

New York Family Professionals for A2886

To: Members of the New York State Assembly and New York State Senate

Re: Memorandum in Support of Assembly Bill A2886

This memo is submitted in support of Assembly Bill A2886, annexed hereto. The bill is necessary to protect the constitutional rights of parents to determine what is in the best interests of their children and to prevent the costly, time-intensive, and emotionally taxing process of litigating visitation in situations where there is an established history of abuse or poor treatment by a grandparent.

The bill seeks to amend the Domestic Relation Law in relation to the rights of grandparents to seek access to minor children. Currently the law provides that a grandparent must establish legal standing before commencing a legal proceeding for visitation. Standing is automatically conferred upon a grandparent whose (adult) child has died and left children of his or her own. However, the current law leaves open the possibility of a lawsuit seeking visitation for a grandparent whose child is alive and well and opposes such visitation. The proposed amendment would create a presumption in favor of parental decisions; any petitioner-grandparent seeking to overturn a parental decision with respect to his or her access to the subject child would have to establish that a denial of visitation would not be in the best interests of the child. The change in the law is necessary to avoid litigation, and its attendant costs, when a grandparent seeks to override the decision of a parent who wishes to deny that grandparent access to the grandchild. Moreover, it provides for an award of fees and costs payable by an unsuccessful petitioner should the Court find that the visitation petition was brought in bad faith.

Currently, DRL §72(1) mandates a Court to undertake a two-part inquiry when determining whether to grant a grandparent visitation with a grandchild. The first part requires the Court to determine whether the petitioner has standing to sue based on alleged equitable circumstances.¹ If equitable circumstances are found, only then may the Court proceed to hear whether visitation is in the best interest of the child. A change to the law is necessary to prevent litigation in situations where grandparents have a demonstrated history of abuse or neglect of their own children.

It is well established that it is not in the best interests of a child for a grandparent with a demonstrated history of abuse to have access and time with that child. For example, in Canales v. Aulet, the Court held that equitable circumstances did not exist where the grandmother had

¹ In determining standing, the court considers all relevant facts and circumstances including: (a) the nature and extent of the grandparent-grandchild relationship, or sufficient efforts to establish one that has been unjustifiably prevented by the parents; (b) the nature and basis of the parents' objection to visitation; and (c) whether the child comes from an intact nuclear family.

disruptive and violent propensities which led to an acrimonious relationship between the grandmother and the mother. Canales v. Aulet, 734 N.Y.S. 2d, 851 (2nd Dept. 2002). In Doe v. Smith, the Court held that a grandfather did not have standing to seek visitation with his grandchildren by two of his children where there was total estrangement of the petitioner from his children, where he had learned that his daughters each had a child through third parties, and where the petitioner had been abusive to his daughters when they were growing up. Doe v. Smith, 595 N.Y.S.2d 624 (Fam. Ct. Queens Cnty. 1993).

The current law is problematic in that it does not articulate clearly that there should be a presumption that parents' decisions with respect to access to their children should be paramount. This failure is inconsistent with the constitutional right to due process as established by the United States Supreme Court in Troxel v. Granville, 50 U.S. 57 (2000), holding that there is a fundamental right under the Fourteenth Amendment for a parent to oversee the care, custody, and control of a child. A failure to provide such a presumption has directly led to the litigation of cases such as those cited above and has cost many New York families tens or even hundreds of thousands of dollars in legal fees defending against such suits. Accordingly, the new law would additionally provide for the payment of legal fees by a grandparent who brings a lawsuit seeking visitation if he or she is found to have acted in bad faith. The bill would thus provide financial relief to parents seeking to protect their child from their own abusive parent. Moreover, it would create a disincentive to grandparents seeking to potentially misuse the courts to supersede parental decisions and to exploit the current law to impose further abuse in the form of financial pain.

Parents have a right to determine what is in the best interest of their children. A2886 not only protects that right but could also prevent competent and loving parents from experiencing the emotional and financial toll of litigation over unwanted and unwarranted visitation by their own previously abusive parents.

Signed,

The National Association of Social Workers, New York State Chapter