

# **American Academy of Matrimonial Lawyers Model Third-Party (Non- Parental) Contact Statute**

(with commentary)

## **Preface**

The American Academy of Matrimonial Lawyers [“Academy” or “AAML”] recognizes that whether and under what circumstances a court may order contact between a child and a third-party (non-parent) over parental objection raises extremely delicate questions. On the one hand, parents possess constitutionally protected rights that should protect them even against having to defend a myriad of child-rearing choices. In particular, the Academy appreciates the general principle that the state may not interfere with a parent’s child-rearing choices merely because those choices would be considered by some not to serve a child’s best interests. On the other hand, children’s interests and parents’ interests do not invariably overlap perfectly. Sometimes, children will develop meaningful relationships with adults which parents wish to sever for reasons unrelated to the best interests of their children. In such cases, the Academy believes courts should have limited authorization to allow proceedings to consider whether court-ordered contact is appropriate over parental objection.

The following Model Statute is constructed from the perspective that third-party contact cases are — or should be considered to be — principally about a child’s right to maintain relationships that already exist. It rejects the concept that adults who are not the parent have a right to develop a relationship with someone else’s child, absent that parent’s on-going consent. Such adults’ entitlement to contact should properly be regarded as the corollary of the child’s right to maintain a significant relationship.

The Model Statute therefore was developed with five broad principles as background. 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

## 2 *Journal of the American Academy of Matrimonial Lawyers*

parents not to lose especially significant relationships that already have been formed. 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.

This Model Statute does not address claims for custody, conservatorship, guardianship, or joint or shared custody. Such claims would continue to be governed by extant laws that may deprive a biological parent of custody or the right to control a child when there was a claim by a non-parent.

**1. Standing for filing a proceeding. A non-parent may initiate a court proceeding by filing a verified application to obtain court-ordered contact when all of the following criteria are satisfied:**

**(a) The applicant is either:**

- (i) a grandparent with a significant relationship with the child; or**
- (ii) an individual with a parent-like relationship with the child. To satisfy this criterion, the applicant must show that: (A) his or her relationship with the child has been parental in nature for a substantial period of time; and (B) a parent or custodian of the child consented to or allowed the formation and establishment of the relationship.**

**(b) A parent or custodian has substantially interfered with the applicant's relationship with the child and the applicant has unsuccessfully attempted to resolve any disagreement with the parent or custodian before going to court.**

**(c) The applicant sought court-ordered contact within a reasonable time after the interference.**

*Commentary to Section (1)(a)*

On June 5, 2000, the Supreme Court of the United States decided the long-awaited “grandparent visitation case,” *Troxel v. Granville*, 120 S.Ct. 2054 (2000). The central issue raised by *Troxel* concerned the power of the state — whether through the legislature or through the courts — to interfere with, and overrule, a parent’s child-rearing choices. Any proposed third-party contact statute must be drafted with a careful eye towards the *Troxel* decision.

The Washington statute at issue in *Troxel* permitted “[a]ny person” to petition a court for visitation rights “at any time.” REV. CODE WASH. § 26.10.160(3). Although the Washington Supreme Court found the statute to be constitutionally deficient because, among other reasons, it swept too broadly in allowing persons to file actions, the Supreme Court of the United States did not strike the statute because of this overbreadth. It affirmed the state court’s order declaring the statute unconstitutional as applied in the case before the Court. Nonetheless, *Troxel* makes clear that the Constitution requires there be some limitations on the conditions under which third-party visitation actions may be commenced.

The Academy recognizes that there are important principles which must be considered when authorizing coercive authority to challenge parental child-rearing choices. These suggest sharp delimitation of the circumstances under which third-party contact cases should be permitted. Under this Model Statute, an applicant must fall within a carefully delineated category or else the case will be dismissed without burdening the parent or the court to even reach the merits of the claim for court-ordered visitation. Third-party contact cases are traumatic events for many parents, with the potential of causing a devastating impact on them and on their ability to parent. As Justice Kennedy emphasized in his dissent in *Troxel*, 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.” 120 S.Ct at 2079.

4 *Journal of the American Academy of Matrimonial Lawyers*

Scholars have long recognized the potentially detrimental impact of a lawsuit over visitation on the stability of a child's environment. Joseph Goldstein, Anna Freud and Albert Solnit, co-authors of several influential books on child development theory and its relation to custody law, would prohibit jurisdiction even to *consider* visitation, unless and until a third party could demonstrate that the case falls within the narrow range of cases where intervention is appropriate. As those authors analyzed it:

Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. . . . At no stage should intrusion in the family [which the authors define as conducting a hearing] be authorized unless probable cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.

JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 25 (1979). For these reasons, we believe the benefits to a child in ordering contact with a third party should be discounted by the multitude of costs exacted by these lawsuits.

In addition, the Academy recognizes that parental authority to make non-reviewable child-rearing choices has deep constitutional roots. Because third-party contact statutes intrude upon fundamental constitutional rights, they must be carefully drawn. *Troxel* is the most recent in a long line of Supreme Court cases that protect against untoward intervention by the state. Legislation authorizing judges to force parents to make their children available to visit non-parents hampers fundamental liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment. In particular, parents enjoy the right to control the details of their children's upbringing, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 230-34 (1972), and families enjoy a right to familial privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), and liberty, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

As the Supreme Court has said:

The absence of dispute [concerning the fundamental nature of the parent-child bond] reflect[s] this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

*Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See also *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

An indispensable component of this Model Statute is the condition of a restrictive “standing” requirement. Only by developing standing rules — and thereby precluding large categories of cases from being initially filed or permitted to reach the trial stage — is it possible to give meaning to the private ordering of family life that is at the heart of the American constitutional scheme. Only certain people are entitled even to have a court reach the merits of an application to have contact with someone else’s children.

A standing requirement is an appropriate way to limit access to courts to suitable cases because courts are empowered to dismiss improper cases before protracted litigation has occurred. A party seeking to sue a parent for contact should have to demonstrate that s/he has or had a significant relationship with the child which the parent has severed or otherwise improperly restricted. Unless the person seeking to sue has already had a significant relationship with the child, the action should be dismissed on the pleadings. This principle follows from the notion that third-party contact cases should be child-focused, not adult-focused. In other words, this statute does not provide a remedy for adults wishing to develop a relationship with a child. Instead, its purpose is to secure a remedy by which already formed child-adult relationships may be allowed to continue.

*Commentary to Section (1)(a)(i)*

Under this statute, all individuals, including grandparents, must already have had a significant relationship with the child in order to have standing to seek court-ordered contact. Some basic features flow from this requirement. Most obviously, this statute plainly intends that parents have the right to prevent a relationship between a grandparent and a child from being formed in the first place. This troubled some members of the Academy who preferred a rule that gave courts the power to order contact whenever grandparents have been thwarted in their efforts to create a relationship with their grandchildren. Under this statute, however, the only remedy for the grandparent seeking to develop a relationship with a grandchild is through private

6 *Journal of the American Academy of Matrimonial Lawyers*

ordering. They remain free to try to persuade or influence the parent to permit a relationship, but courts will not have jurisdiction to create it for them.

Even so, grandparents are in a preferred category over all other non-parents. Although other non-parents must have established a “parent-like” relationship with a child before they may initiate a proceeding seeking contact, grandparents need only an established, “significant” relationship with the child to permit them to initiate a proceeding. This distinction was drawn for obvious reasons. Grandparents may play a very significant role in a child’s life without having developed a “parent-like” relationship. However, this statute unambiguously requires that the grandparent already have established a relationship with the child before filing a court action. Parents who have refused to permit grandparents any role in the children’s lives in the first place will be able to prevent grandparents even from obtaining a hearing on the merits of an application for court-ordered contact.

We recognize that many will regard this requirement as overly restrictive. However, our purpose in drafting this statute is to authorize courts to require that certain relationships already formed be maintained so that children will not suffer an arbitrary loss of the relationship. Relationships that have never come into being are entirely another matter. Although it may be argued that children may suffer a loss by being deprived of the opportunity to form certain relationships, we believe that parents should be free not to permit significant relatives, including grandparents, to have the opportunity ever to obtain “standing” by never allowing any relationship to be formed in the first place. The Academy believes this power is consistent with the parental authority constitutionally accorded to parents. More importantly, we consider it inappropriate to become too concerned with the multitude of missed opportunities for children to form relationships that may prove to be valuable to them. Once one begins traveling down that road, there is no meaningful end in sight.

*Commentary to Section (1)(a)(ii)*

This section addresses when non-parents other than grandparents are authorized to commence an action seeking court-ordered contact with someone else’s children. This statute does not restrict contact actions to persons who are legally or biologically connected to the children. Traditional factors as blood or marital

relationships are not relevant to the impact on a child of the loss of a significant parent-like relationship that once existed. Under this statute, persons authorized to initiate a proceeding for contact would include any non-marital partners who had a significant parent-like relationship with children.

This approach is highly compatible with the recent treatment of domestic partners by the American Law Institute (“ALI”) which bestows legal significance to relationships between people who have shared a life together for a sufficient period of time. Under the formulation adopted by the Institute, parties who live together with a common child, for the required minimum time period, are presumed to be domestic partners. The presumption is rebuttable by evidence that the parties did not “share a life together as a couple,” a defined phrase that is elaborated upon in the ALI commentary. Parties may also be treated as domestic partners if one of them shows that they shared a common household and a life together for a “significant period of time,” even if that time is less than the minimum periods set in the other provisions. *See* Tentative Draft 4 of the Principles of the Law of Family Dissolution (American Law Institute 2000). The Principles also contain provisions establishing a category of persons called “parents by estoppel,” who should be treated as parents for custodial purposes.

Although it is difficult to identify precisely in a model statute which adults may file proceedings, an applicant must meet three criteria to satisfy the standing requirement: first, there must be or recently have been a substantial relationship between the applicant and child; second, their relationship must have parental in nature for a substantial period of time; and third, a parent or guardian must have consented to or allowed the formation of the relationship.

The requirement that the relationship must be parental-like is, however, quite restrictive. It comes close to insisting that the relationship have been *in loco parentis*. Applicants who can most easily meet this requirement are those who cohabited with the parent during a child’s lifetime and actively participated in raising the child. The statute does not set a minimum time period the relationship must have lasted because a child’s sense of time varies with age and because some flexibility is preferred. Similarly, the statute does not define specifically what constitutes a

8 *Journal of the American Academy of Matrimonial Lawyers*

“parent-like relationship.” There is no strict rule that the applicant have lived in the home with the child. States would be free to impose such a requirement. However, the combined criteria are consciously meant to be restrictive. We believe it is wisest to leave to individual states to elaborate the details inherent in applying this statute.

*Commentary to Section (1)(b) and (1)(c)*

In addition to requiring that the applicant have a significant relationship with the child, two additional criteria must be satisfied. First, the parent must have substantially interfered with the relationship. Second, the applicant must seek court intervention within a reasonable time after such interference. These requirements are designed to keep cases out of court until it is clear that the parties are unable to resolve their dispute privately. In addition, because the primary purpose of the statute is to prevent children from suffering the loss of a significant relationship that a parent has unreasonably disrupted, applicants are required to seek court intervention within a reasonable time after the interference.

The statute is deliberately indeterminate on what constitutes substantial interference. “ Plainly, some interference by a parent will not rise to the level of ”substantially interfered.“ Thus, to give one example, if a grandparent has previously seen grandchildren every month and a parent subsequently limits such contact to every other month, we do not envision that courts would conclude that such a reduction is ”substantially interfering“ with the relationship. Courts will be necessarily required to determine on a case-by-case basis which changes in a relationship will constitute substantial interference and which will not. At some point, a quantitative change in degree becomes a qualitative change in kind. We leave to the courts to determine which is which.

**2. Hearing.**

**(a) Order of procedure; burdens and presumptions:**

- (i) The court shall treat standing as a threshold issue. The applicant bears the burden of establishing standing. If the applicant does not satisfy this burden, the proceeding shall be dismissed.**

**(ii) Upon a finding that the applicant has standing, the applicant shall come forward with evidence to show that the child would suffer a serious loss if contact were not awarded. If the applicant presents evidence that could allow a reasonable factfinder to conclude that the child would suffer a serious loss, the burden shifts to the parent or custodian to present evidence why the decision to refuse contact is reasonable and in the best interests of the child.**

**(b) Standard for awarding contact: The court shall order contact if it finds that the applicant has satisfied the burden of showing by clear and convincing evidence that: (i) the child would suffer a serious loss if contact is not awarded; and (ii) the parent's or custodian's denial of contact was unreasonable and not in the child's best interests.**

*Commentary to Section 2(a)*

Under this statute, any contested hearing must be bifurcated unless the parent stipulates that the applicant satisfies the standing requirement. In the absence of a stipulation, the court must first conduct an evidentiary hearing on standing. At this hearing, the burden is on the applicant to demonstrate by a preponderance of the evidence that s/he meets the test set forth in section 1. Specifically, the court must find: (a) that the applicant has the kind of relationship with the child that the statute requires; (b) that the parent has substantially interfered with the relationship and the applicant has attempted unsuccessfully to resolve any disagreement with the parent before going to court; and (c) that the applicant sought court-ordered contact within a reasonable time after the interference. Unless the court finds by a preponderance of the evidence that the applicant has standing, the action must be dismissed.

Once a court finds that the applicant has standing, the applicant is then required to present evidence to show that the child would suffer a serious loss if contact were not awarded. Upon a showing of evidence from which a reasonable factfinder could conclude that the child would suffer a serious loss if court-ordered contact were not awarded, the burden of going forth shifts to the parent or custodian to present evidence that the decision

10 *Journal of the American Academy of Matrimonial Lawyers*

to refuse the contact was reasonable. When children have had a significant relationship with important people in their lives, parents ought not be allowed to prohibit all continuation of the relationship for the sole reason that the parents do not want the relationship to continue. This principle, that children have important interests to maintain significant relationships with persons other than their parents even when their parents are opposed to the maintenance of the relationship, is the guiding principle of this statute.

This statute shifts the burden in court of going forward to the parent once the court has made findings that the applicant has established standing and proved that the child would suffer a serious loss if contact were not ordered. At this point, for the first time, the parent is required to present some evidence why the contact should not be required. The focus of the hearing is now upon the reasonableness of the parent's refusal to permit contact.

Parents should not arbitrarily be allowed to disrupt significant relationships their children have formed with grandparents or parent-like figures in their children's lives. In Justice Stevens's words, in his dissenting opinion in *Troxel*: "[t]he constitutional protection against arbitrary state interference 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." 120 S.Ct. at 2072. If parents are unable to provide a reasonable justification for their decision, it is appropriate to authorize courts to overrule the parent's decision. If the parent fails to come forward with some evidence supporting the reasonableness of the refusal to permit contact, the applicant will have an easy time meeting his or her burden of proving that the parent's refusal is unreasonable. However, the ultimate burden of persuasion is on the applicant, not the parent.

Children who have formed parent-like relationships with non-parents (or significant relationships with grandparents) have the right not to suffer an arbitrary loss of that relationship at the hands of their parents by cutting off an important relationship based on considerations having nothing to do with the child's interests. This statute requires that parents explain the reason for severing the relationship between the applicant and the child.

The Supreme Court already has recognized that children are “persons” within the meaning of the Fourteenth Amendment, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969), with their own liberty and privacy interests, *In re Gault*, 387 U.S. 1 (1967); *Bellotti v. Baird*, 443 U.S. 622 (1979). These interests sometimes will override a parent’s interests to make parental decisions affecting children, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

In particular, decisions by parents which affect their children may not be arbitrary. The substantive standard used in this statute is reasonableness. By this test, we mean to require that parents and courts focus on the child. A *parent’s* decision not to allow a relationship to continue between the applicant and child is arbitrary as it relates to the child if it is completely unrelated to the well-being of the child. Thus, if a parent is unable to explain his or her decision to interfere with the relationship between the child and the applicant in terms that bears on the child, courts ordinarily should conclude that the interference is unreasonable. This is not to suggest that whenever a parent is able to explain his or her decision in terms that bear on the child such decisions are always reasonable. Courts must carefully review a parent’s decision. Those found to be reasonable should be respected. Those found to be unreasonable should not.

*Commentary to Section 2(b)*

*Troxel* leaves open certain questions about the constitutionality of third-party contact statutes. However, one thing is clear: statutes which authorize courts to overrule parental child-rearing choices merely because a judge disagrees with the parent’s choice offend the Constitution. In the words of the plurality, “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a ‘better’ decision could be made.” 120 S.Ct at 2064. Specifically, what failed to pass constitutional review was Washington’s scheme that 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.” 120 S.Ct. at 2061 (plurality opinion).

12 *Journal of the American Academy of Matrimonial Lawyers*

After *Troxel*, courts must accord some “special weight” to the parent’s determination of their children’s best interests. 120 S.Ct. at 2062. However, *Troxel* did not apply a particular test to third-party contact statutes. It did not require, for example, a showing of a “compelling state interest”; it did not explicitly hold that these statutes will be tested with “strict scrutiny.” Neither did the plurality say how much weight needs to be given to the parent’s position. It held only that the burden must be placed on the third-party to prove (without indicating how much of a burden) that the parent’s objection should not be respected (without clarifying on what basis).

This section creates an explicit presumption that the parent’s child-rearing preferences are appropriate. The statute authorizes the court to overrule a parent’s choice only when it is satisfied by clear and convincing evidence that the substantive ground for contact exists. In addition, the substantive basis used is focused on the child’s rights and needs. Although the Supreme Court in *Troxel* did not establish a particular test a applicant must meet to gain court-ordered contact, the plurality opinion approvingly cited a Rhode Island statute that requires the applicant to rebut by clear and convincing evidence the presumption that the parent’s decision to refuse the contact was reasonable. (R.I. STAT. § 15-5-24.3(a)(2)(iii)-(iv). 120 S.Ct. 2063.

The Washington Supreme Court in *Troxel* held that Washington’s statute violated the United States Constitution because it did not require a showing of harm to the child before authorizing courts to order contact over parental objection. The Supreme Court of the United States struck the Washington statute on different grounds without addressing whether such a showing of harm is constitutionally required. We do not support a requirement that harm to the child be demonstrated. We believe such a requirement is too restrictive and too difficult for a applicant to meet. At the same time, we fully embrace the principle that third-party contact actions should be child-focused, in accordance with the views expressed by Justice Stevens in his dissenting opinion in *Troxel*. See 120 S.Ct. at 2072-73. For this reason, this statute requires a showing that the child will suffer a serious loss if contact is not awarded. But we intend this requirement to be less than a required showing of harm to the child.

In many conflicts between a parent and a third-party over continued contact with a child, the parent's opposition is more focused on the interaction between the child and the third-party, rather than whether or not there should be any contact whatsoever. An additional consideration that leads us to limit the pool of individuals who may seek court-ordered contact with another parent's children is that contact is not a discrete act. Rather, contact is a process involving countless interactions between an adult and a child. These multiple interactions provide numerous opportunities to undermine or ignore constitutionally protected parental child-rearing choices. These choices range from the mundane — involving such areas as food, clothing, entertainment — to the profound — including theological and philosophical inquiry into the meaning of life. It may be impossible to isolate the act of “contact” from the myriad of interactions that take place during a visit which may (intentionally or otherwise) conflict with, or undermine, parental child-rearing choices.

In these cases, it is important that parents articulate their concerns and make clear to the court what the parents do not want the third-party doing or saying to the child during contact. Third-parties who gain access to children through a court order should be obligated to interact with the child in accordance with the parents' preferences. Courts should, in appropriate cases, spell out the conditions of contact to ensure that parents are protected when third-parties engage in inappropriate conduct during the contact.

Finally, because court-ordered contact affords the applicant a degree of parent-like entitlements, some states may wish to consider authorizing courts to assess child support obligations to applicants commensurate with their ability to pay and the amount of time they are entitled to spend with the child.

- 3. Fees. If the court dismisses the proceeding for lack of standing, the court shall award reasonable and necessary costs and fees to the prevailing party unless there is a compelling reason to do otherwise. In all other cases, the court may award such costs and fees as it deems appropriate.**

*Commentary*

It is appropriate to discourage lawsuits challenging a parent's child-rearing choices. For this reason, applicants should be

14 *Journal of the American Academy of Matrimonial Lawyers*

aware of the risks of bringing frivolous or non-substantial actions. Where courts dismiss the action for lack of standing, the applicants ordinarily should be required to pay the costs of the action, including attorneys fees of the parents. Where courts find standing but ultimately conclude that contact should not be ordered, courts should be given the discretion (but not be obligated) to award costs and fees to the prevailing party. Finally, where courts order contact, costs and fees may be awarded to the applicant if the court finds the parent unreasonably opposed the visitation. The most salient factor the court should consider in determining whether to assess costs against the losing parent is the reason for the parent's opposition to the contact. Where the parent's opposition is not related to the child's interests, such as where parents have arbitrarily disrupted a significant relationship between the child and the applicant, courts should be able to assess costs against the parents.

In addition to these factors, the ordinary factors in assessing costs in other areas of the law should be taken into account, including the parties' relative financial resources, the need for the party to engage experts, the best interests of child, vexatious or frivolous conduct by the parties, and the reasonableness of efforts made by the parties to avoid the lawsuit.