

Alabama Law Institute

Grandparent Visitation Act

March 2015

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PREFACE

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

Under common law, grandparents did not have any legal rights to court-ordered visitation with their grandchildren over the objection of the parents of the grandchild. Thus, grandparent visitation has been authorized by legislative enactment.

In 2011, Alabama's current grandparent visitation statute was declared unconstitutional in *Ex parte E.R.G.*, 73 So.3d 634 (Ala. 2011), based in part on *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This act has been drafted to meet the constitutional requirements the court determined to be lacking in the existing statute by providing for a rebuttable presumption that a fit parent's decision denying or limiting visitation to the petitioner is in the best interest of the child. This act is based on an Arkansas law previously held by the Arkansas courts to meet the Troxel requirements.

Moreover, in this act Alabama has chosen to use the enhanced standard of clear and convincing evidence, rather than the preponderance of the evidence standard embraced by the Arkansas statute.

To rebut the decision of the parent to deny visitation the grandparent must prove by clear and convincing evidence, both of the following: the grandparent has a significant and viable relationship with the grandchild and visitation with the grandparent is in the best interest of the grandchild.

Courts may grant temporary visitation pending a final order under limited circumstances. Also, the court has the discretion to award any party reasonable expenses incurred by or on behalf of the party.

This act repeals the exiting statute, Section 30-3-4.1 of the Code of Alabama 1975.

This act was the result of a great deal of scholarly work by a committee of judges, professors, and practitioners with extensive backgrounds in this area of the law. The committee was chaired by Dean Noah Funderburg and Penny Davis served the committee as Reporter.

Othni J. Lathram
Director

March 2015

GRANDPARENT VISITATION ACT

Section 1. (a) For the purposes of this section, the following words have the following meanings:

(1) **GRANDPARENT.** The parent of a parent, whether the relationship is created biologically or by adoption.

(2) **HARM.** A finding by the court, by clear and convincing evidence, that without court-ordered visitation by the grandparent, the child's emotional, mental, or physical well-being has been, could reasonably be, or would be jeopardized.

(b) A grandparent may file an original action in a circuit court, or any other court exercising jurisdiction with respect to his or her grandchild, or file a motion to intervene in any action when any court in this state has before it any issue concerning custody of his or her grandchild, including a domestic relations proceeding involving the parent or parents of the grandchild, for reasonable visitation rights with respect to his or her grandchild under this section if any of the following circumstances exist:

(1) An action for a divorce or legal separation of the parents has been filed, or the marital relationship

between the parents of the child has been severed by death or divorce.

(2) The child was born out of wedlock and the petitioner is a maternal grandparent of the child.

(3) The child was born out of wedlock, the petitioner is a paternal grandparent of the child, and paternity has been legally established.

(4) An action to terminate the parental rights of a parent or parents has been filed, or the parental rights of a parent has been terminated by court order; provided, however, the right of the grandparent to seek visitation terminates if the court approves a petition for adoption by an adoptive parent, unless such visitation rights are allowed pursuant to 26-10A-30.

(c) (1) There is a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child.

(2) To rebut the presumption, the petitioner shall prove by clear and convincing evidence, both of the following:

a. The petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation; and

b. Visitation with the petitioner is in the best interest of the child.

(d) To establish a significant and viable relationship with the child, the petitioner shall prove by clear and convincing evidence either of the following:

(1) a. The child resided with the petitioner for at least six consecutive months with or without a parent present;

b. The petitioner was the caregiver to the child on a regular basis for at least six consecutive months; or

c. The petitioner had frequent or regular contact with the child for at least 12 consecutive months.

(2) Any other facts that establish that the loss of the relationship between the petitioner and the child is likely to harm the child.

(e) To establish that visitation with the petitioner is in the best interest of the child, the petitioner shall prove by clear and convincing evidence all of the following:

(1) That the petitioner has the capacity to give the child love, affection, and guidance.

(2) That the loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child.

(3) That the petitioner is willing to cooperate with the parent or parents if visitation with the child is allowed.

(f) The court shall make specific written findings of fact in support of its rulings.

(g) (1) No grandparent or grandparents who are married to each other may file a petition seeking an order for visitation more than once every 24 months absent a showing of good cause. The fact that a grandparent or grandparents who are married to each other have petitioned for visitation shall not preclude another grandparent from subsequently petitioning for visitation within the 24-month period. After an order for grandparent visitation has been granted, the parent, guardian, or legal custodian of the child may file a petition requesting the court to modify or terminate a grandparent's visitation time with a grandchild.

(2) The court may modify or terminate visitation upon proof that a material change in circumstances has occurred since the award of grandparent visitation was made, and a finding by the court that the modification or termination of the grandparent visitation rights is in the best interest of the child.

(h) The court may award any party reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, guardian ad litem fees, investigative fees, expenses for court-appointed witnesses, travel expenses, and child care during the course of the proceedings.

(i) (1) Notwithstanding any provisions of this act to the contrary, a petition filed by a grandparent seeking visitation shall be filed in probate court and is governed by Section 26-10A-30, Code of Alabama 1975, rather than by this act if either of the following circumstances exists:

a. The grandchild has been the subject of an adoption proceeding other than the one creating the grandparent relationship; or

b. The grandchild is the subject of a pending adoption proceeding.

(2) Notwithstanding any provisions of this act to the contrary, any grandparent seeking visitation pursuant to Section 12-15-314, Code of Alabama, shall be governed by Section 12-15-314 rather than by this act.

(3) Notwithstanding any provisions of this act to the contrary, a parent of a parent, whose parental rights have been terminated by court order in which the petitioner was the Department of Human Resources, shall not be awarded any visitation rights pursuant to this act.

(j) The right of a grandparent to maintain visitation rights pursuant to this section terminates upon the adoption of the child except as provided by Section 26-10A-30 of the Code of Alabama 1975.

(k) All of the following are necessary parties to any action filed under this act:

(1) Unless parental rights have been terminated, the parent or parents of the child.

(2) Every other person who has been awarded custody or visitation with the child pursuant to court order.

(3) Any agency having custody of the child pursuant to court order.

(l) In addition, upon filing of the action, notice shall be given to all other grandparents of the child as herein defined. The petition shall affirmatively state the name and address upon whom notice has been given.

(m) Service and notice shall be made in the following manner:

(1) Service of process on necessary parties shall be made in accordance with the Alabama Rules of Civil Procedure.

(2) As to any other person to whom notice is required to be given under subsection (l), notice shall be given by first class mail to the last known address of the person or persons entitled to notice. Notice shall be effective on the third day following mailing.

(n) Notwithstanding the foregoing, the notice requirements provided by this act may be limited or waived by the court to the extent necessary to protect the confidentiality and the health, safety, or liberty of a person or a child.

(o) Upon filing an action under this section, after giving special weight to the fundamental right of a fit parent to decide which associations are in the best interest of his or her child, the

court may enter a pendente lite order granting temporary visitation rights to a grandparent, pending a final order, if the court determines from the evidence that visitation would be in the best interest of the child and one of the following circumstances exist:

- (1) The child resided with the grandparent for at least six consecutive months; or
- (2) The grandparent was the caregiver of the child on a regular basis for at least six consecutive months; or
- (3) The grandparent provided significant financial support for the child for at least six consecutive months; or
- (4) The grandparent had frequent or regular contact with the child for at least 12 consecutive months.

ALABAMA COMMENT

Under common law, grandparents did not have any legal rights to court-ordered visitation with their grandchildren over the objection of the parents of the grandchild.

"Unlike parents, grandparents had no rights in regard to their grandchildren at common law. 'Under common law principles, grandparents lacked any legal right to visitation and communication with the grandchildren if such visitation was forbidden by the parents.' Ex parte Bronstein, 434 So. 2d 780, 782 (Ala.1983). Therefore, the rights of grandparents to visitation with their grandchildren exist only as created by the Act; they are purely statutory." Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011).

While the Legislature clearly has the authority to alter or repeal the common law, it must do so in a manner consistent with the U.S. Constitution and Alabama Constitution. See Ala. Code § 1-3-1 (1975); *Ex parte E.R.G.*, 73 So. 3d 634, 646 (Ala. 2011).

In *Troxel*, the court determined that "the court must accord at least some special weight to the parent's own determination" in decisions concerning grandparent visitation. *Troxel v. Granville*, 530 U.S. 57, 71, 120 S.Ct. 2054, 2062, 147 L.Ed.2d 49, 59 (2000). In *E.R.G.*, the court stated, "In order for a grandparent-visitation statute to pass constitutional muster, it must recognize the fundamental presumption in favor of the rights of the parents." *Ex parte E.R.G.*, 73 So. 3d 634, 646 (Ala. 2011).

This Act is derived primarily from Arkansas' grandparent visitation statute. Ark. Code § 9-13-103 (1987). The Arkansas statute has been held by the Arkansas Supreme Court as complying with *Troxel*.

"After reviewing the history of Arkansas's grandparent-visitation statute, this court observed that our statute 'gives the parent's decision presumptive or special weight in deciding whether grandparent visitation is in the best interest of the child' as required by the Supreme Court's decision in *Troxel v. Granville* and our decision in *Linder v. Linder*." *In re Adoption of J.P.*, 2011 Ark. 535, 14, 385 S.W.3d 266, 275 (Ark. 2011) (internal citations omitted).

Nonetheless, Alabama chose to further protect the fundamental rights of parents to make decisions concerning the care, custody, and control of their children by implementing the enhanced standard of clear and convincing evidence rather than the preponderance of the evidence standard embraced by the Arkansas statute.

Subsection (a)(1) defines "grandparent" for purposes of this act. Once an adoption has occurred the law creates a new legal relationship within the family. Consequently, the adoptive parents

become the legal parents of the adoptee and the parents of the adopting parents become the new legal grandparents of the adopted child. Except when Chapter 10A of Title 26 of the Code of Alabama applies, this sections covers grandparent visitation rights. Chapter 10A of Title 26 of the Code of Alabama governs the visitation rights of a natural grandparent whose grandchild has been adopted or who is the subject of a pending adoption petition by certain relatives or by a stepparent. Thus, for example, a post-adoption petition for visitation by the natural grandparent of a grandchild that was adopted by a step-parent would be governed by the Adoption Code.

Subsection (a)(2) was derived from the Oklahoma grandparent statute. Okla. Stat. Ann. tit. 43, § 109.4(E)(2) (2001). The Arkansas grandparent statute does not contain a definition of "harm." Thus, this definition was added to ensure the consideration of harm to the child in the absence of court-ordered visitation would include the emotional and mental harm to the child in addition the physical well-being of the child.

Subsection (b) was derived partially from Arkansas' grandparent visitation statute and partially from current law. Ark. Code § 9-13-103(b) (1987) and Ala. Code § 30-3-4.1.

The act continues the current practice of allowing the grandparents to intervene in certain actions involving a grandchild. See, Ala. Code § 30-3-4.1(c).

This will allow a court which has proper jurisdiction to resolve grandparent visitation issues and consequently will allow the child to avoid being subjected to a multiplicity of cases that might otherwise be required if only the circuit court had jurisdiction.

In subsections (b) (2) and (3) the words "was born out of wedlock" were substituted for the words "is illegitimate" in keeping with the language in existing Alabama statutory law. Ala. Code § 30-3-4.1 (1975). Alabama modified subsection (b) (3) from paternity being established "by a court of competent jurisdiction" to paternity that "has been legally established." This change was made to reflect that generally, under the Alabama

Uniform Parentage Act, a properly filed valid acknowledgement of paternity shall be considered a legal finding of paternity of a child. Ala. Code § 26-17-305 (1975).

Subsection (c) has been drafted so that this act meets the constitutional requirements the court determined to be lacking in the existing statute by providing for a rebuttable presumption that a fit parent's decision denying or limiting visitation to the petitioner is in the best interest of the child. In 2011, the Alabama grandparent visitation statute was declared unconstitutional in *Ex parte E.R.G.*, 73 So.3d 634 (Ala. 2011), based in part on the rationale in a U.S. Supreme Court decision overturning a Washington state grandparent statute, *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, the U.S. Supreme Court acknowledged that the constitutionality of any standard for awarding visitation is determined by the application of the standard on a case-by-case bases.

"We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' *Post*, at 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. See, e.g., *Fairbanks v. McCarter*, 330 Md. 39, 49-50, 622 A.2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation)." *Troxel v. Granville*, 530 U.S. 57, 73-74, 120 S.Ct. 2054, 2064, 147 L.Ed.2d 49, 61-62 (2000).

Subsection (c) was derived primarily from Arkansas' grandparent visitation statute. Ark. Code § 9-13-103(c) (1987). Alabama's statute does not include great-grandparent visitation as does the Arkansas statute. More importantly, throughout the entire act, Alabama has chosen to use the enhanced standard of clear and convincing evidence, rather than the preponderance of the evidence standard embraced by the Arkansas statute. In subsection (c) (1), Alabama substituted the words "fit parent's" for "custodian's" decision, thus paralleling the determination by the United States Supreme Court that there is a legal presumption that a "fit parent" acts in the child's best interest.

"The substantive fundamental right of parents to make decisions regarding the 'care, custody, and control' of their children is premised on the legal presumption that fit parents act in the best interests of their children: '[T]here is a presumption that fit parents act in the best interests of their children.' *Ex parte E.R.G.*, 73 So. 3d 634, 644 (Ala. 2011) (quoting *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49, 58 (2000)).

Subsection (d) was derived primarily from Arkansas' grandparent visitation statute. Ark. Code § 9-13-103(d) (1987). Alabama has chosen to use the enhanced standard of clear and convincing evidence, rather than the preponderance of the evidence standard embraced by the Arkansas statute. Also, in subsection (d) (1), Alabama has substituted "a parent" for the language "the current custodian" in the Arkansas statute.

Subsection (e) was derived primarily from Arkansas' grandparent visitation statute. Ark. Code § 9-13-103(e) (1987). Alabama has chosen to use the enhanced standard of clear and convincing evidence, rather than the preponderance of the evidence standard embraced by the Arkansas statute. The words "all of" were added before the words "the following" to make it clear that all three elements must be met in order to establish that visitation with the petitioner is in the best interest of the child. Subsection (e) (2) has also been modified to clarify that the relationship between the petitioner and child must have been

"significant and viable." Moreover, the petitioner must prove that the loss of that relationship either has caused or is reasonably likely to cause harm to the child if visitation is not permitted.

Although Troxel did not specifically require a finding of "harm or potential harm to the child as a condition precedent to granting visitation," Alabama has chosen to include the element of harm when determining the best interest of the child.

"Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court-whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' Post, at 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. See, e.g., Fairbanks v. McCarter, 330 Md. 39, 49-50, 622 A.2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); Williams v. Williams, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation)." Ex parte E.R.G., 73 So. 3d 634, 674-75 (Ala. 2011) (Bolin, J., concurring in the result) (quoting Troxel v. Granville, 530 U.S. 57, 73-74,

120 S.Ct. 2054, 2064, 147 L.Ed.2d 49, 61-62 (2000)
(footnote omitted)).

Also, Alabama has substituted "parent or parents" for "custodian" in subsection (e) (3).

Subsection (f) retains the requirement that a court make a specific written finding of facts that is contained in the existing Alabama grandparent statute. Ala. Code § 30-3-4.1(e) (1975).

Subsection (g) is very similar to the existing Alabama grandparent statute at Ala. Code § 30-3-4.1 (e) (1975). However, the subsection was modified to include language to ensure that married grandparents would not be able to file separate actions in a manner to get two independent opportunities to seek visitation. Nonetheless, a grandparent who is not married to a grandparent who has sought visitation within a 24 month period is not precluded from seeking visitation for himself or herself. Modification or termination of visitations rights may only occur upon proof of both a material change in circumstances since the issuance of the visitation order and a finding that the modification or termination would be in the best interest of the child. This provision has been added to limit unwarranted successive litigation and to provide stability in the child's life.

Subsection (h) addresses the issue of awarding of costs, fees, and expenses in a manner consistent with similar provisions of Alabama's enactment of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). Ala. Code §§ 30-3B-208, 30-3B-312 (1975). Under this subsection, the awarding of costs, fees, and expenses are discretionary with the court. Any party, rather than just the prevailing party, may petition for an award of costs, fees, and expenses. Since there are some cases in which different parties may prevail on some of the issues being litigated, it was determined that the wording to this subsection would allow the court to make an award to either party as deemed appropriate by the court.

Subsections (i) and (j) clarify the interaction of this act with Alabama's separate provision in the Alabama Adoption Code that governs a natural grandparent's opportunity to seek visitation rights

with an adoptee who is being adopted or has been adopted. Ala. Code § 26-10A-30 (1975). Subsequent to Troxel, the constitutionality of § 26 -10A-30 of the Code of Alabama was challenged. The court distinguished the facts of the case from Troxel because it involved "the rights of adopting parents in the limited context of intrafamily adoptions" and upheld its constitutionality in Ex parte D.W., 835 So. 2d 186,189 (Ala. 2002); see also Ex parte A.S. and C.S., 91 So. 3d 656 (Ala. 2011) (Bolin, J., concurring specially). The Adoption Code provides that a natural grandparent may seek visitation rights in the limited situations when the adoptee is or has been adopted by a stepparent or certain relatives. The court hearing all of the evidence surrounding the adoption of the child is in the best position to determine whether visitation rights should be granted. Thus, this Act does not apply in those situations. Subsection (i) provides that Title 12 governs grandparents who seek visitation with a "dependent child".

Subsection (k) list the necessary parties to any action filed under this act. Subsection (l) requires notice be given to all other grandparents who are not otherwise parties under subsection (k). Subsection (m) provides for the manner of notice and service. Subsection (n) incorporates the protection notice disclosure exception in the Alabama Parent-Child Relationship Protection Act (Relocation Act). Ala. Code § 30-3-167(a)(2) (1975). The addition of the words "or limited" reflects that the court may be able to give limited notice and, for example, still protect the identifying information of persons at risk from the effect of domestic violence or abuse.

Subsection (o) enumerates the requirements that must be met before the court can enter a pendent lite order granting temporary visitation rights to grandparents under this act. Generally, courts are given authority to issue temporary orders relating to custody and visitation with children pending a final order. Ala. Code § 30-2-8.1 (1975). See also T.J.H. v. S.N.F., 960 So. 2d 669 (Ala. Civ. App. 2006); Ex parte Bamberg, 580 So. 2d 1363 (Ala. Civ. App. 1991). However, because of the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 57 (2000),

there are limitations imposed on the courts issuing temporary orders relating to court-ordered visitation of a child with a grandparent over the objection of a fit parent. The court must first give special weight to the fundamental right of a fit parent to decide which associations are in the best interest of his or her child. Second, the court must determine if it is in the best interest of the child to order temporary visitation. Finally, there must be one of the enumerated relationships between the grandparent and grandchild.

Section 2. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 3. Section 30-3-4.1 of the Code of Alabama 1975, is repealed.

Section 4. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

Alabama Law Institute

Division of Retirement Benefits Upon Divorce Act

March 2015

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Ex Officio:
Justice Mike Bolin
Senator Cam Ward
Rep. Paul DeMarco

PREFACE

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

This bill is drafted by the Standing Family Law Committee of the Alabama Law Institute. Section 30-2-51 of the Code of Alabama, concerning the division of retirement benefits upon divorce, is significantly amended. The court retains the discretion to award retirement benefits to the non-employed spouse within certain limitations. The act retains the limitation that precluded the court from awarding more than 50% of the non-employed spouse's retirement benefits accrued during the marriage. However, the act eliminated the threshold requirements that the parties must be married for at least 10 years before the court could consider awarding retirement benefits.

The bill grants the court broad discretion to use any equitable method of valuing, dividing and distribution of the benefits. It eliminated the costly requirement of providing evidence of the present value of the retirement benefits in all cases. Subsection (d) provides a more equitable result by requiring that each party equally bear the burden or benefit of the passive appreciation or depreciation of the retirement benefits during the time between the award of the benefits and their distribution.

Finally, the court is given the authority to enter orders to protect and preserve the interest of either spouse in the retirement benefits.

This act was the result of a great deal of scholarly work by a committee of judges, professors, and practitioners with extensive backgrounds in this area of the law. The committee was chaired by Dean Noah Funderburg and Penny Davis served the committee as Reporter.

Othni J. Lathram
Director

March 2015

**DIVISION OF RETIREMENT BENEFITS UPON
DIVORCE ACT**

§ 30-2-51. Allowance upon grant of divorce; certain property not considered; retirement benefits.

(a) If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage.

~~(b) — The judge, at his or her discretion, may include in the estate of either spouse the present value of any future or current retirement benefits, that a spouse may have a vested interest in or may be receiving on the date the action for divorce is filed, provided that the following conditions are met:~~

~~(1) — The parties have been married for a period of 10 years during which the retirement was being accumulated.~~

~~(2) — The court shall not include in the estate the value of any retirement benefits acquired prior to the marriage including any interest or appreciation of the benefits.~~

~~(3) — The total amount of the retirement benefits payable to the non-covered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court.~~

~~(e) — If the court finds in its discretion that any of the covered spouse's retirement benefits should be distributed to the non-covered spouse, the amount is not payable to the non-covered spouse until the covered spouse begins to receive his or her retirement benefits or reaches the age of 65 years, unless both parties agree to a lump sum settlement of the non-covered spouse's benefits payable in one or more installments.~~

(b) The marital estate subject to equitable division and distribution shall, unless the parties agree otherwise, include any interest, whether vested or unvested, either spouse has acquired, received, accumulated, or earned during the marriage in any and all individual, joint or group retirement benefits including, but not limited to, any retirement plans, retirement accounts, pensions,

profit-sharing plans, savings plans, stock option plans, annuities, or other similar benefit plans from any kind of employment, including, but not limited to, self-employment, public or private employment, and military employment, except as otherwise provided by federal or state law.

(1) Notwithstanding the foregoing, the total amount of the retirement benefits payable to the non-covered spouse shall not exceed 50 percent of the retirement benefits that may be considered by the court, unless the parties agree otherwise.

(2) Any party asserting that all or a portion of his or her interest in any retirement benefits is excluded from the marital estate shall bear the burden of proving that fact and the value or amount of the excluded interest, including any active or passive income or appreciation on that interest.

(c) The court may use any method of valuing, dividing, and distributing an interest in retirement benefits that is equitable under the circumstances of the case so long as the overall division and distribution of the marital property remains equitable to the parties. Nothing in this section shall be construed to require a

court to divide or distribute any amount, or any percentage, of one spouse's retirement benefits to the other spouse.

(d) Any passive increase or loss in the value of retirement benefits from the effective date of the award to the date of distribution shall accrue to, or be borne by, the parties on a pro rata basis.

(e) Unless otherwise prohibited by state or federal law, a court may enter any order designed to protect or preserve the legal interest of either spouse in retirement benefits, including any order to prevent, or to compensate a spouse for, the deprivation or dissipation of a legal share of any retirement benefits due to the act or omission of the other spouse and any order necessary to enforce the property division of such benefits. Notwithstanding the foregoing, a court may not enter any order modifying the terms of any retirement benefits or enlarging the benefits payable under the terms of a retirement plan.

Alabama Comment to Act 2015

Section 30-2-51(b) governs the equitable division and distribution in divorce cases of retirement benefits which, under *Ex parte Vaughn*, 634 So.2d 533 (Ala. 1993), and similar cases, are considered marital property. The statute preserves prior statutory law by retaining the limitation on the award to the non-covered spouse of no more than 50 percent of each spouse's interest in any retirement plan or retirement account acquired during the marriage.

See 1995 Ala. Acts No. 95-549. However, this act changes prior law by eliminating the requirement that the marriage last at least 10 years in order for retirement benefits to be included in the marital estate and by including nonvested, as well as vested, retirement benefits in the marital estate in order to conform Alabama law to the law in other American jurisdictions. See 2 Brett Turner, *Equitable Distribution of Property*, § 6:22 (3d ed.). The retirement benefits listed in the statute are intended to be illustrative only with the intent that any type of retirement benefits should be included in the marital estate unless expressly excluded by federal or state law. Other examples of retirement benefits that are included are an IRA, a SEP IRA, a 401(k) plan and other similar plans. See Uniform Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (excluding certain federal military retirement benefits from equitable division under state law). However, it is not intended that the statute will be applied to benefits paid or payable for reasons unrelated to the retirement of a spouse even if the benefits are of a type listed in the statute or these comments.

Section 30-2-51(b)(3) further changes prior statutory law by placing the burden of proof on the spouse seeking to exclude his or her interest, or some portion of that interest, in a retirement plan or retirement account from the marital estate, also to be consistent with the rule prevailing in other American jurisdictions. See 2 Brett Turner, *Equitable Distribution of Property*, § 6:24 (3d ed.). For example, when a spouse claims that part of his or her interest in a defined-benefit retirement plan accrued before the marriage, the burden rests on that spouse to prove the number of years of creditable service accruing prior to the marriage; absent such proof, the court shall presume that the entire interest accrued during the marriage. The statute intentionally fails to define the term "during the marriage," leaving it to the court to decide based on the evidence and equitable considerations the appropriate starting and ending date of the marriage for all purposes under the statute.

Section 30-2-51(c) authorizes a court to use any equitable method of valuing, dividing, and distributing an interest in retirement benefits when making an overall equitable division of the marital estate. For example, a court may use an immediate

offset method by determining the present value of the retirement benefits based on actuarial probabilities and awarding a non-covered spouse his or her marital share of the benefits in an immediate lump sum award of cash or property. Using this method, the court does not divide or distribute the retirement benefits themselves, which is permissible under the second sentence of § 30-2-51(c). On the other hand, a court may use a deferred distribution method by which the court awards a non-covered spouse a stated percentage of the retirement benefits payable when the covered spouse becomes fully eligible for receipt of those benefits under the terms of the retirement plan. In this example, the court does not determine the present value of the covered spouse's interest in the retirement plan. By authorizing such a division and distribution, subsection 30-2-51(c) deviates from prior statutory law which required evidence of present value in all cases in order for retirement benefits to be considered when a court divided marital property. See, e.g., *Brattmiller v. Brattmiller*, 975 So. 2d 359 (Ala. Civ. App. 2007).

Section 30-2-51(d) provides that the parties shall bear the passive appreciation or depreciation of an interest in retirement benefits in proportion to their basis in that interest as provided in the property settlement. By using the word "passive," the statute contemplates increases or decreases in value such as from fluctuations in investment markets and cost-of-living adjustments made pursuant to the retirement plans as distinguished from active appreciation such as from continued service or actual monetary contributions and active loss from withdrawals or elections which diminish the value of the retirement benefits, which actions should not affect the property settlement.

Section 30-2-51(e) authorizes a court to enter such orders as are necessary to protect and preserve retirement benefits pending division of a marital estate and to enter such orders as are necessary to enforce the terms of the property settlement after it has been determined. Any order entered pursuant to § 30-2-51(e) will be effective unless in conflict with federal law or other state law or unless the order modifies the terms of a retirement plan or enlarges the benefits payable under the plan. See, e.g., 26 U.S.C. § 414(p)(3) (prohibiting state domestic relations order from requiring retirement plan administrator to pay to an alternate payee any type,

form, or amount of retirement benefit not available under the terms of the retirement plan).

Alabama Law Institute

Deployed Parents Custody and Visitation Act

March 2015

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PREFACE

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

This bill is drafted by the Standing Family Law Committee of the Alabama Law Institute. It is in conformity with a provision of the National Defense Authorization Act of 2014 passed by the United States Congress in December, 2013. It provides that a military deployment may not be the sole factor considered by the court in making a custody determination.

Furthermore, it provides clarification to the court on its ability to issue a pendente lite custody determination order in situations in which a case is continued or stayed based on Federal law.

This act was the result of a great deal of scholarly work by a committee of judges, professors, and practitioners with extensive backgrounds in this area of the law. The committee was chaired by Dean Noah Funderburg and Penny Davis served the committee as Reporter.

Othni J. Lathram
Director

March 2015

DEPLOYED PARENTS CUSTODY AND VISITATION ACT

Section 1. A military deployment, including past, previous, or future deployments, may not be considered by the court as the sole factor when making an original child custody determination, or in modifying an existing child custody determination, in any proceeding involving any person who has, or is seeking, custodial rights to, or visitation rights with, a child.

Section 2. Any order granting a continuance or stay of a child custody case granted pursuant to the Federal Servicemembers Civil Relief Act, 50 App. U.S.C. Section 501 et seq., may include a pendente lite custody determination order.

Section 3. Nothing in this act shall be construed so as to limit or expand the legal rights of any person under any existing law.

Section 4. This act shall become effective immediately following its passage and approval by the Governor, or otherwise becoming law.

Alabama Comment

Section 1 of this bill is in agreement with a provision of the National Defense Authorization Act of 2014 passed by the United States Congress in December, 2013. The term "child custody determination" is a defined term in the Uniform Child Custody Jurisdiction and Enforcement Act. Ala. Code § 30-3B-102 (3)

The Servicemembers Civil Relief Act, 50 App. U.S.C. Section 501 et seq, formerly known as, the Soldiers' and Sailors' Civil Relief Act, provides for the continuance or stay of an action under specific circumstances.

Section 2 clarifies that a court is permitted to enter a pendente lite custody determination order if a case is continued or stayed based on that federal act.

Section 3 is an expression of the legislative intent of the bill. It is an acknowledgment of the existing law with regard to the effect of military deployment in cases in which a custody determination order has been entered and is an expression of the legislative intent with regard to future cases.