

The Making of the Model Third-Party (Non-Parental) Contact Statute: The Reporter's Perspective

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I. Introduction

As the Reporter to the American Academy of Matrimonial Lawyers (the Academy)¹ for the Model Third-Party (Non-Parental) Contact Statute, I was asked to write this brief article introducing the Statute. I have twice been privileged to serve as the Reporter for the Committee on Special Concerns of Children. The first time, from 1993 to 1995, was in connection with the Academy's Standards for Representing Children in Custody and Visitation Proceedings published in 1995. I described the process by which those Standards were developed in a previous article in this journal.² In 1999, Barbara Handschu, then the new Chair of the Special Concerns of Children Committee, asked me to become the Reporter to work on an increasingly important topic that the Academy believed was in need of clarification: whether and under what circumstances is it appropriate for a non-parent to be authorized to petition a court to seek visitation or other contact to a child?

This article describes the circumstances under which the Academy deliberated upon and proposed its Model Third-Party (Non-Parental) Contact Statute and highlights the principles upon which it is based. Part II provides a brief sketch of the

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¹ The American Academy of Matrimonial Lawyers is a peer selected group of approximately 1500 family law attorneys throughout the country. The purpose of the Academy is "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected."

² Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW 201 (1995).

American family today and sets the stage for a discussion of the 2000 Supreme Court decision in *Troxel v. Granville*.³ Part III describes and analyzes *Troxel* in order to provide the reader with the necessary constitutional parameters within which the Committee was operating when it produced the Model Statute. Part IV describes and explains the Model Statute. The article concludes with a prediction that the Model Statute is likely to survive constitutional challenge if it ever were to be reviewed in court.

II. Third-Party Contact Statutes

The picture of the American family today is very different from what it was a mere generation ago. Today, only about three children in five live in the same household with their biological mother and father. A divorce rate hovering at fifty percent combined with one in three children born out of wedlock means that fully forty percent of children in the United States live in what was once a non-traditional household. Almost thirty percent live with only one parent.⁴ This, in turn, means that in many households extended family members provide important, needed child-rearing assistance.⁵

But the picture is significantly more complicated than this. In addition to the large number of single-parent households, there is also a fast growing number of households with children in which two adults reside. One of these adults, however, is not a legally recognized parent. In some instances, these couples have chosen not to marry; in other instances, they are not permitted to marry because state law will not recognize the marriage between people of the same sex. Some have estimated that there may be as many as four million gay men and lesbian women raising ap-

³ 530 U.S. 57 (2000).

⁴ U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998).

⁵ A recent study by the American Association of Retired Persons found that 1 in 10 grandparents acts as a primary caretaker or a regular caregiver for a grandchild. Tamar Lewin, Grandparents Play Big Part in Grandchildren's Lives, Survey Finds, N.Y. TIMES, Jan. 6, 2000, at A16.

proximately eight to ten million children.⁶ These figures include children of heterosexual relationships that ended, the figures also include children of gay and lesbian couples or individuals that are becoming parents through assisted reproductive technologies, such as artificial insemination.

Even when couples are married, it is common today that one of the spouses is not legally related to the children the couple is raising because the stepparent has not adopted the children. It has been estimated that within the next generation as many as one in four children will live with a stepparent before they reach majority.⁷ Again, the failure to adopt may be the result of a personal choice; it may also be that the child still has a legal parent who has not abandoned him or her, so that the child is not eligible to be adopted by the stepparent. All of this adds up to millions of adults who may perform parent-like functions but who do not enjoy legally recognized parental status.

When the Special Concerns Committee began its deliberations near the of the 1990s, every state in the country had enacted a law that, at least under some circumstances, permitted certain non-parents the right to seek contact with someone else's children over the parents' objection.⁸ The so-called third-party contact movement was begun by grandparents. Despite the common law rule that grandparents had no right to seek visitation over a parent's objection,⁹ grandparents proved to have significant clout in the state legislatures. This was partly because the generation that includes grandparents has proven to be successful lobbyists for issues of primary concern to them. But the third-party contact movement goes well beyond grandparents and their influence. Once some legislatures opened the door to grandparental contact, others expanded it even wider to permit relatives other

⁶ Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay and Lesbian Women*, 42 DEPAUL J. HEALTH CARE L. 147 (2000).

⁷ Frank Furstenberg, *The New Extended Family: The Experience of Parents and Children After Remarriage*, in REMARRIAGE AND STEP-PARENTING: CURRENT RESEARCH AND THEORY (K. Pasley & M. Ihinger-Tallman eds., 1987).

⁸ See *Troxel v. Granville*, 530 U.S. 57, 71 (2000).

⁹ Joan C. Bohl, *The 'Unprecedented Intrusion': A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 OKLA. L. REV. 29, 29 & n.1 (1996)

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than grandparents the same right;¹⁰ a few states have authorized courts to order visitation with unrelated third parties.¹¹

The changing character and makeup of the American family helps explain the success of a movement that allows non-legally recognized parents to seek judicial approval to keep alive a significant relationship they formed with someone else's children. When the most common form of family was a two-parent household in a long-term marriage, few imagined a right to intrude upon that family and order the parents to make their children available to persons outside of the nuclear family. But single parent households, particularly when they are headed by women, are sometimes seen as less powerful institutions. Children raised in non-marital homes are more likely to develop very significant relationships with adults other than their legally recognized parents.¹²

The question raised by third-party contact issues is whether courts should ever permit these non-parents to obtain common law-like parental rights to obtain judicially ordered contact to someone else's children. This question rather quickly leads one deep into fundamental principles of American constitutional law.¹³ This is because a statute authorizing third-party contact will be invoked only when the parent, for whatever reason, has refused the third-party the degree of contact he or she wants. Third-party contact issues are not abstract sociological inquiries into the degree to which non-parents play a significant role in children's lives. Rather, they confront directly the limits of the state's power to compel parents to raise their children in a manner unsatisfactory to the parent.

At the time the Committee took up the issue, numerous state supreme courts had heard challenges to their third-party statutes. Many of these courts upheld their statutes against vari-

¹⁰ See, e.g., N.J. STAT. ANN. § 9:2-7.1.a (West 2001) (siblings).

¹¹ See, e.g., GEN. STAT. CONN. § 46b-59 (1995).

¹² See generally Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L. REV. 783 (2001); Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV.14 (Jan. 2003).

¹³ See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV.879 (1984).

ous challenges, including those based on the federal Constitution.¹⁴ Some courts declared their statute unconstitutional under the federal (or state) Constitution.¹⁵

During the first year of the Committee's deliberations, the Supreme Court of the United States agreed to review the constitutionality of Washington's third-party contact statute. The Committee met several times before the Court's judgment in *Troxel v. Granville*¹⁶ was announced, but the Committee chose not to complete its work until after the Court decided the case. The Academy submitted a brief *amicus curiae* in the case which reflected the views the Committee had reached through its first year of considering the issue.

The Court's judgment, announced in June 2000, declared unconstitutional Washington's grandparent visitation statute as applied to that particular case. *Troxel* answered some, but not nearly all, of the federal constitutional questions raised by third-party contact statutes. Once the judgment was announced, the Committee carefully reviewed the many decisions that were issued in the case before completing its task of proposing a model statute. Because the *Troxel* decision is crucial to an understanding of the constitutional parameters in third-party contact statutes, and because the decision framed the remainder of the Committee's deliberations, the next section will recount what the various Justices wrote in the case. As we shall see, the Model Statute fits well within the parameters of *Troxel*.

III. The Decision in *Troxel v. Granville*

The Court was sharply divided in *Troxel*. A plurality decision of four Justices announced the judgment of the Court. In all, a total of six decisions were issued. It is impossible to understand *Troxel's* holding without some understanding of the underlying facts of the case. Briefly, the challenged statute permitted "[a]ny person" to petition a court for visitation rights "at any time," and authorized courts to grant such visitation rights whenever "visitation may serve the best interest of the child."¹⁷ In

¹⁴ See, e.g., *King v. King*, 828 S.W.2d 630, 630 (Ky. 1992).

¹⁵ See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

¹⁶ 530 U.S. 57 (2000).

¹⁷ WASH. REV. CODE § 26.10.160(3) (1999).

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Troxel, paternal grandparents (“the Troxels”) of two grandchildren sued the children’s mother (Granville). The case ultimately reached the Washington Supreme Court, which held that the statute unconstitutionally interferes with the fundamental right of parents to rear their children.

Granville and the children’s father shared an unmarried relationship and had two children together. After their relationship ended in June 1991, the father lived with his parents and regularly brought his daughters to his parents’ home for weekend visitation. The father committed suicide in May 1993. Although the Troxels at first continued to see their grandchildren on a regular basis after their son’s death, the mother informed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month.

In December 1993, the Troxels filed their visitation proceeding in a Washington state court. The controlling statute provided: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”¹⁸ At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. In 1995, the trial court ordered visitation of one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents’ birthdays. The trial court’s reasoning was as follows:

The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music. . . .

The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the children’s nuclear family. The court finds that the children’s best interests are served by spending time with their mother and stepfather’s other six children.¹⁹

¹⁸ *Id.*

¹⁹ *Troxel*, 520 U.S. at 61-62.

The Washington Supreme Court reversed the court-ordered visitation, holding that the statute unconstitutionally infringed on the fundamental right of parents to rear their children. In the court's view, the nonparental visitation statute presented at least two problems.²⁰ First, according to that court, the Constitution permits a state to interfere with a parent's right to rear children only to prevent harm or potential harm to a child. The statute failed that standard because it required no threshold showing of harm.²¹ Second, by allowing "'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute swept too broadly.²² The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas."²³

The Supreme Court of the United States affirmed the order declaring the statute unconstitutional. A plurality opinion, written by Justice O'Connor, and joined by Chief Justice Rehnquist, and Justices Ginsberg and Breyer, announced the Court's judgment.²⁴ Concurring opinions were written by Justices Souter²⁵ and Thomas.²⁶ Three justices dissented (Stevens,²⁷ Scalia,²⁸ and Kennedy²⁹). But Justices Stevens and Kennedy expressed views highly compatible with the views of the plurality. Indeed, the Court was in considerably more substantive agreement on the basic constitutional issues concerning third-party visitation statutes than is apparent from the number of opinions filed and the inability of any one opinion to capture a majority of views. The voting split within the Court had more to do with principles of federalism and arcane federal constitutional rules for deciding fa-

²⁰ *In re Smith*, 969 P.2d 21 (Wash. 1998).

²¹ *Id.* at 28-30.

²² *Id.* at 30.

²³ *Id.* at 31.

²⁴ *Troxel*, 520 U.S. at 60 (plurality opinion).

²⁵ *Id.* at 75 (Souter, J., concurring).

²⁶ *Id.* at 80 (Thomas, J., concurring).

²⁷ *Id.* (Stevens, J., dissenting).

²⁸ *Id.* at 91 (Scalia, J., dissenting).

²⁹ *Id.* at 93 (Kennedy, J., dissenting).

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cial challenges to statutes outside the First Amendment area than it did with the rights of parents and children.

a. *The Plurality Opinion*

The plurality opinion found the Washington statute unconstitutionally broad as applied to the case before the Court, not on its face. Paradoxically, this holding will likely have a greater impact on the field of family law than a decision that struck the law as unconstitutional on its face. However, the overbreadth of the law, as applied, had nothing to do with who could sue for visitation. Instead, what was overbroad was the judge's substantive power to reject the parent's views about the propriety of visitation.

When the case was accepted for review by the Court, most observers commented on the single characteristic of overbreadth that at once seemed to make the case relatively easy to decide but also relatively unimportant as precedent. The statute, as interpreted by the Washington Supreme Court, authorized "any person" to file a petition to seek visitation at "any time."³⁰ It is very likely that a statute allowing anybody, for any reason, to sue a parent to obtain court-ordered visitation would violate a parent's constitutional right to privacy or familial integrity. However, various members of the Supreme Court have been engaged in a long-standing dispute over the standard for reviewing a facial attack to a statute outside of the First Amendment. For several Justices, a facial attack outside of the First Amendment must be rejected unless the challengers can show that "no set of circumstances exists under which the Act would be valid."³¹ Outside of the First Amendment, these Justices hold that facial attacks must be rejected if the law can be applied constitutionally. Thus, a facial attack on Washington's "any person" visitation statute would be rejected by these Justices because the application of the statute to grandparents who had a pre-existing relationship with the child would not offend the Constitution. For this reason, it proved impossible to obtain a majority to strike the statute as unconstitutionally overbroad for giving "standing" to anybody to

³⁰ In re Smith, 969 P.2d at 30.

³¹ See *id.* at 85 & n.6 (Stevens, J., dissenting) (*quoting* Salerno v. United States, 481 U.S. 739, 745 (1987)).

bring the lawsuit (even though every Justice except Justice Scalia indicated that such a law, as applied, *would* offend the Constitution). Moreover, because the grandparents in *Troxel* had a substantial pre-existing relationship with the children when they filed their action for visitation, the standing prong of the Washington statute could not be stricken as unconstitutionally overbroad as applied.

But what is of particular interest is that, had the statute been stricken as overbroad because it allows “any person” to file a visitation petition, the ruling would have had very little national import because all other states already require some showing of “standing” or risk the petition being dismissed without a hearing.³² A ruling declaring a statute void without requiring some showing of “standing” would only have ratified what was the law throughout the country.³³

Instead, for a plurality of the Court, the fatal defect in the application of the statute was the *substantive basis* upon which the trial court was permitted to order visitation over a parent’s objection. The statute was unconstitutional because it “effectively permits a court to 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 interest.”³⁴

The plurality concluded that the trial court’s order violated the Constitution because it overturned the parent’s childrearing decision too causally. Rather than founding its decision on any “special factors” that might justify the interference with a parent’s fundamental right to make childrearing decisions, the trial court based its determination in favor of greater visitation “on precisely the type of mere disagreement we have just described

³² *Ellen Marrus, Over the Hills and Through the Woods to Grandparents’ House We Go: Or Do We, Post Troxel?*, 43 ARIZ. L. REV. 751, 772-74 (2001) (hereafter “Marrus”). Some states limit third-part actions to grandparents or great-grandparents, *e.g.*, ALA. CODE § 30-3-4 (1993); others include unenumerated relatives, such as aunts and uncles), *e.g.*, N.M. STAT. ANN. § 40-9-2(2) (Michie 2001); still others limit such actions to siblings, *e.g.*, N.J. STAT. ANN. § 9:2-7.1 (West 2001).

³³ *See Marrus, supra* n 31 at 773-74 (“Only one statute, that of the state of Washington, allowed *anyone* to seek visitation with a child at *any time*. (*Emphasis in original*)).

³⁴ *Troxel*, 520 U.S. at 67 (plurality opinion).

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and nothing more.”³⁵ Beyond this, it is not clear precisely what the plurality would require of a third-party access statute. It left for the lower courts to work out how much weight should be given to the parent’s position. It also left for later cases the question of what showing is minimally needed to justify interfering with a parent’s preferences. The Washington Supreme Court required a showing that the child would be harmed unless the visitation were ordered. The plurality did not reach that issue. The plurality’s conclusion that the trial court impermissibly placed “the burden of *disproving* that visitation would be in the best interests of” the children on the parent³⁶ was sufficient for it to find that the statute had been unconstitutionally applied. (It cited approvingly state statutes that place the burden on the grandparents to show that the parent’s refusal to permit visitation was reasonable.)³⁷

The only other factor the plurality mentioned as pertinent to its conclusion that the statute was applied unconstitutionally was that the dispute over visitation had not been over whether there should be any visitation, but over how much visitation there should be. The mother agreed to visitation, but to a shorter duration than sought by the grandparents. In *dictum*, the plurality observed “[s]ignificantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party.”³⁸

b. *The Concurring Opinions*

Justices Souter and Thomas separately concurred in the judgment. For Justice Souter, the statute was unconstitutionally overbroad on its face (without regard to how it was actually applied) because it authorizes any person at any time to petition and receive visitation rights subject only to a free-ranging best-interest-of-the-child standard. For Justice Souter, the combination of the overbreadth of who may petition (any person whether or not he or she had a substantial relationship with the child) *and*

³⁵ *Id.* at 68.

³⁶ *Id.* at 69 (emphasis in original).

³⁷ *Id.* at 70 (*citing*, among other statutes, R.I. GEN. LAWS § 15-5-24.3(a)(2)(v) (Supp. 1999)).

³⁸ *Id.* at 71.

the substantively boundless best interest standard meant the law was facially defective.³⁹ In one sense, Justice Souter's decision is narrower than the plurality's. He would strike the law because theoretically it can be applied to permit a neighbor or a sales clerk to petition for visitation even if the petitioner never had a relationship with the child. But there is no evidence that the statute has ever been used in this way. Certainly, there are no reported cases involving such attenuated petitioners. In addition, no other statute in the United States is as broad as Washington's in permitting, even theoretically, anyone to seek visitation.⁴⁰

Because the plurality struck the law as applied to paternal grandparents who had a substantial relationship with the grandchildren before going to court, the plurality decision will likely have a wider impact on law and practice in the United States. But Justice Souter made clear that he, too, was quite troubled by the ease with which the Washington statute authorizes judges to intrude upon a parent's freedom to raise children without oversight by state authorities. In Justice Souter's view,

The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school.⁴¹

In Justice Thomas's concurrence, he expressed the view that the challenged statute "lacks even a legitimate governmental interest — to say nothing of a compelling one."⁴²

c. *The Dissenting Opinions*

Justice Stevens dissented because he believed that the Court should not have reached the constitutionality of the application of the statute. Unlike Justice Souter, he believed the statute is constitutional on its face (while expressing no view on the constitutionality of the statute as applied to this case). Justice Stevens noted that the Washington Supreme Court had not reached the

³⁹ Troxel, 520 U.S. at 77-78 (Souter, J., concurring).

⁴⁰ See *supra* n.32 and accompanying text.

⁴¹ *Id.* at 78.

⁴² Troxel, 520 U.S. at 80 (Thomas, J., concurring).

as-applied issues and, because state courts should reach these issues before the Supreme Court is asked to, he would have remanded the case to the state courts for further consideration. Justice Stevens agreed that the application of a best interests standard in determining visitation cases must be made in light of the presumption that parents act in their children's best interest, but he would not strike the statute as unconstitutional on its face and would, instead, await review of a wrongful application of the standard.⁴³

There is much in Justice Stevens's dissent to buoy the spirits of children's advocates. Justice Stevens's dissent advances the jurisprudence of children's rights by seeking to recast third-party visitation cases from an adult's right to visit a child to a child's right to maintain a substantial relationship with an adult. Justice Stevens noted that the Court's jurisprudence has already recognized a "child's own complementary interest in preserving relationships that serve her welfare and protection."⁴⁴ Recasting these disputes from "bipolar struggles between the parents and the State over who has final authority to determine what is in a child's best interests,"⁴⁵ Justice Stevens would insist that the child's rights be factored into the analysis. He expressed the view that children almost certainly have a fundamental liberty interest in preserving intimate relationships they have formed.⁴⁶ Justice Scalia's dissent expressed his view that the Constitution does not prevent states from enacting third-party visitation statutes.⁴⁷

Finally, Justice Kennedy believed that the Washington Supreme Court erred in requiring a showing of harm to a child in every case before it would be constitutional to order visitation over a parent's objection. He acknowledged that when only a "best interests" standard is used, courts might "give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the state."⁴⁸ Like Justice Stevens, he preferred to await an application of the statute before decid-

⁴³ Troxel, 502 U.S. at 84-85 (Stevens, J., dissenting).

⁴⁴ *Id.* at 88.

⁴⁵ *Id.* at 86.

⁴⁶ *Id.* at 88-89.

⁴⁷ Troxel, 520 U.S. at 91-92 (Scalia, J., dissenting).

⁴⁸ Troxel, 520 U.S. at 94 (Kennedy, J., dissenting).

ing that the constitution was offended. Aware of the multitude of “non-traditional” families that exist in the United States today, Justice Kennedy’s expressed concern with the plurality’s approach was that it⁴⁹

seems to proceed from the assumption that the parent or parents who resist visitation have always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case.

Justice Kennedy wanted to preserve the chance for children to maintain significant relationships that parents might inappropriately seek to prevent. He believes the best interest standard best meets that goal. At the same time, Justice Kennedy made clear that he would be prepared to strike a statute as applied, but he prefers the flexibility that such a broadly worded statute provides precisely because so many new families are being created that the specific factors in each case should be the bases for court-ordered visitation.⁵⁰

Justice Kennedy noted at the end of his opinion that the mere bringing of a proceeding “can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child’s welfare becomes implicated.”⁵¹ But he was not prepared to prohibit statutes from using a best interests standard to decide the merits of a case. Instead, he would declare unconstitutional the inappropriate exercise of the power to order visitation when it is shown that a parent’s choice was not given proper deference.⁵²

IV. The Model Statute

When the Committee reconvened its deliberations after *Troxel* was announced, it approached its task with the following understanding: Grandparents and other persons who have a significant interest in children may be allowed to file lawsuits seeking visitation with them over a parent’s objection. But *Troxel*

⁴⁹ *Id.* at 98.

⁵⁰ *Id.* at 89-101.

⁵¹ *Id.* at 101.

⁵² *Id.* at 102.

almost certainly imposed some limitations on such lawsuits. First, to survive federal constitutional challenge, persons filing for access probably will have to show that their relationship with the children has been interrupted or that they are entitled to have a relationship even though one does not already exist because they are a significant relative as defined by our culture.⁵³ Second, presumably they will have to show they tried to maintain a relationship before filing in court (in light of Justice Kennedy's observation that even defending a lawsuit can be a significant infringement on parental rights).⁵⁴ Third, to prevail they will have to show that the parent has refused visitation inappropriately (something more than merely a judge's conclusion that the child's best interests would be served by the visitation).⁵⁵ Finally, it is improbable that the federal Constitution requires a court to find, as a precondition to ordering access, that the child would be harmed unless access were allowed.⁵⁶

With this understanding, the Committee continued its work to complete the Model Statute. The Committee unanimously agreed that choices about which adults children should have contact with are quintessential examples of a parent's fundamental right to control the details of their upbringing.⁵⁷ For this reason, the Committee comfortably concluded that those seeking to intrude upon this type of parental childrearing choice should bear the burden of persuasion.

Members of the Committee who believed that some parental decisions improperly interfere with their children's indepen-

⁵³ This would include stepparents and other "de facto" parents, *see, e.g.*, LA. CIV. CODE ANN. art. 136(B) (West 1999); N.H. REV. STAT. ANN. § 458:17(VI) (1992 & Supp. 2001); OR. REV. STAT. § 109.119(1) (2001); VA. CODE ANN. § 16.1-241 (Michie 2000) (stepparents). *See supra*, n. 31 and accompanying text for representative statutes authorizing certain relatives the right to seek visitation. .

⁵⁴ *See, e.g.*, MISS. CODE ANN. §§ 93-16-3(2)a)((b) (2001) must be a "viable relationship" between grandparent and grandchild and visitation must have been unreasonably denied). *See also* MO. ANN. STAT. § 452.402(1)(3) (West 1997); OR. REV. STAT. § 109.121(1)(a)(B) (1999).

⁵⁵ *See, e.g.*, MINN. STAT. ANN. § 257.022(1) (West 1998); NEB. REV. STAT. § 43-1802(2) (1998); 23 PA. CONS. STAT. ANN. § 5311 (West 2001).

⁵⁶ *But see* Neal v. Lee, 14 P.3d 547 (Okla. 2000); *Herbst v. Sayre*, 971 P.2d 395 (Okla. 1998).

⁵⁷ *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

dent rights took up the challenge and defended a statute that sought to protect children from the arbitrary disruption of an already formed significant relationship. No one on the Committee defended third-party access from the perspective that the adult petitioner had an independent right to contact with someone else's child. In *that* dispute — between two adults (a parent and a non-parent) — the Committee unanimously concluded the parent's views should triumph. Those who wished to permit an opportunity for judicially ordered contact for a non-parent defended their position on the basis of the *child's* right. The Committee was ultimately persuaded that third-party access claims are best conceived and defended as advancing a child's right to maintain an already formed relationship. This became the framework upon which the Model Statute was drafted. This article seeks briefly to explain and defend these principles.

Five broad principles shaped the drafting of the Model Statute. First, parents generally ought to have the power to control the details of their children's upbringing. Second, children ought to have rights independent from their parents not to lose especially significant relationships that already have been formed. Interestingly, only Justice Stevens recognized these interests of children. Third, any effort that can result in forcing parents to permit contact with non-parents over parental objection must be achieved through the judicial process. Fourth, formal dispute resolution through the judicial process can have many negative costs and ought not to be lightly undertaken. Fifth, however appealing on its face it may be to afford courts maximum opportunity to determine a child's best interests in third-party visitation or custody cases (and however child-friendly such a rule appears to be), ultimately such open-ended discretion can lead to unwanted and inappropriate litigation which could be detrimental to the child.

As we searched for doctrinal support preventing parents from refusing children their own rights, we identified the adolescent abortion cases as the closest analogy. In *Bellotti v. Baird*,⁵⁸ the Supreme Court held that parents may not arbitrarily veto their daughters' constitutional right to terminate an unwanted pregnancy. Although the analogy to third-party access cases is

⁵⁸ 443 U.S. 622 (1979).

somewhat attenuated, we relied on it as an important example of the Court's recognition of two basic principles. First, that children sometimes have rights to do things even when their parents oppose their doing them. Second, that, in some circumstances, parents may be said to be using their parental power arbitrarily. These two principles were sufficient for the Committee to agree that, in limited circumstances, third-party should be permitted to seek access to a child over the parent's objections. These limited circumstances must include both (a) that the *child's* right to maintain a relationship is at stake and (b) that the parent's refusal to permit the relationship is arbitrary.

Our challenge then became drafting a coherent statute that reflected the views of the committee members. To that end, we worked hard to find a middle ground between competing forces. Some committee members began the process seeking broadly to expand third-party access. These members believed that courts can be entrusted to reject applications for contact when they would not obviously benefit children. Their goal was to maximize the possibility of courts deciding these matters. Other committee members began from the opposite pole. They were opposed even to allowing third-party access cases over a parent's objection. These members saw as among the bundle of rights enjoyed by parents the right to make all important child-rearing decisions free from oversight by courts. The Committee was well-represented by both views, with the rest being somewhere in between.

a. *Standing*

Section 1(a) of the Model Statute limits the universe of non-parents who may petition a court to those who have at least a significant relationship with the child at the time of the filing. Grandparents need only show they have a "significant relationship";⁵⁹ all others must show they have a "parent-like relationship."⁶⁰ To show a "parent-like relationship," the parent must have consented to its being formed and it must have lasted for "a substantial period of time."

⁵⁹ Section 1(a)(I). *See also* CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN., tit. 10, § 1031(1) (1999).

⁶⁰ Section 1(a)(ii). *See, e.g.*, *Hichenbottom v. Hichenbottom*, 477 N.W.2d 8, 17 (Neb. 1981); *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

The Committee imagined that the most likely petitioners under the “parent-like relationship” prong of the statute would be step-parents and non-marital partners (in same-sex or opposite-sex relationships). Even when these petitioners meet that part of the statute, they must also show that the parent has substantially interfered with the relationship,⁶¹ they made efforts to ameliorate the problem before going to court,⁶² and that they petitioned the court within a reasonable time after the relationship was disrupted.⁶³

As the Commentary to Section 1 states, the Committee was aware that it drafted a relatively restrictive standing requirement. It did not attempt to protect children against imagined or potential lost relationships. It was interested only in allowing the possibility of preserving important ones. Accordingly, it strictly limited standing to persons who already have a relationship with the child. Though restrictive in one sense, the statute is broader than many existing laws because it permits persons often not recognized as having standing in these types of cases. The statute does not distinguish petitioners on the basis of legal or biological relationships. In this regard, the statute is fully compatible with the principles adopted by the American Law Institute, which recognizes that individuals, regardless of their relationship to the parent, may obtain legal recognition of their parental rights to visitation and custody when they have acted as parents and been significantly involved in caring for the children.⁶⁴

b. Burdens, Presumptions and Standard for Awarding Contact

The statute places the burden on the applicant to establish standing.⁶⁵ If the applicant does not sustain this burden, the matter must be dismissed.⁶⁶ Once standing has been established, the

⁶¹ Section 1(b). *See, e.g.*, MISS. CODE ANN. §§ 93-16-3(2)a)((b) (2001) must be a “viable relationship” between grandparent and grandchild and visitation must have been unreasonably denied). *See also* H.S.H.-K., 533 N.W.2d at 436.

⁶² H.S.H.-K., 533 N.W.2d at 436.

⁶³ Section 1(c).

⁶⁴ AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, ch. 2, §§ 2.03-2.21 (Tentative Draft No. 4, April 10, 2000; adopted May 16, 2000).

⁶⁵ Section 2(a)(1).

⁶⁶ *Id.*

statute continues to place the burden on the applicant to produce evidence to conclude the child would suffer a serious loss if contact were not awarded.⁶⁷ The applicant need not prove his or her case at this stage, but proffer evidence from which the court may find that a reasonable factfinder could conclude that the child would suffer a serious loss if the relationship is not maintained.

The most contentious issue, by far, was deciding what applicants must show to prevail. Relatively late in our deliberations, several committee members pressed for a requirement that courts first find that the child would “suffer a risk of serious detriment or harm” if contact were not ordered before a court would be authorized to order contact. A majority of the committee considered this standard to be overly restrictive, coming too close to rejecting the underlying notion of third-party contact. In the majority’s view, such a standard is calculated to result in virtually all petitions for contact being rejected because the required showing will rarely be met. The language ultimately adopted — the child will “suffer a serious loss if contact were not awarded” — was designed to cut a middle path between making it too easy for third-parties to obtain court-ordered contact on the one hand and making it virtually impossible to do so on the other.

Once the applicant meets these burdens, the burden shifts, for the first time, to the parent to come forward with evidence showing why the decision to refuse contact is reasonable and in the child’s best interests.⁶⁸ It is important to stress here that the burden of proving these things does not shift to the parent. The statute only intends to require parents to present evidence in the nature of an explanation for the choice to sever the relationship that the applicant seeks to sustain. The statute continues to place on the applicant the burden of proving that the child would suffer a serious loss if contact were not awarded *and* that the parent’s denial of contact was unreasonable and not in the child’s best interests.

The requirement of a finding that the decision was unreasonable is consistent with Justice Stevens’s dissenting opinion in *Troxel*: “[t]he constitutional protection against arbitrary state in-

⁶⁷ Section 2(a)(ii).

⁶⁸ *Id.*

terference with parental rights should not be extended to prevent States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”⁶⁹ But the statute goes beyond this in three ways. It requires that the court also find that the child would suffer a serious loss if contact were not awarded. It requires that the court conclude the decision does not further the child’s best interests. It also requires that the court make these findings by clear and convincing evidence.

V. Conclusion

Since *Troxel*, state courts have heard challenges to their third-party access statutes at an accelerated pace. Some statutes have survived attack;⁷⁰ others have succumb.⁷¹ It remains too early to say what the final word on the constitutionality of these statutes will be. It is unlikely the Supreme Court will consider the issue again for a very long time. All that can be said thus far is that the statutes that have been declared unconstitutional in light of *Troxel* contained broader provisions that are in the Model Statute. The Model Statute has an excellent chance of surviving constitutional challenge because it contains a number of features that sharply restrict the circumstances under which third-party access may be ordered. First, it has a restrictive standing requirement that carefully limits the pool of potential applicants. Second, the statute requires that the applicant show that the child will suffer a serious loss if the relationship is not

⁶⁹ *Troxel*, 520 U.S. at 89 (Stevens, J., dissenting).

⁷⁰ *Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001) (maternal grandparents awarded visitation. Over objection of custodial father after mother was imprisoned); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) no constitutional bar to applying third-party statute to grandparents who had acted as parents of the children for a significant period of time and trial court accords special weight to parents’ decisions and objections regarding requests for third-party visitation. *Id.* At 297.

⁷¹ *See, e.g., State Dep’t of Soc. & Rehab. Services v. Paillet*, 16 P.3d 962 (Kan. 2001) (statute unconstitutional as applied because law does not expressly require trial court to overcome presumption that fut parent will act in best interests of child and trial judge gave no special weight to parent’s reasons for opposing visitation); *Lulay v. Lulay*, 739 N.E. 2d 521 (Ill. 2000) (statute that permits grandparent to seek court-ordered visitation merely upon showing that parent opposes such visitation is unconstitutional).

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sustained. Finally, under the statute no access may be ordered unless the court concludes based on clear and convincing proof that the denial of contact was unreasonable and not in the child's best interests.

To some, undoubtedly, this statute goes too far in permitting non-parents to intrude in the constitutionally protected sphere of parent decisionmaking. To others, the statute will be criticized as being far too restrictive and denying both children and adults their rights to maintain or establish important relationships. Hopefully, all will agree that the Academy has produced a thoughtful, rational statute that is, at the least, defensible, if not persuasive to everyone.