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Grandparent Visitation Legislation: The Controversy Didn't Begin or End with *Troxel v. Granville*

The Supreme Court case Troxel v. Granville assured the states the definitive say in grandparents' visitation rights. It also endorsed the traditional right of the parent or parents to decide who their children visit. What paths will the state courts take? This article reviews state statutes and decisions for the winning arguments that might influence courts in the future.

By Randall E. Doyle

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In the not-too-distant past, the concept of visitation with a minor child was governed only by common-law principles.¹ One of the hallmarks of these principles was that no one, including grandparents, had any legal right to visit with an intact family's children if the child's parents forbade the visitation.²

In some jurisdictions this principle was expanded to include non-intact families as well; as one court phrased it: "[t]he right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who is charged with the daily responsibility of rearing the children."³

The reasoning behind the courts' reluctance to involve themselves in familial disputes is sound. Generally, they believe that "any interference with parental decision-making would undermine parental authority and impede parents from accomplishing the legal and moral duties imposed by society."⁴ In addition, they recognize that courts simply are not structured for effective resolution of intergenerational familial disputes.⁵

In the 1960s American societal demographics began to shift. One aspect of the changes was that the average life expectancy increased. The number of people aged sixty-five and older dramatically rose, and will continue to rise over the next few

decades.⁶ In addition, Americans are retiring earlier and wealthier.⁷ This last fact has led to the older generation having more resources and time to actively involve themselves in the lives of their adult children and grandchildren.⁸ Also, the older generation has become increasingly politically active in an attempt to safeguard its interests.⁹ This activism ultimately led to the passage of grandparent visitation legislation in all fifty states.¹⁰

Setting the Stage for *Troxel v. Granville*: Constitutional Challenges to Grandparent Visitation Legislation

The passage of legislation by the states did not put an end to the issue of grandparents' visitation rights. Rather, the passage of grandparent visitation legislation led to questions concerning parental autonomy and the constitutionality of the statutes.¹¹ Prior to June 5, 2000, when the United States Supreme Court handed down its decision in *Troxel v. Granville*, litigation of the issue of parental autonomy had caused six states to declare their grandparent visitation statutes unconstitutional.¹²

Although the state of Tennessee was not the first state to address the constitutionality of grandparent visitation legislation,¹³ it was the first state to strike down a statute as unconstitutional. In *Hawk v. Hawk*, the Tennessee Supreme Court held that the state's Grandparents' Visitation Act¹⁴ interfered with fundamental liberty interests that had been identified as far back as *Meyer v. Nebraska*¹⁵ and *Pierce v. Society of Sisters*¹⁶ by the United States Supreme Court.¹⁷ The Tennessee court focused on the fact that the statute only required a trial court to find that visitation would be in the best interests of the child while not requiring the court to articulate any reason for disregarding the judgment of the parent.¹⁸ In striking down the statute as written, they found that a trial court should grant visitation only upon a showing that the denial of such would harm or potentially harm the child.¹⁹

The Supreme Court of Georgia followed Tennessee two years later in *Brooks v. Parkerson*. In *Brooks* the court declared the Georgia statute unconstitutional under both the U.S. and Georgia Constitutions.²⁰ The court said that, under the

Fourteenth Amendment, the right to raise a child without governmental interference was a fundamental liberty interest.²¹ The statute was unconstitutional because it did not clearly promote the health or welfare of the child and did not require a showing of harm to the child before state interference was authorized.²²

In *Beagle v. Beagle* the Florida Supreme Court interpreted the Florida Constitution to afford greater privacy protection than the Federal Constitution.²³ Thus, there must be a compelling state interest to infringe upon parents' fundamental privacy rights in the rearing of their children.²⁴ Agreeing with Tennessee and Georgia, the court held that without a finding of harm or potential harm to the child, there could be no compelling state interest and therefore the statute was facially flawed.²⁵

In *In re Herbst* the Oklahoma Supreme Court adopted the "harm to the child" standard while also requiring a showing of parental unfitness before visitation could be awarded to the petitioning grandparents.²⁶ The court wrote that "a vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with [the] parental decision regarding who may see a child."²⁷ While petitioner argued that the case was ultimately about the best interests of the child, the court rejected this argument.²⁸ It said that to reach the question of the child's best interests there must first be a threshold showing of harm or threat of harm to the child.²⁹ Thus, the statute as written could not pass constitutional analysis.³⁰

However, the North Dakota Supreme Court chose not to adopt the "harm to the child" standard when it rendered its decision in *Hoff v. Berg*.³¹ Instead, the court held that, under a strict scrutiny standard, the statute in question was not narrow enough.³² The state was unable to make a compelling argument to justify any presumption that grandparent visitation was in the best interests of the child.³³ The court said that since there was no compelling argument justifying such a burden upon parents' fundamental rights the statute must fail strict constitutional scrutiny.³⁴

Troxel v. Granville

The Case Works Its Way Toward the U.S. Supreme Court

Respondent Tommie Granville was the mother of two daughters, Natalie and Isabelle, born to the son of the Petitioners, Gary and Jenifer Troxel.³⁵ The Troxels had maintained contact with their grandchildren after their son Brad committed suicide in 1993.³⁶

Eventually, a dispute arose between the Troxels and Granville regarding the frequency of the visits.³⁷ The Troxels brought suit and requested visitation of two overnight weekends a month and two weeks during the summer.³⁸ Granville, however, did not completely oppose the idea of visitation and instead requested the trial court to limit it to one weekend a month with no overnight stay.³⁹ After a remand, the trial court determined that the Troxels were to receive visitation for one weekend a month, one week during the summer and for four hours on each of the Troxel's birthdays.⁴⁰ The court said its decision regarding visitation was based on the best interests of the child.⁴¹

Granville appealed and the Washington Court of Appeals reversed the trial court's decision.⁴² The appellate court did not reach the constitutional question, instead basing its decision on the issue of standing.⁴³ The appellate court wrote that unless there was an underlying custody action pending, a third party would not have standing to petition for visitation.⁴⁴

The Troxels then appealed the decision to the Washington Supreme Court, which granted the petition for review and consolidated it with two other cases.⁴⁵ The state supreme court disagreed with the appellate court on the issue of standing, finding that the plain language of the statute afforded standing regardless of the whether there was an underlying custody action.⁴⁶ However, the Washington Supreme Court reached the same conclusion as the Court of Appeals and upheld reversal of the trial court's order.⁴⁷ The Washington Supreme Court based its decision upon the Federal Constitution and the fundamental privacy right of parents to raise their children.⁴⁸

According to the court, there were two basic problems with the statute.⁴⁹ First, it failed to

afford the proper amount of constitutional protection to the parents because it did not require a petitioner to make a threshold showing of harm to the child.⁵⁰ The threshold showing was necessary to rebut the presumption that a fit parent always acted in the best interests of the child.⁵¹ Second, the court found the statute was too broad, as it allowed "any person" to petition for visitation at "any time" with the only requirement for granting of the requested visitation being the best interests of the child.⁵² The court stated that no judges should be able to substitute their judgment for that of the parents just because they felt they could make a "better" decision.⁵³ In addition, "the parents should be the ones to choose whether to expose their children to certain people or ideas."⁵⁴

The Troxels appealed the decision to the United States Supreme Court, which granted certiorari.⁵⁵

The United States Supreme Court Considers Washington's Grandparent Visitation Statute

In the plurality opinion, Justice O'Connor returned to the substantive due process decisions that had been articulated in the *Meyer* and *Pierce* cases and that allowed parents the right to be free from state interference regarding the care, custody, and control of their children.⁵⁶ The plurality determined that the Washington statute erred in placing the determination of the best interests of the child in the hands of a judge and not with the parent.⁵⁷

Applying the proper legal standard to the facts of the case, Justice O'Connor found three basic factors that caused the trial court's order to violate Granville's constitutional rights. First, there were no allegations or proof that Granville was an unfit parent.⁵⁸ In the absence of such proof there is a presumption that the parent is acting in the best interests of the child and thus a court should give proper weight to the parent's wishes.⁵⁹ Second, not only did the trial court fail to acknowledge the presumption in favor of the parents but it based its decision on the presumption that, without evidence to the contrary, grandparent visitation is in the best interests of the child.⁶⁰ Finally, the Court noted that there were no allegations that Granville was attempting to deny visitation to the Troxels unilaterally.⁶¹ Indeed, there was evidence to the contrary: Granville was willing to allow continued vis-

itation but wanted the amount restricted.⁶²

The Court's plurality determined that, based on these three factors, Granville's due process rights had been violated by the visitation order issued by the trial court.⁶³

However, there are also some considerations that the Court did not determine. The Court did not go as far as the Washington Supreme Court by adopting the "harm to the child" standard.⁶⁴ But the standard was not rejected either.⁶⁵ Rather, the plurality only criticized the statute for allowing a judge to substitute his or her judgment for that of the parent,⁶⁶ and stated that a trial judge must give special weight to a fit parent's wishes.⁶⁷ The plurality chose not to incorporate the special weight provision into a standard that would automatically guarantee a parent's constitutional rights.⁶⁸

Two justices concurred in the result, but stated that they would have found the statute unconstitutional on its face.⁶⁹ Justice Souter found the statute facially overbroad in that it allowed "any person" to petition the courts "at any time."⁷⁰ Justice Thomas also wrote separately, saying that he agreed with the plurality's ultimate determination but criticized them for not applying a strict scrutiny standard.⁷¹

The Effect of *Troxel v. Granville* On Grandparent Visitation Legislation

Prior to the *Troxel* decision, six states had invalidated their grandparent visitation statutes. In the wake of the *Troxel* decision, however, only two states have declared their grandparent visitation legislation to be facially unconstitutional.⁷²

In *Santi v. Santi* the Supreme Court of Iowa applied the strict scrutiny standard required for fundamental liberty interests.⁷³ The court noted that "[c]onspicuously absent from the statute is any rationale—compelling or otherwise—for...court-ordered intrusion on parental decision-making."⁷⁴ Without a threshold requirement of parental unfitness "the statute effectively substitutes sentimentality for constitutionality."⁷⁵ The court determined that under the Iowa Constitution the statute was facially unconstitutional because it permitted "state intrusion on fit parents' fundamental liberty interest in childrearing."⁷⁶

In *Derosé v. Derosé* the Michigan Court of Appeals struck down the Michigan visitation

statute because it lacked any standards beyond the "best interests of the child."⁷⁷ Specifically, citing *Troxel*, the court noted that the statute at issue suffered from the same infirmity as the Washington statute.⁷⁸ The court declined to interpret the statute in a manner that would be constitutional, noting that such an endeavor "would require a significant, substantive rewriting of the statute."⁷⁹ In striking down the statute the court stated that such a task is better left to the legislature than the judiciary.⁸⁰

However, at least one court has chosen to interpret its grandparent visitation statute in a manner that saves it.⁸¹ In *Patricia C. v. Virginia O.* the Wisconsin Court of Appeals noted that the statute did not articulate a presumption in favor of a fit parent's decision.⁸² Looking to the *Troxel* decision, the court determined that *Troxel* "strongly suggested" that a presumption in favor of the parent's wishes could be read into a statute to save it from facial unconstitutionality.⁸³ The court then held that such a presumption must be applied by Wisconsin circuit courts when making a grandparent visitation determination.⁸⁴

Also, it should be noted that many states, while refusing to declare their grandparent visitation statutes facially unconstitutional, have ruled that their grandparent visitation statutes were unconstitutional as applied in the specific case. The California Court of Appeals, in *Punsly v. Ho*, held that the application of the California visitation statute infringed on a fit mother's fundamental rights when the trial court applied a presumption in favor of grandparental visitation and awarded the visitation over her objection.⁸⁵ In addition, the mother did not oppose some visitation.⁸⁶ In *Roth v. Weston*, the Connecticut Supreme Court held that visitation could not be ordered against a father's wishes when the father was not shown to be unfit, there was no showing of harm to the child if visitation were denied, and the petitioners did not have a parent-like relationship with the child.⁸⁷

The Illinois Supreme Court, in *Lulay v. Lulay*, found that there was no compelling state interest in forcing fit, divorced parents to give visitation to grandparents over their objection.⁸⁸ The Indiana Court of Appeals found their statute constitutional, but found that it had been applied unconstitutionally when the trial court did not give a presumption in favor of a fit mother's objection to vis-

itation in *Crafton v. Gibson*.⁸⁹ In a case factually similar to the *Troxel* decision, the Maryland Court of Special Appeals, in *Brice v. Brice*, held the state's visitation statute unconstitutional as applied when there was no showing of parental unfitness and the mother was not opposed to a limited amount of visitation.⁹⁰ In the New Jersey case of *Wilde v. Wilde*, the state Supreme Court found its statute unconstitutional as applied when it was used to force a newly widowed mother into mediation soon after her husband's suicide and without any showing of the mother's unfitness.⁹¹

Finally, many states have found their visitation statutes were constitutional, in both pre- and post-*Troxel* decisions. The Maine Supreme Court, in *Rideout v. Riendeau*, held that there was a compelling state interest present when a parent-child relationship existed between the grandparents and the child and overturned the lower court's finding of unconstitutionality.⁹² In *Stacy v. Ross*, the Mississippi high court held their Grandparent Visitation Act did not violate due process because visitation could be awarded only in limited circumstances that did not interfere with parents' fundamental rights.⁹³

In a post-*Troxel* decision, the New York Appellate Division held that *Troxel* did not call for a per se invalidation of the New York visitation statute and therefore the trial court had erred in dismissing a grandfather's petition.⁹⁴ The Ohio Court of Appeals, in *Epps v. Epps*, held that the trial court did not err in awarding visitation over the mother's objections as the Ohio statute at issue was more narrowly drawn than the one invalidated in the *Troxel* decision.⁹⁵ Further, the West Virginia Supreme Court of Appeals upheld their statute, as it required a showing that an award of visitation would not interfere with the parent-child relationship.⁹⁶

Conclusion

The Supreme Court's decision in *Troxel v. Granville* did not sound the death knell on grandparent visitation statutes. Six states had declared their statutes unconstitutional prior to the *Troxel* decision. Nearly two years after *Troxel*, only Iowa and Michigan have found their statutes facially

unconstitutional.

Many states have limited the applicability of their statutes by holding them unconstitutional as applied in specific cases. Other states have found that their statutes were constitutional because they were either consistent with *Troxel* or gave parents more protection. But it is important to keep in mind that nearly all litigation of the visitation statutes has occurred in the last decade. It was only 1993 when the first statute was struck down.

With *Troxel* having been decided only two years ago, the state high courts have not heard many post-*Troxel* decisions yet. It will take time before we are able to appreciate the full impact it will have on this area of the law.

Endnotes

1. See e.g., *Olson v. Olson*, 534 N.W.2d 547 (Minn. 1995).
2. See *id.*; see also *Hicks v. Enlow*, 764 S.W.2d 68, 70 (Ky. 1989).
3. See *Chodzko v. Chodzko*, 360 N.E.2d 60, 61-62 (Ill. 1976).
4. See Susan Tomaine, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes In The American Family*, 50 CATH. U.L. REV. 731, 736-737 (2001).
5. See *id.*
6. See FROLIK AND BARNES, *ELDERLAW*, 2ND ED., pg. 5.
7. See Tomaine, *supra* note 4, at 740.
8. See *id.*
9. See *Grandparents Rights: Preserving Generational Bonds, Hearing Before the Subcomm. on Human Services of the Select Comm. on Aging*, 102d Cong. at 2.
10. See *Troxel v. Granville*, 530 U.S. 57, 73 (2002).
11. See Tomaine, *supra* note 4, at 750.
12. See *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Beagle v. Beagle*, 678 So.2d 1271

- (Fla. 1996); *In re Visitation of Troxel*, 969 P.2d 21 (Wash. 1998); *In re Herbst*, 971 P.2d 395 (Okla. 1998); *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999).
13. *See King v. King*, 828 S.W.2d 630 (Ky. 1992) (where parents and child had lived for 16 months with grandfather and grandfather had daily contact with child the court found that the right of parents to raise their children free from government interference was not absolute and the legislation was "an appropriate response" to the concerns of grandparents in the state); see also *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993) (holding that because any visitation allowed under the statute would be "temporary" and "occasional" any infringement of parental autonomy would be "minimal").
 14. *See* TENN. CODE ANN. § 36-6-301 (1985) (allowing grandparents reasonable visitation if it would be in the best interests of the child).
 15. 262 U.S. 390 (1923).
 16. 268 U.S. 510 (1925).
 17. *See Hawk*, 855 S.W.2d at 578.
 18. *See id.* at 577.
 19. *See id.* at 580.
 20. *See Brooks*, 454 S.E.2d at 773.
 21. *See id.* at 722.
 22. *Id.*
 23. *See Beagle*, 678 So.2d 1276.
 24. *Id.*
 25. *Id.* at 1277 (the court limited its holding to situations involving an intact family where at least one parent objects to the visitation).
 26. *See Herbst*, 971 P.2d at 398.
 27. *See id.* at 399.
 28. *Id.*
 29. *Id.*
 30. *Id.*
 31. *See Hoff*, 595 N.W.2d at 287.
 32. *See id.* at 291-92.
 33. *Id.*
 34. *Id.*
 35. *See Troxel v. Granville*, 530 U.S. 57, 60.
 36. *Id.*
 37. *See id.* at 60-61.
 38. *See id.* at 61.
 39. *Id.*
 40. *See id.* at 62
 41. *Id.*
 42. *Id.*
 43. *Id.*
 44. *Id.*
 45. *Id.* The decision was reported as *In re Smith*, Wash.2d 1 (1998).
 46. *See Troxel*, 530 U.S. at 62. However, the court did acknowledge that the statute did have "potentially troubling" consequences. *See Tomaine*, at fn166.
 47. *See Troxel*, 530 U.S. at 63.
 48. *Id.*
 49. *Id.*
 50. *See Smith*, 137 Wash.2d at 15-20.
 51. *Id.*
 52. *See id.* at 20.
 53. *Id.*
 54. *See id.* at 21.
 55. 527 U.S. 1069 (1999).
 56. *See Tomaine*, *supra* note 4, at 764; *Troxel*, 530 U.S. at 65-66. Justice O'Connor also acknowl-

- edged later substantive due process opinions concerning parental rights as to raising their children including *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
57. *See Troxel*, 530 U.S. at 67.
58. *See id.* at 68.
59. *See id.* at 69.
60. *See id.* at 70; *see also* Tomaine, *supra* note 4, at 765.
61. *See Troxel*, 530 U.S. at 71.
62. *Id.*
63. *See id.* at 72.
64. *See id.* at 73.
65. *Id.*
66. *See* Tomaine, *supra* note 4, at 765.
67. *See id.*; *see also* *Troxel*, 530 U.S. at 70.
68. *See* Tomaine, *supra* note 4, at 765-66; *see also* *Troxel* 530 U.S. at 68.
69. *See id.* at 75-80.
70. *See Troxel*, 530 U.S. at 78.
71. *Id.* at 80.
72. *See* *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001); *Derosé v. Derosé*, 2002 Mich. App. LEXIS 54 (Mich. Ct. App. 2002).
73. *See* *Santi*, 633 N.W.2d at 318.
74. *See id.* at 319.
75. *See id.* at 320.
76. *See id.* at 321.
77. *See* *Derosé*, 2002 Mich. App. LEXIS 54 at 5.
78. *See id.* at 8.
79. *See id.* at 10.
80. *See id.* at 11.
81. *See* *Patricia C. v. Virginia O.* (In re paternity of Roger D. H.), 2002 WI App. 35 (2002).
82. *See id.* ¶12.
83. *See id.* ¶ 13.
84. *See id.* ¶19.
85. *See* *Punsly*, 87 Cal. App.4th 1099 (Ca. Ct. App. 2001).
86. *See id.*
87. *See* *Roth*, 789 A.2d 431 (Conn. 2002).
88. *See* *Lulay*, 739 N.E.2d 521 (Ill. 2000); *see also* *Langman v. Langman*, 757 N.E.2d 505 (Ill. 2001) (grant of additional visitation improper because it impermissibly limited fit mother's fundamental rights).
89. *See* *Crafton*, 752 N.E.2d 78 (Ind. Ct. App. 2001).
90. *See* *Brice*, 754 A.2d 1132 (Md. Ct. Spec. App. 2000).
91. *See* *Wilde*, 775 A.2d 535 (N.J. 2001).
92. *See* *Rideout*, 761 A.2d 291 (Me. 2000).
93. *See* *Stacy*, 798 So.2d 1275 (Miss. 2001).
94. *See* *Hertz v. Hertz*, 2002 N.Y. App. Div. LEXIS 2161 (N.Y. App. Div. 2002).
95. *See* *Epps*, 2001 Ohio App. LEXIS 3668 (Ohio Ct. App. 2001).
96. *See* *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001).