SUBJECT: Higher proof standard for grandparent visitation rights to a grandchild

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Jackson, Lewis, Bohac, S. Davis, Madden, Raymond, Woolley

1 nay — Scott

3 absent — Castro, Hartnett, Thompson

WITNESSES: For — Tim Lambert, Texas Home School Coalition; Judy Powell, Parent Guidance Center; Jonathan Saenz, Liberty Institute; Sharon Ramage; Chassidie Russell; Cecilia Wood; (*Registered, but did not testify:* MerryLynn Gerstenschlager, Texas Eagle Forum; Paul Hastings, Imagivation; Michael Quinn Sullivan)

Against — Steve Bresnen, Lynn Kamin, Texas Family Law Foundation

BACKGROUND: Family Code, ch. 153, subch. H, governs access and possession (visitation) rights of grandparents to their grandchildren. Under Family Code, sec. 153.433, a court may order reasonable access by a grandparent to a grandchild if :

- at least one biological or adoptive parent of the child has not had parental rights terminated;
- the grandparent overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of visitation rights would significantly impair the child's physical health or emotional well-being; and
- the grandparent is a parent of a parent of the child and that parent of the child:
    - has been incarcerated;
    - has been found incompetent;
    - is dead; or
    - does not have actual or court-ordered possession of or access to the child.

A grandparent may not request visitation if the grandchild has been adopted by a person other than the child's stepparents.

DIGEST:

CSHB 2557 would require a grandparent to prove by clear and convincing evidence that denial of visitation rights would significantly impair the child's physical health or emotional well-being. If a grandparent could not prove this, the court would have to dismiss the suit at an initial hearing by the 45th day after service of process.

A grandparent could not request visitation if the grandchild had been adopted.

A suit for visitation by a grandparent could not be tried or consolidated with any other suit for conservatorship of the child or any other proceeding involving or arising from a claim involving the parent-child relationship. The court could not impose a geographic restriction on the suit.

If a suit for access to a grandchild was filed frivolously or to harass a party, the court would have to assess attorney's fees against the offending party. If the grandparent failed to meet evidentiary burdens, the court could award the parent all costs, fees, and expenses incurred by the parent to defend the suit.

The bill would add to what must be stated in an order granting visitation rights to a grandparent over a parent's objections. The order would have to state the parent's objections, the fact that and manner in which the court gave special weight to the parent's objections, and the specific grounds for overriding the parent's objections.

The bill would not prohibit a grandparent from filing suit for conservatorship of a child.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011.

SUPPORTERS SAY:

Parental rights are a fundamental constitutional right. CSHB 2557 would protect parents, especially parents who have lost their spouse through divorce, death, or incarceration. Current law allows a grandparent to request visitation with a grandchild even over a parent's objections if the grandparent's child has been incarcerated, been found incompetent, has died, or does not have actual or court-ordered possession of or access to

the child. Current law discriminates against single parents, since other parents are not subject to similar provisions.

Raising the burden of proof for grandparents to a clear and convincing standard would ensure that parents' fundamental constitutional rights were protected. The clear and convincing standard that would be required by the bill already is used in other family law contexts, such as termination of the parent-child relationship.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court noted that litigation is a burden on the parent-child relationship. CSHB 2557 would provide for dismissal of a grandparent's suit for visitation in 45 days unless the burden of proof was met, stopping needless prolonged litigation. The bill also would protect parents from severe financial stain by requiring the recovery of their legal fees in cases where parents prevail.

It is unlikely that grandparents merely seeking visitation would seek conservatorship of a child. A suit for conservatorship is a suit for full responsibility of a child, whereas a suit for visitation is a suit to allow someone to spend time with the child.

OPPONENTS SAY:

This bill would make it easier for a grandparent to be appointed as a conservator than to be given visitation rights. For a grandparent to be appointed as a conservator, the court must find by a preponderance of the evidence that the appointment of the parent as conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development. This is a lower burden of proof than clear and convincing evidence, which would be the burden of proof for visitation under the bill. Furthermore, for a grandparent to be appointed as a conservator, there are no requirements that a parent have been incarcerated, been found incompetent, be dead, or not have actual or court-ordered possession of or access to the child. A judge might not be convinced that there was clear and convincing evidence that denial of visitation rights would significantly impair the child's physical health or emotional well-being, but could find that appointment of the parent or parents as conservator would significantly impair the child's physical health or emotional development. In this case, a judge might appoint a grandparent as conservator rather than granting visitation.

This bill is not necessary to comply with *Troxel v. Granville*, 530 U.S. 57 (2000). *Troxel* was a U.S. Supreme Court case that held that a Washington state law that allowed any person, even a nonrelative, to seek visitation rights if it served the best interest of the child violated the right of parents, under the due process clause of the Fourteenth Amendment, to make decisions concerning the care, custody, and control of their children. Texas law was subsequently amended to require grandparents to prove by a preponderance of the evidence that denial of visitation rights would significantly impair the child's physical health or emotional well-being. Current law protects parents' constitutional rights, and further change is not needed.

The bill would increase a parent's litigation expenses. The bill would prevent a suit for visitation by a grandparent from being coupled with another proceeding. This would essentially require duplicate litigation, meaning duplicate discovery, a different judge who was unfamiliar with the situation, additional filing fees, and a separate court reporter.