical or psychological well-being, including the effects resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement of a child with a non-parent."

2. *See, e.g., McGovern v. McGovern,* 201 Ariz. 172, 33 P.3d 506 (Ariz.Ct.App.2001); *In re Marriage of Harris,* 34 Cal.4th 210, 96 P.3d 141, 17 Cal.Rptr.3d 842 (2004); *In re Adoption of C.A.,* 137 P.3d 318 (Colo.2006); *Crafton v. Gibson,* 752 N.E.2d 78 (Ind.Ct.App.2001); *Walker v. Blair,* 382 S.W.3d 862 (Ky.2012); *Rogers v. Pastureau,* 117 So.3d 517 (La.Ct.App.2013); *Deem v. Lobato,* 136 N.M. 266, 96 P.3d 1186 (2004); *In re S.B.,* 845 N.W.2d 317 (N.D.2014); *Harrold v. Collier,* 107 Ohio St.3d 44, 836 N.E.2d 1165 (2005); *Hiller v. Fausey,* 588 Pa. 342, 904 A.2d 875 (2006); *State ex rel. Brandon L. v. Moats,* 209 W.Va. 752, 551 S.E.2d 674 (2001); and *In re Paternity of Roger D.H.,* 250 Wis.2d 747, 641 N.W.2d 440 (Wis.Ct.App.2002). The preceding cases were cited by Weldon v. Ballow, ___ So.3d ___, 2015 WL 6618983, at 13 (Ala. Civ. App. Oct. 30, 2015) *appeal denied sub nom. Ex parte Strange*, 2016 WL 281069 (Ala. Jan. 22, 2016). *See also In re S.B*., 2014 ND 87, 845 N.W.2d 317.

In addition, in *Harrold v. Collier*, 107 Ohio St.3d 44, 836 N.E.2d 1165 (Ohio 2005), the court upheld the constitutionality of the state's grandparent visitation law as applied and ordered visitation to the maternal grandparents over objection of the father. The child had been raised by the grandparents for five years of her life. The court said: "[N]othing in Troxel suggests that a parent's wishes should be placed before a child's best interest. The state has a compelling interest in protecting a child's best interest, *In re T.R.* (1990), 52 Ohio St.3d 6, 18, 556 N.E.2d 439, and Ohio's nonparental-visitation statutes are narrowly tailored to serve that compelling interest. They are not, therefore, unconstitutional under *Troxel*." 836 N.E.2d at 1172.

3. *See, e.g., N.F. v. R.A., Jr. (In re Adoption of C.A.)*, 137 P.3d 318 (Colo. 2006); *SooHoo v. Johnson (In re SooHoo)*, 731 N.W.2d 815 (Minn. 2007); *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006); *Medearis v. Whiting*, 695 N.W.2d 226 (S.D. 2005); *Uzelac v. Thurgood (In re Estate of S.T.T.)*, 2006 UT 46, 144 P.3d 1083 (2006). In these cases, other protections also may have been applicable, such as presuming the parent's decision was correct.

Cf. State Department of Social and Rehabilitative Services v. Paillet, 16 P.3d 962 (Kan. 2001) (holding that the Kansas grandparent visitation was not unconstitutional on its face, but the statute as applied to a paternal grandparents request for visitation following death of the child's father was unconstitutional when the grandparents did not have a substantial relationship with their grandchild).

4. *Conlogue v. Conlogue*, 2006 ME 12, 890 A.2d 691, 697 (2006).

5. *Koshko v. Haining*, 398 Md. 404, 440, 921 A.2d 171 (Md. 2007).

6. *Latimer v. Farmer,* 360 S.C. 375, 602 S.E.2d 32, 39 (2004) ("Before visitation may be awarded to grandparents over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest."

7. Court opinions requiring a showing of harm to the child include: *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

In a recent case before the Alabama Court of Appeals – *Weldon v. Ballow*, No. 2140471, ___ So.3d ___, 2015 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), *cert. denied sub nom. Ex parte Strange*, No. 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016) – the court held state's 2011 Grandparent Visitation Act was facially unconstitutional, even though it had a presumption in favor of the parents' decision. The court said: "Without resolving the question of the correct constitutional standard, we are clear that the [act] applies the wrong standard in authorizing a court to override the decision of a custodial parent regarding grandparent visitation based solely on its determination of the best interests of the child." *Id.* The court, with a dissenting opinion, implied, but did not explicitly state, that a showing of harm is required.

Ark. Code Ann. § 9-13-103(e) (West 2016) provides: "To establish that visitation with the petitioner is in the best interest of the child, the petitioner must prove by a preponderance of the evidence the following: . . . (2) The loss of the relationship between the petitioner and the child is likely to harm the child . . . ."

Ga. Code Ann. § 19-7-3(c)(1) (West 2016) provides: "the court may grant any grandparent of the child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted and if the best interests of the child would be served by such visitation." Ga. Code Ann. § 19-7-3(c)(3) provides: "While a parent's decision regarding grandparent visitation shall be given deference by the court, the parent's decision shall not be conclusive when failure to provide grandparent contact would result in emotional harm to the child. A court may presume that a child who is denied any contact with his or her grandparent or who is not provided some minimal opportunity for contact with his or her grandparent may suffer emotional injury that is harmful to such child's health. Such presumption shall be a rebuttable presumption."

Okl. Stat. Ann. tit. 43, § 109.4 (West 2016) provides: "Pursuant to the provisions of this section, any grandparent of an unmarried minor child may seek and be granted reasonable visitation rights to the child which visitation rights may be independent of either parent of the child if: . . . (b) there is a showing of parental unfitness, or the grandparent has rebutted, by clear and convincing evidence, the presumption that the fit parent is acting in the best interests of the

child by showing that the child would suffer harm or potential harm without the granting of visitation rights to the grandparent of the child . . . ."

Tex. Fam. Code § 153.433(a) (West 2016) provides: "The court may order reasonable possession of or access to a grandchild by a grandparent if: . . . (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being . . . ."

8. *Roth v. Weston*, 259 Conn. 202, 234-35, 789 A.2d 431, 450 (2002).

9. *Sullivan v. Sapp*, 866 So. 2d 28, 36 (Fla. 2004), *quoting Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996).

10. *Troxel v. Granville*, 530 U.S. 57, 73, 120 S. Ct. 2054, 2064, 147 L. Ed. 2d 49 (2000).

11. See the statute quoted in endnote 7.

12. See *Roth v. Weston*, quoted in the text accompanying endnote 8.

13. *Santi v. Santi*, 633 N.W.2d 312, 321 (Iowa 2001) ("We believe that [the Iowa statute] is fundamentally flawed, not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis.") In *In re Waites*, 152 So. 3d 306, 314 (Miss. 2014), the court rejected a husband's motion for custody of a child born during the marriage whom the husband raised, although the child was not biologically related to the husband. The court said: " Under the present state of the law, in the absence of rebutting the natural-parent presumption via clear and convincing evidence of abandonment, desertion, immoral conduct detrimental to the child, and/or unfitness, [t]he court may not consider granting custody to a third party, including one standing *in loco parentis* . . . ." (citation omitted).

14. *Hiller v. Fausey*, 588 Pa. 342, 365-66, 904 A.2d 875, 890 (2006): " Moreover, we conclude that requiring grandparents to demonstrate that the denial of visitation would result in harm in every [23 Pa. Stat. And Cons. Stats.] Section 5311 case would set the bar too high, vitiating the purpose of the statute and the policy expressed in Section 5301, which is to assure the continued contact between grandchildren and grandparents when a parent is deceased, divorced, or separated. Instead, we conclude that the stringent requirements of Section 5311, as applied in this case, combined with the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm" (footnote omitted).