

# HOUSE BILL REPORT

## HB 1930

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**As Reported by House Committee On:**  
Judiciary

**Title:** An act relating to child custody.

**Brief Description:** Concerning child custody.

**Sponsors:** Representatives Frame, Rodne and Jinkins.

**Brief History:**

**Committee Activity:**

Judiciary: 2/9/17, 2/16/17 [DPS].

**Brief Summary of Substitute Bill**

- Revises procedures and standards applicable to third party child custody proceedings.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Muri, Assistant Ranking Minority Member; Frame, Goodman, Hansen, Kirby and Orwall.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Rodne, Ranking Minority Member; Graves, Haler, Klippert and Shea.

**Staff:** Edie Adams (786-7180).

**Background:**

Washington's third party custody statute sets forth procedures for persons who are not parents to seek custody of a child. A person filing a third party custody action must submit an affidavit declaring that the child is not in the physical custody of one of the child's parents or that neither parent is a suitable custodian, and setting forth facts supporting the requested order. Other parties to the proceeding may submit opposing affidavits. A court may hold a

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

hearing on the petition only if the court finds that adequate cause for hearing the motion is established by the affidavits.

Third party custody proceedings are to be given priority when being set for hearing. The trial is conducted to the court without a jury. If the court finds that a public hearing may be detrimental to the child's best interests, the court may exclude the public from the hearing and admit only those persons who have a direct and legitimate interest in the court's work. The court may also order the record of the proceeding sealed if it finds it necessary to protect the child's welfare.

The court may appoint an attorney to represent the interests of the child. The court also may appoint a guardian ad litem for the child and order an investigation and report concerning custodian arrangements for the child. In addition, the court may seek the advice of professional personnel and may interview the child in chambers to ascertain the child's wishes as to his or her custodian and visitation privileges.

A child custody decree must make provision for the custody, visitation, and support of any child entitled to support, and any necessary continuing restraining orders. A parent who is not granted custody is entitled to reasonable visitation rights except in specified situations involving wrongful conduct, such as abandonment or abuse of a child, certain sex offenses, or a history of domestic violence. A court may modify an order granting or denying visitation rights if the modification would serve the best interests of the child.

A party may petition for a modification of a child custody decree by filing a motion supported by an affidavit or declaration setting forth the facts supporting the modification. Other parties may file opposing affidavits, and the court may set the motion for hearing only if it finds adequate cause for a hearing based on the affidavits. The court must determine the motion based on requirements applicable to a modification of a parenting plan, which require a showing of a substantial change of circumstances.

The third party custody statute provides that the court must determine custody in accordance with the best interests of the child. However, Washington courts have found that the best interests of the child standard is constitutionally inadequate in a custody proceeding between a parent and nonparent given the fundamental rights of a parent in the care, custody, and control of his or her children. In order to protect a parent's constitutional rights, a court may not grant custody to a nonparent unless there is proof that the parent is unfit or proof that placement with the parent would result in actual detriment to the child's growth and development.

A provision in the third party custody chapter allows any person to petition for visitation with a child at any time, including in custody proceedings. The statute provides that the court may order visitation if it is in the best interest of the child. Application of this statute in the context of a proceeding by a nonparent seeking visitation with a child where the parent is fit has been found unconstitutional as a violation of a parent's fundamental right to raise a child without state interference.

## **Summary of Substitute Bill:**

Standards and procedures for obtaining a third party custody order are revised.

The standard for awarding custody to a nonparent in a custody proceeding involving a parent is revised. A nonparent seeking custody from a parent must prove by clear, cogent, and convincing evidence that: the parent is unfit; or placement of the child with an otherwise fit parent would be detrimental to the child's physical, mental, or emotional health. The court will order a hearing on a petition for custody only if the court determines from the declarations filed by the parties that there is adequate cause for a hearing. Adequate cause means facts that, if true, would show the parent is unfit or placement with an otherwise fit parent would be detrimental to the child's physical, mental, or emotional health. A temporary custody order may be issued upon a finding of adequate cause. If adequate cause is not established, the petition must be dismissed.

The provision allowing any person to petition the court for visitation with a child at any time, and allowing the court to grant visitation under the best interest of the child standard, is removed. A provision allowing modification of an order granting or denying visitation if modification would serve the best interest of the child is also removed.

Circumstances under which limitations may be placed on a parent's ability to have visitation with a child are revised. Visitation must be limited if it is found that the parent seeking visitation: suffers from a long-term emotional, physical, or substance use impairment which interferes with the parent's performance of parenting functions; has an absence or substantial impairment of emotional ties between the parent and the child; or has engaged in the abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. The definition of "child" under this visitation statute is revised to include any legal child of the parent, including a "de facto" child.

Procedures governing petitions to change a final nonparent parenting plan, custody order, or visitation order, including terminating the order to return the child to the care of the parent, must be heard and reviewed pursuant to the third party custody chapter, rather than the dissolution chapter. In proceedings for modification or termination of a nonparent custody order or residential schedule, adequate cause for a hearing is not required if the original custody order was entered with no specific findings of unfitness or actual detriment of the parties.

If an original nonparent custody order was entered after trial with no specific findings of the unfitness or actual detriment of the parents, or it was entered by default or agreement of the parties, the court must terminate the custody order unless the custodian or another party demonstrates by clear, cogent, and convincing evidence the current unfitness of the parent or actual detriment to the child. If the original nonparent custody order was entered pursuant to a finding of parental unfitness or detriment to the child, the party moving for modification must demonstrate by a preponderance of the evidence a substantial change in his or her circumstances specifically related to the basis for the custody order and the best interest of the child.

A new provision is established governing modification of residential provisions for the child. The court may order adjustments upon a showing of a substantial change in circumstances of either parent or of the child if the proposed change is a minor modification that does not change the child's primary residence and if the change:

- does not exceed 24 full days in a calendar year;
- is based on a change of residence of the parent with whom the child does not reside a majority of the time, or an involuntary change in work schedule, that makes the residential schedule impractical to follow; or
- does not result in a schedule that exceeds 90 overnights per year, if the court finds the schedule does not provide reasonable time with the parent with whom the child does not reside a majority of the time and it is in the best interests of the child to increase residential time with that parent.

The court may order adjustments to the residential schedule if:

- the custodians and both parents agree to the modification;
- the child has been integrated into the family of the moving party with the consent of the custodian and the other parent in substantial deviation from the parenting plan;
- the child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change is outweighed by the advantage of a change to the child; or
- the court has found the nonmoving custodian in contempt of court at least twice within three years for failure to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree.

The court may order adjustments to a residential schedule pursuant to a proceeding to permit or restrain the relocation of a child. The court must determine whether to permit or restrain the relocation using the standards and procedures for relocation of a child under the dissolution chapter.

A parent with whom the child does not reside a majority of the time and whose residential time is limited under statutory requirements may not seek expansion of residential time unless there has been a substantial change in circumstances specifically related to the basis for the limitation. In addition, a parent seeking expansion of residential time must have fully complied with any previously ordered evaluations, treatment, or parenting classes.

The court may order adjustments to the nonresidential aspects of a residential schedule upon a showing of a substantial change of circumstances of a custodian, either parent, or a child, and that the adjustment is in the best interest of the child.

### **Substitute Bill Compared to Original Bill:**

The current law standing requirement is reinstated, requiring that a person may petition for custody if the child is not in the physical custody of a parent or neither parent is a suitable custodian. Language relating to the required showing of actual detriment to a child is revised to require a showing that placement with an otherwise fit parent would be detrimental to the child's physical, mental, or emotional health. The adequate cause provision is revised. Adequate cause is established if the declarations set forth facts that, if true, would show the

parent is unfit or placement with an otherwise fit parent would be detrimental to the child's physical, mental, or emotional health. Temporary orders may be entered upon a showing of adequate cause. For the purposes of the statute that governs visitation for a parent who is not granted custody, the definition of "child" is revised to include any legal child of the parent, including a "de facto" child.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This legislation was brought forward by the superior court judges to clean up our nonparent custody laws. In the last six or eight years there have been court decisions invalidating provisions of the nonparent custody statute. If an attorney were to follow the requirements of the statute, the attorney would be committing malpractice. In many cases the parties are self-represented, and they do not know how to look up case law to determine the requirements that apply under court decisions.

The bill creates a necessary mechanism for children to be reunited with a parent in appropriate cases where the parent has worked hard to address their parenting issues. The legislation amends the modification provision to bring the process in line with constitutional rights. Sometimes parents go through difficult times, and there is a need for a family member to take custody of a child until the parent can address his or her problems. The current statute puts up an impossible barrier for a parent to get a child back because the parent has to show a change in the circumstances of the custodian. That is not the appropriate test since the relevant issue is whether the parent has changed and can again be a good parent. Parents and children should not have to go through the difficulties created by the barriers to reunification in the current law.

The change to the standing requirement to require both that the child is not in the custody of a parent and neither parent is suitable could create a barrier for some cases.

(Opposed) None.

**Persons Testifying:** Representative Frame, prime sponsor; Kitty-Ann Van Doorninck, Superior Court Judges Association; Patricia Novotny; and Melissa England.

**Persons Signed In To Testify But Not Testifying:** None.