

Alabama Law Institute

Alimony

January 2016

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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 act will apply to divorce, legal separations or annulment actions that are filed after the effective date of this act. Existing case and statutory law will govern alimony awards for cases filed prior to the effective date of this act, January 1, 2017.

This act continues the existing law of allowing the court to award interim alimony, but adds an enumeration of the factors for the court to consider when determining whether to award interim alimony. The court may also order the litigation cost and expenses, including attorney fees, necessary to pursue or defend the action out of marital property.

While the act does continue the existing law of allowing the court to award alimony after a final decree, the act does establish priorities, limitations and factors to be considered when making an award. First, unless the court expressly finds that rehabilitative alimony is not feasible, the court is to only award rehabilitative alimony, which is limited to five years, absent extraordinary circumstances.

Second, if the court determines that rehabilitative alimony is not feasible or has failed, the court may award periodic alimony. Generally, for marriages of less than 20 years, periodic alimony shall be limited to a period not to exceed the length of the marriage. If the parties have been married for 20 years or longer, the time limit on the eligibility to receive alimony does not apply. However, both rehabilitative and periodic alimony continue to terminate upon remarriage or cohabitation as provided in current law.

Modification of both rehabilitative and periodic alimony continues to be allowed based on a showing of a material change in circumstances. Also, unchanged is the current law that if there is not an award of alimony nor a reservation of jurisdiction for awarding alimony at the time of the divorce, the court permanently loses the ability to subsequently award alimony.

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

January 2016

A BILL
TO BE ENTITLED
AN ACT

Relating to alimony; to provide for an award of interim alimony in an action for divorce, legal separation, or annulment under certain conditions; to provide for the modification of interim alimony awards; to provide for the termination of an interim alimony award; to provide for an award of rehabilitative or periodic alimony under certain conditions upon the granting of a divorce or legal separation; to provide for modification of an order awarding rehabilitative or periodic alimony; and to provide for termination of an award of rehabilitative or periodic alimony.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1.

- (a) (1) In an action for divorce, legal separation, or annulment, the court may award either spouse interim alimony based upon a showing of all of the following:
- a. The spouse maintains the validity of the marriage.
 - b. The spouse needs interim alimony, after taking into consideration any other financial contributions

provided by the other spouse pursuant to other interim orders of the court.

c. The other spouse has the ability to pay interim alimony.

(2) An award under subdivision (1) may be made retroactive to the date of the filing of the complaint. The amount awarded shall be based on the applicable factors for awarding rehabilitative or periodic alimony as established in subsections (d), (e), and (f) of Section 2.

(b) An order awarding interim alimony may be terminated or prospectively modified at any time prior to the entry of a final judgment for good cause shown. In case of an emergency, the court may order or prospectively modify interim alimony without notice to the other party pursuant to Rule 65, Alabama Rules of Civil Procedure, subject to the right of the other party to a hearing as soon as practicable for the purpose of determining whether the emergency order should be dissolved, maintained, or modified.

(c) An order awarding interim alimony shall automatically terminate upon entry of the final judgment, the voluntary dismissal

of all pending claims, or the abatement of the proceedings, subject to the following:

(1) The jurisdiction of the court to continue or prospectively modify the interim alimony during a pending appeal, including a petition for a writ of certiorari, of the final judgment.

(2) The right of either party to file a subsequent action to recover any arrearage or overage accumulated prior to the termination of the order.

(d) In an action for divorce, legal separation, annulment, or appeals thereof, the court may award out of the marital property or current income reasonable interim fees, costs, and litigation expenses, including discovery, expert witnesses, guardians ad litem, special masters, and attorney fees, to enable each party to have equitable access to the marital property to pursue or defend the action. A denial of the requested motion for interim fees, costs, and litigation expenses does not preclude the court from making such an award. Upon final order, the court shall consider any award or other payments made for interim fees, costs, or litigation expenses.

Section 2.

(a) Upon granting a divorce or legal separation, the court shall award either rehabilitative or periodic alimony as provided in subsection (b), if the court expressly finds all of the following:

(1) A party lacks a separate estate or his or her separate estate is insufficient to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.

(2) The other party has the ability to supply those means without undue economic hardship.

(3) The circumstances of the case make it equitable.

(b) If a party has met the requirements of subsection (a) of this section, the court shall award alimony in the following priority:

(1) Unless the court expressly finds that rehabilitative alimony is not feasible, the court shall award rehabilitative alimony to the party for a limited duration, not to exceed five years, absent extraordinary circumstances, of an amount to enable the party to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage.

(2) In cases in which the court expressly finds that rehabilitation is not feasible, a good-faith attempt at rehabilitation fails, or good-faith rehabilitation only enables the party to partially acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall award the party periodic installments of alimony for a duration and an amount to allow the party to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage as provided in subsection (g) of Section 2.

(c) In cases in which a party has proven a lack of means to acquire the ability to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, but there exists a present inability of the other party to supply those means, a court, when the circumstances of the case make it equitable, shall reserve jurisdiction to award rehabilitative or periodic alimony. If there is neither an award of alimony nor a reservation of jurisdiction at the time of the divorce, the court shall permanently lose jurisdiction to subsequently make an award of rehabilitative or periodic alimony.

(d) In determining whether a party has a sufficient separate estate to preserve, to the extent possible, the economic status quo of the parties as it existed during the marriage, the court shall consider any and all relevant evidence, including all of the following:

- (1) The party's own individual assets.
- (2) The marital property received by or awarded to the party.
- (3) The liabilities of the party following the distribution of marital property.
- (4) The party's own wage-earning capacity, taking into account the age, health, education, and work experience of the party as well as the prevailing economic conditions.
- (5) Any benefits that will assist the party in obtaining and maintaining gainful employment.
- (6) That the party has primary physical custody of a child of the marriage whose condition or circumstances make it appropriate that the party not be required to seek employment outside the home.
- (7) Any other factor the court deems equitable under the circumstances of the case.

(e) In determining whether the other party has the ability to pay alimony, the court shall consider any and all evidence, including all of the following:

(1) His or her own individual assets, except those assets protected from use for the payment of alimony by federal law.

(2) The marital property received by or awarded to him or her.

(3) His or her liabilities following the distribution of marital property.

(4) His or her net income.

(5) His or her wage-earning ability, considering his or her age, health, education, professional licensing, work history, family commitments, and prevailing economic conditions.

(6) That he or she has primary physical custody of a child of the marriage whose condition or circumstances make it appropriate that he or she not be required to maintain employment outside the home.

(7) Any other factor the court deems equitable under the circumstances of the case.

(f) In determining whether the award of rehabilitative or periodic alimony is equitable, the court shall consider all relevant factors including all of the following:

- (1) The length of the marriage.
- (2) The standard of living to which the parties became accustomed during the marriage.
- (3) The relative fault of the parties for the breakdown of the marriage.
- (4) The age and health of the parties.
- (5) The future employment prospects of the parties.
- (6) The contribution of the one party to the education or earning ability of the other party.
- (7) The extent to which one party reduced his or her income or career opportunities for the benefit of the other party or the family.
- (8) Excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition of property.
- (9) All actual damages and judgments from conduct resulting in criminal conviction of either spouse in which the other spouse or child of the marriage was the victim.

(10) Any other factor the court deems equitable under the circumstances of the case.

(g) Except upon a finding by the court that a deviation from the time limits of this section is equitably required, a person shall be eligible for periodic alimony for a period not to exceed the length of the marriage, as of the date of the filing of the complaint, with the exception that if a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility.

(h) An order awarding rehabilitative or periodic alimony may be modified based upon application and a showing of material change in circumstances.

(i) Rehabilitative or periodic alimony awarded under this section terminates as provided in Section 30-2-55, Code of Alabama 1975, or upon the death of either spouse.

Section 3. This act governs only actions for divorce, legal separation, or annulment filed after the effective date of this act. This act does not govern any actions concerning alimony in any

case concerning divorce, legal separation, or annulment that was filed before the effective date of this act.

Section 4. This act shall become effective on January 1, 2017, following its passage and approval by the Governor, or its otherwise becoming law.

Alabama Comment

Section 1

Subsection (a) provides that a party seeking interim alimony cannot, at the same time, refute the existence of the marriage. An award of interim alimony may be made retroactive to the date of the filing of the complaint.

Subsection (b) provides that there must be a material change in circumstances in order for the court to vacate or prospectively modify the interim alimony award. Emergency relief may be sought pursuant to Rule 65 of the Alabama Rules of Civil Procedure.

Although the interim alimony award terminates upon a final judgment, under subsection (c) the court retains jurisdiction to continue to prospectively modify the interim alimony during a pending appeal. Notwithstanding, a party may file a subsequent action to recover any arrearage or overage accumulated prior to the termination of the order.

Subsection (d) is included to ensure that marital financial resources are available to both parties to pursue or defend the action and to prohibit one party from limiting the other party's access to marital property during the action.

No appeal lies from an interlocutory order awarding interim alimony, but the Alabama Court of Civil Appeals may review such order by way of a petition for a writ of mandamus.

Section 2

Subsection (a) establishes the criteria that the applicant spouse must meet to be entitled to an award of alimony. Once the criterion in subsection (a) for an award of alimony has been met, subsection (b) establishes the priority for the award. First, if feasible, the court shall award rehabilitative alimony rather than periodic alimony. If rehabilitative alimony is not feasible or fails to achieve or maintain, insofar as is possible, the economic status quo of the parties as it existed during the marriage, then the court shall award periodic alimony.

Subsection (c) provides for the reservation for the future award of alimony. Also, unchanged is the current law that if there is no an award of alimony nor a reservation of jurisdiction for awarding alimony at the time of the divorce, the court permanently loses the ability to subsequently make an award of alimony.

The evidence to be considered by the court when determining whether the applicant spouse has a sufficient estate is enumerated in Subsection (d). See *Miller v. Miller*, 695 So.2d 1192 (Ala. Civ. App. 1997) ; [*DeShazo v. DeShazo*, 582 So.2d 564, 565 \(Ala.Civ.App.1991\)](#); and [*Treusdell v. Treusdell*, 671 So.2d 699, 704 \(Ala.Civ.App.1995\)](#). The evidence to be considered by the court in its determination of whether the responding spouse has the ability to pay alimony is enumerated in Subsection (e). See, *Rieger v. Rieger*, 147 So. 3d 421(ACA 2013).

Subsection (f) list the factors the court shall utilize when determining whether the award of alimony is equitable. See, eg., [*Stone v. Stone*, 26 So.3d 1232, 1236 \(Ala.Civ.App.2009\)](#) (length of marriage) ; [*Washington v. Washington*, 24 So.3d 1126, 1135–36 \(Ala.Civ.App.2009\)](#) (standard of living); [*Lackey v. Lackey*, 18 So.3d 393, 401 \(Ala.Civ.App.2009\)](#) (fault); [*Ex parte Elliott*, 782 So.2d 308, 311 \(Ala.2000\)](#) (age and health of parties); and [*Baggett v. Baggett*, 855 So.2d 556, 559 \(Ala.Civ.App.2003\)](#) (future employment prospects).

The duration for the award of periodic alimony is established in subsection (g). Generally, for marriages of less than 20 years, periodic alimony shall be limited to a period not to exceed the length of the marriage. Nonetheless, if the court determines that equity so requires, the court can deviate from the time limits established in this section. If the parties have been married for 20 years or longer, the time limitation on the eligibility to receive alimony does not apply.

Consistent with current law, under subsection (h), alimony may be modified based on a material change in circumstances. Likewise, subsection (i) is consistent with current law by providing that alimony terminates upon the death of either spouse or as is provided in section 30-2-55 of the Code of Alabama.

Section 3

Because Alabama considers property settlements and the determination of the equity of awarding alimony “as matters that must be considered together”, this act only has prospective application since a property settlement cannot be modified once it becomes final. *Rieger v. Rieger*, 147 So.3d 421,434 (Ala. 2013).

Alabama Law Institute

Common Law Marriage Statute

January 2016

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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.

Alabama is in the minority of states that has retain common law marriage. This Act codifies the current elements required to establish the existence of a common law marriage and provides two methods of proving the existence of a common law marriage in Alabama. The first method of proving the existence of a common law marriage is by executing and filing a Declaration of Common Law Marriage pursuant to this act. The filing of a Declaration of Common Law Marriage is new to Alabama and is based on the Texas Statutory Informal Marriage Act. A Declaration of Common Law Marriage execute and recorded as provided by this act is prima facie evidence of the marriage of the parties.

The second method of proving the existence of a common law marriage codifies the existing law of proving, by clear and convincing evidence, the existence of all of the elements of a common law marriage. When a party is attempting to prove the existence of a common law marriage by proving each element, the act creates a rebuttable presumption that the parties entered into an agreement to be married if both parties have asserted that they are married in certain enumerated legal documents, such as income tax forms.

The act prohibits a person under the age of 19 years from entering into a common law marriage which differs from existing case law.

A Declaration of Common Law Marriage can only be filed by residents of Alabama in the Probate Office of their county of residence and both parties must be present to file the document and show proof of their age and identity.

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

January 2016

**SECTION 1. PROOF OF COMMON LAW
MARRIAGE**

(a) The common law marriage between two individuals may be proved:

(1) By evidence that a Declaration of Common Law marriage has been signed and recorded as provided by this act; or

(2) By clear and convincing evidence of the existence of all of the following elements of a common law marriage:

- (a) Capacity;
- (b) Present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and
- (c) Public recognition of the relationship as a marriage, public assumption of marital duties, and cohabitation.

(b) An individual who has knowingly assumed the position in a judicial proceeding that he entered into a common law marriage with another person is estopped from assuming a position inconsistent with the individual's prior position which prejudices the other person to whom he asserted that he had entered into a common law marriage.

(c) In a proceeding in which a marriage is to be proved as provided by subsection (a) (2), it is rebuttably presumed that the parties did enter into an agreement to be married if both parties signed:

(1) A federal or state income tax form stating that they are married;

(2) A health insurance document claiming they are married; or

(3) Any other legal document under oath claiming they are married.

(d) A person under 19 years of age may not:

(1) Be a party to a common law marriage; or

(2) Execute a Declaration of Common Law Marriage under Section 2.

(e) A person may not be a party to a common law marriage or execute a Declaration of Common Law Marriage if the person is presently married to a person who is not the other party to the purported common law marriage or the purported Declaration of Common Law Marriage, as applicable.

SECTION 2. DECLARATION AND REGISTRATION OF COMMON LAW MARRIAGE.

(a) A Declaration of Common Law Marriage must be signed on a form prescribed by the Alabama Administrative Office of Courts. Each party to the declaration shall provide the information required in the form.

(b) The declaration form must contain the following and be stated in substantially the same form as follows:

(1) A heading entitled "Declaration and Registration of Common law marriage, _____ County, Alabama";

(2) Spaces for each party's full name, including the name on each party's current birth certificate, current address, date of birth, place of birth, including city, county, and state;

(3) A space for indicating the type of document tendered by each party as proof of age and identity;

(4) A certification that: "The other party is not related to me as:

(A) An ancestor or descendant, by blood or adoption;

(B) A brother or sister, of the whole or half blood or by adoption;

(C) A stepchild or stepparent, while the marriage creating the relationship exists;

(D) An aunt, uncle, nephew or niece of the whole or half-blood";

(5) A certification that both parties are currently residents of the State of Alabama and a space for the parties to list their current address;

(6) A space for the date on or about which the parties are asserting is the date they entered into a common law marriage;

(7) A printed declaration and oath reading:

"I SOLEMNLY SWEAR (OR AFFIRM) THAT WE, THE UNDERSIGNED, ARE MARRIED TO EACH OTHER BY VIRTUE OF THE FOLLOWING FACTS: ON OR ABOUT _____ (DATE) WE MET ALL OF THE FOLLOWING ELEMENTS OF A COMMON LAW MARRIAGE; (A) CAPACITY; (B) PRESENT, MUTUAL AGREEMENT TO PERMANENTLY ENTER THE MARRIAGE RELATIONSHIP TO THE EXCLUSION OF ALL OTHER RELATIONSHIPS; AND (C) PUBLIC RECOGNITION OF THE RELATIONSHIP AS A MARRIAGE, PUBLIC

ASSUMPTION OF MARITAL DUTIES, AND COHABITATION. THIS DECLARATION IS TRUE AND THE INFORMATION IN IT WHICH I HAVE GIVEN IS CORRECT.";

(8) Spaces immediately below the printed declaration and oath for the parties' signatures; and

(9) A certificate of the notary public, stated in substantially the same form as follows:

Personally appeared before me _____, who provided proof of his or her identity by presenting to me one of documents listed below as indicated by the checked box;

- Certified Birth Certificate;
- I.D. or identification cards that complies with REAL ID Act of 2005; or
- National Government Passport.

And having first been duly sworn, did hereby swear or affirm that all of the statements contained in the above and foregoing Declaration of Common Law Marriage are true and correct.

Sworn to and subscribed before me on this the ____ day of _____, 20__.

Notary Public
Expire on: _____
Seal

Personally appeared before me _____, who provided proof of his or her identity by presenting to me one of documents listed below as indicated by the checked box;

- Certified Birth Certificate;

[] I.D. or identification cards that complies with
REAL ID Act of 2005; or

[] National Government Passport.

And having first been duly sworn, did hereby swear or
affirm that all of the statements contained in the above
and foregoing Declaration of Common Law Marriage are
true and correct.

Sworn to and subscribed before me on this the
___ day of _____, 20__.

Notary Public
Expire on: _____
Seal

**SECTION 3. PROOF OF IDENTITY AND AGE;
OFFENSE.**

(a) The notary public shall require proof of the
identity and age of each party to the Declaration of Common Law
Marriage to be established by one of the documents listed below:

1. Certified Birth Certificate;
2. Star I.D. or identification card that
complies with the REAL ID Act of 2005;
or
3. National Government Passport.

(b) A person commits an offense if the person knowingly
provides false, fraudulent, or otherwise inaccurate proof of the
person's identity or age under this section. An offense under this
subsection is a Class A misdemeanor.

**SECTION 4. RECORDING OF DECLARATION OF
COMMON LAW MARRIAGE.**

(a) Both parties seeking to record a Declaration of Common Law Marriage must personally appear together before the clerk in the office of the judge of probate and present to the clerk the executed Declaration of Common Law Marriage and the proof of verification of the age and identity of each party. Upon the receipt of the executed Declaration of Common Law Marriage and verification of the age and identity of the parties, the clerk in office of the probate judge in the county where both parties reside shall record the Declaration of Common Law Marriage, return to the parties the original of the Declaration and the proof of the age and the identity of the parties and send a copy of the Declaration of Common Law Marriage to the Office of vital Statistics.

(b) A fee for the recording of the Declaration of Common Law Marriage shall be charged by the Judge of Probate in the county in which the license is recorded. The fees charged shall be the same amount as the fees that are charged for the issuance and recording of a marriage license in that county and shall be disbursed in the same manner.

(c) An executed Declaration of Common Law Marriage recorded as provided in this act is prima facie evidence of the marriage of the parties.

Alabama Comment

This act is based on the Texas Statutory Informal Marriage Act.

Section 1.

Subsection (a) provides two methods of proving the existence of a common law marriage in Alabama. The first is by executing and filing a Declaration of Common Law Marriage pursuant to this act. The second method codifies the existing law of proving, by clear and convincing evidence, the existence of all of

the elements of a common law marriage. *Skipworth v. Skipworth*, 360 So.2d 975 (Ala. 1978); *Baker v. Townsend*, 484 So. 2d 1097 (Ala. Civ. App. 1986); *Walton v. Walton* 409 So. 2d 858 (Ala. Civ. App. 1982); *Luther v. M & M Chemical Co.*, 475 So. 2d 191 (Ala. Civ. App. 1985).

Subsection (b) codifies the Doctrine of Judicial Estoppel. Under the Doctrine of Judicial Estoppel, a party is precluded from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous legal proceeding. *Russell v. Russell*, 404 So. 2d 662 (Ala. 1981); *McGlaughn v. McGlaughn*, 611 So. 2d 382 (Ala. Civ. App. 1992); *Keeton v. Big Lots Stores, Inc.*, 84 F.Supp. 3d 1290 (N. Dist. Ala. 2015); *New Hampshire v. Manin*, 532 U.S. 742 (2001).

When a party is attempting to prove the existence of a common law marriage by proving each element, subsection (c) creates a rebuttable presumption that the parties entered into an agreement to be married if both parties have asserted, in certain enumerated legal documents, that they are married.

Subsection (d) prohibits a person under the age of 19 years from entering into a common law marriage. This provision overrides existing case law that distinguished between common law marriage and the requirement that the parents consent to the marriage of their children who are under 18 years old. See, *Adams v. Boan*, 559 So. 2d 1084 (Ala.1990).

Subsection (e) codifies the existing law that an individual may be married to only one person at a time. *Hampton v. State*, 37 Ala. App. 427, 69 So.2d 727 (Ala. Civ. App. 1954). Bigamy is a Class C felony in Alabama. Ala. Code Section 13A- 13-1.

Section 2.

Section two requires the Declaration of Common Law Marriage form be developed by the Alabama Administrative Office of Courts and enumerates what has to be included on the form. Subsection (b) 4 is derived from Section 13A-13-3 of the Code of Alabama. The form, accompanied with the proper identification, is to be sworn to or affirmed by each party and signed in the presence of a Notary Public.

Section 3.

This section enumerates which documents may be presented to establish the age and identity of each party. The

REAL ID Act of 2005, Pub. L. 109–13, 119 Stat. 302, enacted May 11, 2005, is an Act of Congress that modified the United States federal law pertaining to security, authentication, and issuance procedures standards for state driver's licenses and identification (ID) cards.

It is a Class A misdemeanor for anyone to knowingly provide false, fraudulent or inaccurate proof a party's age or identity.

Section 4.

The clerk in the office of the judge of probate shall record the Declaration of Common Law Marriage upon receipt of the Declaration form and the verification of the age and identity of the parties. The Declaration form and the proof of verification of the age and identity of the parties must be presented in person by both parties at the same time to the clerk. The documents provided to establish proof of the age and identity of the parties is not recorded in the probate office because of the personal information contained in the documents. Upon recording of the Declaration, the clerk is required to send a copy of the Declaration of Common Law Marriage to the Office of Vital Statistics. The original Declaration and the documents provided to the clerk to establish the age and identity of the parties are to be returned to the parties by the clerk.

The fees charged for the recording of the Declaration are for the same amount as for the issuance and recording of a marriage license and disbursed in the same manner.

A properly executed and recorded Declaration provides prima facie evidence of the existence of a common law marriage.

Alabama Law Institute

Custody Amendments

January 2016

Chairman
Dean Noah Funderburg

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Ex Officio:
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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 act amends and expands the current statutory law relating to joint custody to all custody arrangements. It abolishes the concepts of one parent being awarded sole physical custody and the other parent being awarded visitation. That concept is replaced with the concept that if the parents are not awarded joint physical custody, then one parent will have primary physical custody and the other parent will be the non-residential custodial parent or will have restricted physical custody.

Under existing law, both parents are required to submit a parenting plan to the court only if they both seek joint physical custody. Under this bill, both parents are required to submit parenting plans in all custody cases. Moreover, if both parents submit to the court the same parenting plan, that parenting plan shall be granted in the final court order unless the court makes specific findings as to why the parenting plan jointly submitted by the parties should not be granted.

The act enumerates the factors that the court shall consider when determining whether to award joint physical custody. Likewise, the act enumerates the factors to be used to determine which parent shall be designated as the parent with primary physical custody if joint custody is not awarded.

A new section provides additional remedies to a party when a parent, without proper cause, fails to adhere to the time-sharing schedule in a parenting plan. Make-up parenting time and reimbursement for costs and attorney fees are among the remedies available when a parent violates the time-sharing schedule in a parenting plan.

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

January 2016

Section 30-3-150

State policy. ~~Joint Custody.~~ It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage. ~~Joint custody does not necessarily mean equal physical custody.~~

Section 30-3-151

Definitions. For the purposes of this article the following words shall have the following meanings:

(1) JOINT CUSTODY. Joint legal custody and joint physical custody.

(2) JOINT LEGAL CUSTODY. ~~Both parents have equal rights and responsibilities for major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training. The court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions. Both parents have equal rights and responsibilities for major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training. This includes the responsibility of both parents to discuss those decisions and consider the wishes and concerns of each parent and the child. The court may designate one parent to have tie-breaking authority to make certain major decisions; however, that designation does not~~

negate the responsibility of that parent to discuss those decisions with the other parent and to consider the other parent's wishes and concerns. In the event of an impasse and in the absence of an express award of tie-breaking authority, the primary physical custodian shall have tie-breaking authority for those decisions.

(3) JOINT PHYSICAL CUSTODY. Physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time.

(4) NON-RESIDENTIAL CUSTODIAL PARENT. The non-residential custodial parent is the parent with whom the child does not live the majority of the time and who does not have the primary authority and responsibility for the day-to-day care of a child nor the authority to establish where a child will live. Notwithstanding the foregoing, the non-residential custodial parent has the authority and responsibility for the day-to-day care of a child when the child is in his or her physical custody and not in the physical custody of the parent with primary physical custody.

(5) PARENTING PLAN. A plan that specifies the time which a minor child will spend with each parent.

(6) ~~SOLE PRIMARY PHYSICAL CUSTODY.~~ The parent with primary physical custody has the primary authority and responsibility for the day-to-day care of a child and establishes where a child will live. One parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court.

(7) RESTRICTED PHYSICAL CUSTODY. The court restricts a parent's physical access to a child by requiring

supervised custody, no over-night custody, a suspension of physical contact or any other restrictions on custody determined by the court to be in the best interest of the child.

(8) SOLE LEGAL CUSTODY. One parent has sole rights and responsibilities to make major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training.

Section 30-3-152

Factors considered; order without both parents' consent; presumption where both parents request joint custody.

(a) The court shall in every case consider joint custody but may award any form of custody which is determined to be in the best interest of the child. In determining whether joint custody is in the best interest of the child, the court shall consider the same factors considered in awarding other forms of sole legal and physical custody arrangements and all of the ~~following~~ factors below. These factors are not listed in a specific order of importance, and a court may weigh various factors differently based on the facts presented and the best interests of the child.

(1) The agreement or lack of agreement of the parents on joint custody.

(2) The past and present ability of the parents to cooperate with each other and make decisions jointly.

(3) The ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent.

(4) Any history of or potential for child abuse, spouse abuse, or kidnapping.

(5) The geographic proximity of the parents to each other as this relates to the practical considerations of joint physical custody.

(b) The court may order a form of joint custody without the consent of both parents, when it is in the best interest of the child.

(c) If both parents request joint custody, the presumption is that joint custody is in the best interest of the child. Joint custody shall be granted in the final order of the court unless the court makes specific findings as to why joint custody is not granted.

(d) If joint custody is not awarded by the court, the following factors shall be considered by the court when determining which other custody arrangement is in the best interest of the child. These factors are not listed in a specific order of importance, and a court may weigh various factors differently based on the facts presented and the best interests of the child.

- (1) The relationship between each parent and the child;
- (2) The relationship between the child, the child's peers, and siblings, or other relatives;
- (3) The capacity of each parent to provide a loving relationship, and the needs of each child, including their emotional, social, moral, material and educational needs;
- (4) Each parent's knowledge and familiarity with the child and pre- and post-separation involvement in the child's life;

- (5) The effect on the child of disrupting or continuing an existing custodial status;
- (6) Each parent's home environment;
- (7) The preferences of the parents;
- (8) Moral, mental, and physical fitness of each parent;
- (9) The child's age and any special needs;
- (10) The preference of the child, if the child is of sufficient age and maturity;
- (11) The history of cooperation between the parents, including the past and present history, and the capacity of each parent to facilitate or encourage a continuing parent-child relationship with both parents;
- (12) Each parent's criminal history or evidence of violence, sexual, mental, or physical abuse;
- (13) Evidence of substance abuse by either parent;
- (14) The child's current adjustment to or involvement with his or her community;
- (15) Military considerations;
- (16) Characteristics of those seeking custody, including age, character, stability, mental and physical health;
- (17) The report and recommendation of any expert witnesses or other independent investigator; and
- (18) Any other relevant factors.

Section 30-3-153

Implementation; required provisions; plan set by court.

(a) ~~In order to implement joint custody,~~ The court shall require ~~the~~ each parents to submit, separately or together, ~~as part of their agreement,~~ provisions covering matters relevant to the care and custody of the child, including, but not limited to, all of the following:

- ~~(1) The care and education of the child.~~
- ~~(2) The medical and dental care of the child.~~
- ~~(3) Holidays and vacations.~~
- ~~(4) Child support.~~
- ~~(5) Other necessary factors that affect the physical or emotional health and well-being of the child.~~

- (1) How the parents will share and be responsible for the daily tasks with the upbringing of the child;
- (2) A parenting plan that specifies the time that the minor child will spend with each parent;
- (3) A designation of who will be responsible for any and all forms of health care, school-related matters including the address to be used for school residential determination and registration, and other activities;
- (4) Transportation arrangements for the child, including who bears the cost for transporting the child;

- (5) The methods and technologies that the parents will use to communicate with the child and each other;
- (6) Any other matter specifically delineated by the court.
- (7) The division of any expenses, in addition to child support as provided by Rule 32 of the Rules of Judicial Administration; and
- (8) A designation of the parent possessing primary authority and responsibility regarding involvement of the minor child in academic, religious, civic, cultural, athletic, and other activities, and in medical and dental care if the parents are unable to agree on these decisions.

(b) If the parties are unable to reach an agreement as to the provisions in subsection (a), the court shall set the plan.

(c) If both parents submit the same parenting plan, the presumption is that the parenting plan jointly submitted by the parents is in the best interest of the child. The parenting plan jointly submitted by both parents shall be granted in the final order of the court, unless the court makes specific findings as to why the parenting plan jointly submitted by the parties is not granted.

Section 30-3-154

Availability of records to both parents.

Unless otherwise prohibited by court order or statute, all records and information pertaining to the child, including, but not limited to, medical, physiological, dental, scholastic, athletic,

extracurricular, and law enforcement, shall be equally available to both parents, in all types of custody arrangements.

Section 30-3-155

Determination of child support.

In making a determination of child support, the court shall apply Rule 32 of the Alabama Rules of Judicial Administration.

Section 30-3-156

Interference with custody or violation of Chapter 3B.

The fact that joint custody has been awarded to both parents shall not preclude a court from finding that one parent has committed the crime of interference with custody as provided in Section 13A-6-45, or has violated the Uniform Child Custody Jurisdiction and Enforcement Act as provided in Chapter 3B of this title.

Section 30-3-157

Construction of article with respect to existing orders.

This article shall not be construed as grounds for modification of an existing order. This article shall not be construed as affecting the standard applicable to a subsequent modification.

Section 30-3-158. Remedies.

(a) When a parent refuses to adhere to the time-sharing schedule in the parenting plan without proper cause, the court may:

(1) After calculating the amount of time-sharing improperly denied, award the parent denied time a sufficient amount of extra time-sharing to compensate for the time-

sharing missed, and such time-sharing shall be ordered as expeditiously as possible in a manner consistent with the best interests of the child and scheduled in a manner that is convenient for the parent deprived of time-sharing. In ordering any makeup time-sharing, the court shall schedule such time-sharing in a manner that is consistent with the best interests of the child or children and that is convenient for the non-offending parent and at the expense of the noncompliant parent.

(2) Order the parent who did not provide time-sharing or did not properly exercise time-sharing under the time-sharing schedule to pay reasonable court costs and attorney's fees incurred by the non-offending parent to enforce the time-sharing schedule.

(3) Order the parent who did not provide time-sharing or did not properly exercise time-sharing under the time-sharing schedule to attend a parenting course approved by the court.

(4) Order the parent who did not provide time-sharing or did not properly exercise time-sharing under the time-sharing schedule to pay the actual cost incurred by the other parent because of the failure to provide time-sharing or the failure to properly exercise time sharing as provided by the court order.

(5) May impose any other reasonable remedies as a result of noncompliance.

(b) These remedies are in addition to existing remedies, including, but not limited to, contempt.

Alabama Commentary

Section 30-3-151

Three new definitions were added to this section; restricted physical custody, non-residential custodial parent and parenting plans. The definition of “sole physical custody” was modified to “primary physical custody” which is consistent with the language frequently used in cases to reflect the desire to move away from the concept of one parent having sole physical custody and the other parent having only “visitation rights” with their child.

If joint physical custody is not awarded, the parent given primary physical custody will have primary authority and responsibilities for the day-to-day care of the child and will determine where the child resides. The other parent will be the non-residential custodial parent unless the court determines to award the other parent restricted physical custody.

The non-residential custodial parent has the responsibility for the day-to-day care of the child when the child is in his or her custody. Typically, restricted physical custody will be awarded by a court in situations when restricted visitation is required out of concern for the safety or well-being of the child or when the parent has limited parenting skills

The parenting plan is a plan which specifies when the child is with each parent. Section 30-3-153 contains the provisions relating to parenting plans.

Section 30-3-152

Subsection (d) is added and provides the factors for the court to utilize when determining which custody arrangement is best for the child if joint custody is not going to be awarded by the court. Many of these factors are listed in current law. See for example, *Ex Parte Devine*, 398 So.2d 686 (Ala.1981).

Section 30-3-153

Subsection (a) is amended to require each parent to submit a parenting plan to the court in each custody case. This differs from the current law that only requires a plan to be submitted when the parties request joint custody. The specifics of what must be included in the plan were developed from the requirements for

parenting plans in other states, but primarily from the State of Florida.

If the parents are unable to reach an agreement on the parenting plans, the court will establish the plan. If both parties agree on a parenting plan, the presumption is that the parents' plan should be granted by the court unless the court makes specific findings as to why the parents' plan should not be granted by the court.

Section 30-3-158

This new section provides additional remedies to a party when a parent, without proper cause, fails to adhere to the time-sharing schedule in a parenting plan. Make-up parenting time and reimbursement for costs and attorney fees are among the remedies available when a parent violates the time-sharing schedule in a parenting plan. These remedies are similar to those provided under Florida law.

Alabama Law Institute

Grandparent Visitation Act

January 2016

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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

January 2016

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 where the child resides, 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 Section 26-10A-30, Code of Alabama 1975.

(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 that resulted in a strong and meaningful relationship with the child.

(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, having standing under Chapter 10A of Title 26 of the Code of Alabama, 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 or a finalized 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 1975, shall be governed by Section 12-15-314, Code of Alabama 1975, 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.

(1) 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 (1), 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 presented at a hearing 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;

(2) the grandparent was the caregiver of the child on a regular basis for at least six consecutive months;

(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.

Section 2. As a matter of public policy this act recognizes the importance of family and the fundamental rights of parents and children. In the context of grandparent visitation under this section of the Code of Alabama, a fit parent's decision regarding whether to permit grandparent visitation is entitled to special weight due to a parent's fundamental right to make decisions concerning the rearing of his or her child. Nonetheless, a parent's interest in a child must be balanced against the states' long-recognized interests as *parens patriae*. Thus, as applied to grandparent visitation under this section, this act balances the constitutional rights of parents and children by imposing an enhanced standard of review and consideration of the harm to a child caused by the parent's limitation or termination of a prior relationship of a child to his or her grandparent.

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

Section 4. 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 5. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

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 or Chapter 15 of Title 12 of the Code of Alabama apply, these 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 stepparent would be governed by the Adoption Code. Chapter 15 of Title 12 of the Code of Alabama gives juvenile court original jurisdiction over certain grandparent visitation cases.

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.

Alabama Law Institute

Division of Retirement Benefits Upon Divorce Act

January 2016

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Justice Mike Bolin
Senator Cam Ward

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

January 2016

A BILL
TO BE ENTITLED
AN ACT

To amend Section 30-2-51, Code of Alabama 1975, relating to allowance upon divorce of certain retirement benefits; to provide further for the circumstances in which the court may make an allowance; and to provide further for the valuation of retirement benefits; and to provide for the obligations of each party.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 30-2-51, Code of Alabama 1975, is amended to read as follows:

§30-2-51.

(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.~~

~~(c) 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 is subject to equitable division and distribution. Unless the parties agree otherwise, and except as otherwise provided by federal or state law, the marital estate includes 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.

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

(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.

Section 2. This act shall become effective on January 1, 2017, following its passage and approval by the Governor, or its otherwise becoming law.

Alabama Comment

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 amendments to this 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).