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## **S.B. 444 -- Third-party visitation**

Judiciary Committee public hearing -- March 23, 2012

Testimony of Raphael L. Podolsky

**Recommended Committee action: NO ACTION ON S.B. 444**

The proposal contained in this bill should be reviewed in conjunction with H.B. 5440, AAC Visitation Rights for Grandparents and Other Persons, which has been sent to the Judiciary Committee from the Committee on Aging. The attorneys in the legal services programs have mixed views on what the statutes should say on third-party visitation, and it is not entirely clear whether the adoption of either bill would or would not make it easier for third parties to obtain visitation. The only actual position we have taken is that, if H.B. 5440 is to move forward, certain changes should be made in the bill. They are itemized in my testimony on that bill to the Committee on Aging, which did not make those changes.

- **The fundamental constitutional right:** The issue of third-party visitation, which is a difficult one to start with, is complicated by Connecticut Supreme Court constitutional decisions that limit the General Assembly's statutory options. It also pits two competing important interests against each other -- the constitutional right of fit parents to make decisions about the raising their children without interference from others and the desire of closely bonded non-parent third parties to retain their bond with those children, even over the objection of the child's parent or parents. The decision-making authority of parents is an established constitutional right of the parents (sometimes referred to as the right to family integrity). The landmark federal case is Troxel v. Granville, 530 US 57 (2000), which struck down as unconstitutional a State of Washington statute that is very similar to C.G.S. 46b-59. The involvement of grandparents or other third parties is less a question of their "rights" than it is an aspect of the child's best interest. As a starting point, therefore, it is the parents, not the grandparents or other third parties, who are constitutionally authorized to make decisions about visitation with children.
- **The state Supreme Court interpretation:** Troxel was applied by the Connecticut Supreme Court in two important but confusing cases that reinterpreted C.G.S. 46b-59, the Connecticut third-party visitation statute, which if read literally would be plainly unconstitutional under Troxel, so as to make it constitutional. Some aspects of those decisions are explicitly constitutional, i.e., they hold that the Constitution requires certain standards. Other parts are what I would call "Constitution-influenced," i.e., they are not required by the Constitution but, in the Court's opinion, are desirable ways to make the statute constitutional. It is sometimes difficult to tell with certainty which are which. The leading case is Roth v. Weston, 259 Conn. 202 (2002), which was modified in 2011 by DiGiovanni v. St. George, 300 Conn. 59

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(2011). These cases explicitly hold that, as a threshold matter to litigation, third parties cannot seek visitation unless they can show both that (1) they have a parent-like relationship with the child and (2) denial of visitation to the third party would cause harm to the child analogous to neglect under the Juvenile Court statutes.

- C.G.S. 46b-57 and C.G.S. 46b-59: S.B. 444 amends 46b-57, which allows a third party to intervene in a court action initiated by someone else (e.g., a divorce or a custody proceeding) that is already pending in the Superior Court. H.B. 5440 amends C.G.S. 46b-59, which allows a third party to initiate a visitation proceeding in Superior Court as the applicant or petitioner. It appears that the legal doctrine of Roth and DiGiovanni, which was expressed in cases under C.G.S. 46b-59, also applies to C.G.S. 46b-57.
- S.B. 444: S.B. 444 requires the court, on a motion to intervene under C.G.S. 46b-57, to "give due consideration" to three factors, only one of which is a Roth threshold factor. The third factor (significant financial support) is at best a lesser factor. As a result, the bill does not really address the Supreme Court decisions and it is unlikely to satisfy the Supreme Court. H.B. 5440 attempts to address those decisions by codifying DiGiovanni and proposing a longer list of considerations in determining "parent-like relationship" and "best interest of the child." "Best interest" is the established standard for a visitation order if the Roth threshold is met.
- H.B. 5440: It remains an open question as to whether codification is or is not the best approach. If, however, the legislature desires to codify the Supreme Court decisions, we believe it should codify Roth rather than DiGiovanni. The difference, although subtle, is significant. Under Roth, if the two-part threshold test is met ("parent-like relationship" and "harm to child"), the court then determines whether visitation is in the child's best interest and, if so, what sort of visitation to order. Under DiGiovanni, if the two-part threshold test is met, the Court assumes that visitation is in the child's best interest and determines only what sort of visitation to order. We believe that there are some circumstances in which the threshold test, which places the focus on relationship and harm and is jurisdictional in nature, may be met but it will nevertheless not be in the child's best interest to order visitation. H.B. 5440 should also assure that the custodial parent receives actual notice of the proceeding.