BILL ANALYSIS

C.S.H.B. 261
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Juvenile Justice & Family Issues
Committee Report (Substituted)

BACKGROUND AND PURPOSE

When Title 2 of the Family Code was first enacted in 1973, a committee amendment to the bill as originally introduced granting the trial court discretionary power to "allow reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree." Since this relatively modest beginning, the provisions for what is still usually called "grandparental visitation" has been relettered on numerous occasions and renumbered once, appeared in two separate substantive subsections at the same time, and was generally the source of constant modification between 1973 and 1987—there were eight separate enactments on this subject in that timeframe. Along the way the terminology was inconsistently changed from "visitation" to "access," or sometimes to "possession of and access to" the child. In 1987 the basis of what now is Subchapter H, Chapter 153, Family Code (§§ 153.431-434), was enacted, based on a proposal for a model act on the subject. (See John J. Sampson, Texas Family Code Symposium—Title 2, Chapter 14, 21 TEXAS TECH L. REV. 1323, 1344 (1990)). Although there were no amendments to the statute between 1987 and the recodification of the Family Code in 1995, there were more amendments to Subchapter H in 1997 and 1999.

In short, since 1973 grandparents have had an independent cause of action to request access to their grandchildren. Under the current text of the Family Code, it would appear that on a "best interest test" judicial discretion may be exercised to allow grandparents to prevail over the objection of the custodial parent, or even of both parents, so long as the parents are not residing in a single family unit. Further, with one crucial exception, the grandparent claiming access to a grandchild is required to assert the claim against the other parents' claim through his or her own child because that child is incarcerated, institutionalized, or dead. The one exception is that there is no restriction to assert a claim only against the other parent if the parents are divorced. This allows the possibility that a grandparent may be suing his or her own child in court for a court order authorizing grandparental access.

With limited exceptions, the statutory framework is entirely fact-driven, and was operated with little legal controversy until recently. A review of the appellate citations after the recodification of the Family Code in 1995 to 2000 reveals that only eight appellate cases were reported. This relatively quiet area of the law saw a major shift when the U.S. Supreme Court decided *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Court had long maintained that parents have a fundamental constitutional right to have and raise children without interference from the state except in extraordinary circumstances, *e.g.*, mandatory schooling, mandatory immunization, and abuse and neglect of a child. In *Troxel* the Court reaffirmed that principle, finding unconstitutional a Washington State statute that provided for access to a child by third parties over the objection of the parents. *Troxel*, in fact, did involve a claim by grandparents, although the statute was phrased in much broader terms than merely grandparental visitation (as Subchapter H). Essentially, the Court ruled that the right of a parent to decide with whom the child would have contact is one of the fundamental rights of parenthood, and that a trial court must presume that a fit parent makes such decisions in the best interest of the child.

Moreover, the implications of the *Troxel* decision has generated considerable controversy nationwide. There have been innumerable law review articles on the subject (764 citations), and 46 separate Texas appellate cases have cited the opinion. In 2004 Senator Jeff Wentworth requested an attorney general's opinion to answer his questions about the rights or limitations on grandparental visitation. In response, Attorney General Greg Abbott issued opinion GA-0260, which basically analyzed seven Texas appellate court opinions, relying primarily on *In re* C.P.J.,

129 S.W.3d 573 (Tex. App.—Dallas 2003, pet. denied); and *In re* Pensom, 126 S.W.3d 251 (Tex. App.—San Antonio 2003, no pet.).

C.S.H.B. 261 codifies the Attorney General's opinion and the identified appellate analyses in order to reduce or eliminate possible confusion at the trial court level on the subject of grandparental visitation.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Amends Section 153.432, Family Code, to make consistent the language throughout Subchapter H that the suit is for possession of or access to the child and not merely for access to the child, terminology which is currently inconsistently applied.

SECTION 2. Amends Section 153.433 by adding language to conform the Family Code to appellate caselaw regarding grandparental possession of and access to a child, as identified in Attorney General Opinion GA-0260. Incorporates the holding in *Troxell v. Granville*, 530 US 57 (2000), that the trial court must presume that a fit parent acts in the best interest of the parents' child, which may be rebutted by a grandparent either showing the parent is unfit or that denial of grandparental visitation would significant impair the child's physical or emotional well-being. Further amends the statute to prevent a grandparent from bringing suit against his or her own child who is the parent of the grandchild, thereby limiting grandparental suits seeking possession of or access to the child from the other parent. Subsections (2)(B) through (3)(A)(i-vi) and (3)(B)and (C), requiring that the parent through whom the grandparent is claiming not to have actual court-ordered possession of or access to the child are condensed into one Subsection.

SECTION 3. Amends the caption in 153.434 to employ consistent language.

SECTION 4. The changes in law made by this Act to Sections 153.432 and 153.433, Family Code, apply to a suit under Section 153.432, Family Code, that is pending in a trial court on the effective date of this Act or that is filed on or after the effective date of this Act.

SECTION 5. This Act takes effect September 1, 2005.

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B.261 modifies the original H.B.261 by requiring that the parent through whom the grandparent is claiming not to have actual court-ordered possession of or access to the child are condensed into one subsection. Additionally, C.S.H.B.261 changes the standard necessary for a grandparent to be granted possession of or access to a grandchild by a court. Current law sets forth a standard of best interest of the child based on the preponderance of the evidence. Therefore, a grandparent must only prove by preponderance of the evidence that it is in a child's best interest for a grandparent to have possession of or access to their grandchild. C.S.H.B.261 would set forth a standard of significant impairment to the child's physical or emotional well-being and would bring current statute into conformity with existing case law and current attorney general's opinions.

Finally, C.S.H.B. 261 also eliminates the need for the child to have been adjudicated as a child in need of supervision, a delinquent child under Title 3, or the need for the child to have resided with the grandparent requesting possession of or access to the child for at least six months.