

## Grandparents' Right to Visitation

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# Grandparents' Right to Visitation

*Many lawyers, it seems, steer clear of "grandparents' rights" by declining cases in which a court orders parents or stepparents to let a grandparent visit their grandchild. Is it because of lack of familiarity with such actions, or are they uneasy with the concept of rights of grandparents?*

**By Victoria Roth**

Some of my fondest memories of childhood were the times I spent at my grandparents' house. My siblings and I spent at least one day a week with my grandma and grandpa, and each week we would partake in a different adventure. My grandpa was the first person to ever take me fishing, an activity my parents didn't have time to teach me. I remember dancing with my grandpa to Lawrence Welk music, hearing my grandma tell me about relatives I had never met, and listening to stories about silly things my uncles had done in years past. The times I shared with my grandparents and the memories I have of

our time spent together are priceless. Granted, I was fortunate to have grandparents who took an interest in their grandchildren. I find the things I learned from my grandparents to be indispensable and our relationship an asset to who I am today.

A grandparent's right to visitation, as a matter of law, is a relatively new idea. This legal concept has only come into prominence in approximately the last ten years. It is estimated that almost 75 percent of today's older population, Americans over 65, are currently grandparents.<sup>1</sup> With the current divorce and legal separation rate in the United States nearing almost 50 percent, close to one million grandchildren find themselves with divorced parents,<sup>2</sup> and an increasing number of grandparents are finding themselves the "victims" of these shattered families. These grandparents are finding that they are getting less and less time with their grandchildren and, in many cases, not allowed to see or share in their grandchildren's lives at all. Numerous other reasons, including geographic distance between the family members and animosity among the parents and grandparents, have also been cited as roadblocks to visitation. Whatever the reason may be, the input of grandparents in these children's lives is often being diminished.

Denying grandparents visitation with their grandchildren has been shown to be detrimental to all members of the family.<sup>3</sup> When a struggle develops between grandparents who want to see their grandchildren and parents who refuse to allow the visitation, family members are often forced to choose sides. This choosing of sides often leads to confusion for the children.<sup>4</sup>

Not all grandparents want visitation, however, nor should all grandparents be granted the right. For almost every story about a wonderful, involved grandparent, there seems to be a contrasting story

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involving an indifferent or unkind grandparent. For those grandparents who are indifferent, no changes need to be made to the common-law rules. Grandparents who are loving and nurturing and who want to visit with grandchildren but find their requests refused for various reasons have turned to the law to protect them. A strong desire by these grandparents to continue the family unit, and to end the discrimination they are feeling, have brought their cases before the many legislatures and courts in America.

### Historical and Constitutional Bases to a Grandparent's Right to Visitation

Historically, parents have had the right to raise their children without interference from the government.<sup>5</sup> This established principle is predicated in the Fourteenth Amendment, which establishes an American's right to privacy. The Supreme Court has held this Fourteenth Amendment right of privacy to include the family relationship.<sup>6</sup> Courts have consistently held that parents have a fundamental, constitutionally protected right to determine what is best for their children.<sup>7</sup> Likewise, the courts have held that the "custody, care, and nurture of the child reside first with the parent."<sup>8</sup>

At common law, the right of grandparents to visit with their grandchild was a moral right, not a legal right.<sup>9</sup> Over time, with the absence of a statute specifically addressing visitation, courts have granted visitation to grandparents in instances where they could establish a relationship between the grandparent and grandchild, paired with a special circumstance.<sup>10</sup> Today, the right grandparents have to visit with their grandchildren essentially equates to the special circumstances that the court of equity drew from the common-law principle.<sup>11</sup>

In what appears to be a contrast to these established principles, the state has a duty, under the *parens patriae* doctrine, to protect the best interests of a child. The *parens patriae* doctrine gives the state the power and a duty to protect children whose health, welfare, or well-being is placed in jeopardy.<sup>12</sup> To reconcile the Fourteenth Amendment rights of individuals and the *parens patriae* duty of the state, courts have required states to demonstrate a compelling interest before they can interfere in the personal lives of a family.

Given this legal basis, visitation law is presently concerned with examining the event(s) that trigger and justify state intervention on behalf of a child.<sup>13</sup>

Today, most courts view visitation as a balance between a biological or adoptive parent's constitutionally protected "liberty" interest in determining how to rear their children and the "best interest of the child" standard. Emergence of expanded visitation rights for grandparents has never been contingent upon the suitability of a parent. Instead, these rights rest upon whether the grandparents' influence benefits the child.<sup>14</sup>

### State Statutes

All 50 states have enacted statutes that address a grandparent's right to visitation, each state setting its own rules and guidelines as to when and how a grandparent may petition the court for visitation. These differences vary considerably from state to state, but two common factors can be seen in almost all state statutes. First, no state, with the exception of New York, currently grants a grandparent's petition for visitation rights where there is an "intact" family. An "intact" family is defined differently throughout the states but basically is characterized as a family where the biological mother and biological father of the child are married and living together as a unit. Second, in order to justify any court order granting visitation, each state requires the grandparent to show that visitation is in the best interest of the child.

### Hearing

A grandparent who thinks that visitation would be beneficial to the child must first petition the court for a hearing. All hearings involving visitation rights for grandparents essentially proceed in the same three-step fashion. First, the grandparents must present evidence that they meet the requirements of the statute under which they are petitioning. During this step the court will also examine whether visitation by the grandparents is in the best interest of the child. Grandparents usually serve as the main witnesses and may present others who can substantiate their claims. Typically, a psychologist or social worker who has spent some time with the child will provide testimony as to whether the visitation would be in the best interest of the child.

Second, evidence may be presented as to why visitation would *not* be in the best interest of the child. This is when the parent who is denying visitation tells why they are doing so. Typically, in cases involving a divorce or separation, evidence may also be presented by one or more of the par-

ents and their witnesses asserting that the grandparent will undermine, or "talk bad" about another person who is present in the child's life such as a stepparent or an ex-spouse.

Finally, once all the testimony is presented, the court weighs the evidence and makes a determination regarding visitation. If the court determines that the grandparents have a right to visitation, the length and conditions of the visitation will also be determined. The length and conditions of visitation will depend on a number of factors including the age of the child, the child's school schedule, the ability of grandparents to provide necessities, the geographical distance between the grandparent and grandchild, the visiting schedule of the noncustodial parent, and the health of the child.<sup>15</sup> In many cases, a court will order the grandparent not to discuss the parent with the child under any circumstances, in order to eliminate any concerns that a grandparent will undermine the parent's authority. Any violation of this order will terminate the grandparent's visitation right.<sup>16</sup>

### **One State's Example: Wisconsin's Approach to Grandparents' Rights to Visitation**

Since 1971, there have been only ten cited Wisconsin cases where a grandparent has petitioned for the right to visitation. Prior to 1975, visitation rights in Wisconsin were granted to grandparents pursuant to a general visitation statute, Section 247.24.<sup>17</sup> This statute applied to all who had rights to request visitation and required a proceeding termed "an action affecting the family" before the court would review the case. In 1975, the Wisconsin legislature enacted two distinct statutes, each of which specifically defined particular rights of grandparents to visitation. Both these statutes were enacted by the Wisconsin legislature in response to the public's request for increased protection of grandparents' rights. The first statute enacted, Wisconsin Statutes Section 880.155, gave rights to the maternal or paternal grandparents to petition the court for visitation upon the death of their child, their grandchild's biological mother or father. The second statute enacted, Wisconsin Statutes Section 767.245, allowed grandparents to petition the court for visitation, upon the court's rendering of a "judgment affecting the family." Such judgments include an annulment, a divorce, or a legal separation.

No third statute was necessary until 1991 when the Supreme Court of Wisconsin, in the landmark case of *Sorgel v. Raufman*, held that the parents of the biological mother or father were not allowed to petition the court for visitation when the grandchild had been adopted by a stepparent.<sup>18</sup> The court, in doing so, basically determined that remarriage of a biological spouse created a new "intact family." In response to the ruling in *Sorgel*, the Wisconsin legislature enacted Wisconsin Statutes Section 48.925.

Today, Wisconsin retains the three statutes that address and determine a grandparent's right to visitation. These statutes will be addressed separately and discussed according to the rules governing their use. Likewise, each statute will be examined in terms of the guidelines the courts have constructed for their use, and the case law that has come in the years since.

### **Guardians and Wards: Visitation by Grandparents and Stepparents**

As noted, Wisconsin Statutes Section 880.155 gives rights to the maternal or paternal grandparents to petition the court for visitation upon the death of their child, their grandchild's biological mother or father. This statute is very limited and only applies to a certain class of people. It provides as follows:

- (2) If one or both parents of a minor child are deceased and the child is in the custody of the surviving parent or another person, a grandparent or stepparent of the child may petition for visitation privileges with respect to the child, whether or not the person with custody is married. The grandparent or stepparent may file the petition in a guardianship or temporary guardianship proceeding under this chapter that affects the minor child or may file the petition to commence an independent action under this chapter. The court may grant reasonable visitation privilege to the grandparent if the surviving parent or other person who has custody of the child has notice of the hearing and if the court determines that visitation is in the best interest of the child.

Should a grandparent petition the court for visitation and demonstrate that the statute is applicable to the facts of their case, the court must then

determine if visitation is in the best interest of the child.<sup>19</sup> The court may grant an order for visitation under this statute, even in cases where the guardian, regardless of who they are, opposes the visitation.<sup>20</sup> The case law indicates that courts are not willing to expand the application of this statute beyond the circumstances described above.

### **Actions Affecting the Family: Visitation Rights of Certain Persons**

Wisconsin Statutes Section 767.245 is derived from the prior Wisconsin Statutes Section 247.24(1)(c), the first statute available and used by grandparents to request visitation with their grandchildren. The change to Wisconsin Statutes Section 247.24(1)(c), reflected in Wisconsin Statutes Section 767.245, is the specific mention of grandparents as potential parties. Despite the fact that Section 767.245 does not specifically state that it governs “actions affecting the family,” the courts that have interpreted this statute to apply only where a judgment that affects the family is entered by a court. The now defunct Wisconsin Statutes Section 247.02(1) actually specified what constituted an “action affecting the family,” which included affirmation of marriage, annulment, divorce, legal separation, custody, child support, maintenance, property division, or modifications of previous judgment(s).

In requiring that an action affecting the family be present, Wisconsin courts have based their interpretation of Wisconsin Statutes Section 767.245 on the statute roots in Wisconsin Statutes Section 247.02(1). Also, the legislature has amended Wisconsin Statutes Section 767.245, but has failed to counter the “actions affecting the family” requirement imposed by the courts’ interpretation.

The courts’ rationale for basing visitation on an action affecting the family is twofold. Courts have held first that the child should be protected from the ordeal of a dissolving family and second that grandparents through visitation can aid the child in coping with the changing family environment. Wisconsin courts subsequently narrowed the definition of “an action affecting a family” to “an action that threatens the integrity of the family unit.”<sup>21</sup> Such actions are limited to divorce, separation, annulment, or custody hearing.

Wisconsin Statutes Section 767.245 reads, in part, as follows:

- (1) Except as provided in sub. (2m), upon petition by a grandparent who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation right to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.
- (2m) Subsection (3), rather than sub. (1) applies to a grandparent requesting visitation rights under this section if sub. (3)(a) to (c) applies to the child.
- (3) The court may grant reasonable visitation rights, with respect to a child, to a grandparent of the child if the child’s parents have notice of the hearing and the court determines the following:
  - (a) The child is a nonmarital child whose parents have not subsequently married each other.
  - (b) The paternity of the child has been determined under the laws of this state or another jurisdiction if the grandparent filing the petition is a parent of the child’s father.
  - (c) The child has not been adopted.

For a grandparent to petition for visitation under Wisconsin Statutes Section 767.245, there must first be an action before the court that threatens the integrity of the family, and the grandparent(s) need to (1) establish a relationship similar to a parent-child relationship, (2) give notice of the hearing to the parents, and (3) prove that the visitation would be in the best interest of the child.

Grandparents petitioned for visitation under Wisconsin Statutes Section 767.245 in the landmark case of *Sorgel v. Raufman*. In *Sorgel*, a mother was divorced but had custody of the child. The mother remarried, and her new husband adopted the child. The “new family” decided the paternal grandparents could not see their grandchild. The grandparents, given this exclusion by the mother, petitioned the court for visitation. The Supreme Court of Wisconsin held that the mother and her new husband, the adoptive parent of the child, now constituted an intact family. The court further held that the paternal grandparents could not interfere with the “intact family’s” decision to deny visitation.<sup>22</sup> The ruling of the Supreme Court of Wisconsin in *Sorgel* stated in part, “where one biological parent marries, and the stepparent adopts the children from a previous marriage, this proce-

ture will form an intact family, therefore not allowing a grandparent to petition for visitation.”<sup>23</sup> In effect, this ruling essentially made the parent(s) of the noncustodial parent, a “nonfamily” member to their own grandchild.

### **Children's Code: Visitation Rights of Certain Persons**

The Wisconsin Supreme Court's holding in *Sorgel* was overruled by the Wisconsin legislature in 1991, by their enactment of Wisconsin Statutes Section 48.925. This statute was added to the Children's Code and reinstated a long-held belief that, despite the nonpresence of a biological mother or father, a grandparent is still part of the grandchild's “family.” The legislature, by this statute clearly demonstrated that it was not fair to punish the grandparent(s) for factors that were beyond their control but that affected the relationship between themselves and their grandchildren. Wisconsin Statutes Section 48.925 reads as follows:

- (1) Upon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court may grant reasonable visitation rights to that person if the petitioner has maintained such a relationship within 2 years prior to the filing of the petition, if the adoptive parent or parents, or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent, have notice of the hearing and if the court determines all of the following:
  - (a) That visitation is in the best interest of the child.
  - (b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parents' and birth parents' relationship with the child.
  - (c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

- (3) This section applies to every child in this state who has been adopted, by a stepparent or relative, regardless of the date of adoption.

The Supreme Court of Wisconsin has interpreted Section 48.925 as applying only to “family members” who have not voluntarily given up their rights to the child.<sup>24</sup> Where a parent voluntarily gives up his or her right to the child, the grandparents cannot petition for visitation.

### **Other Options In Wisconsin**

If the grandparents' circumstances do not fall under those specified by the statutes, they may still be able to petition the court for visitation. In July of 1995, the Supreme Court of Wisconsin, in *Holtzman v. Knott*, held that a petitioner can petition for visitation if he or she can meet a two-part test. According to this two-part test, a petitioner must first prove that there is a sufficient parentlike relationship between the parties and, second, that there is a “triggering” event that justifies intervention by the state. If the petitioner succeeds in doing this, the court is then required to look at what is in the best interest of the child. In this case, two women were involved in a ten-year relationship. Together they purchased a house, exchanged vows in a private ceremony, and decided to have a child by artificially inseminating Knott. Knott later moved to Madison and ended the relationship with Holtzman. Holtzman petitioned the court for visitation but the supreme court held that the law did not recognize the alternative type of relationship that existed with these two women and could not grant Holtzman her request. Despite the Wisconsin Supreme Court's holding, this has created another option under which grandparents can petition for visitation. The Supreme Court has now held that grandparents who wish to petition for visitation do not fall under the requirements laid out in the statutes but can now petition under the two-part test of this case.

### **Other States**

Wisconsin's statutes granting visitation to grandparents are quite limited in their scope. Wisconsin is not alone in this approach. Many other states have similar statutes, and some provisions are narrower than Wisconsin. In contrast, some other states grant grandparents broader opportunities for

court intervention. In Mississippi, for example, a "viable relationship" is sufficient basis for a grant of visitation. A viable relationship is defined as a relationship where the grandparents financially supported the grandchild for at least six months prior to their request for visitation.<sup>25</sup>

A contrasting approach can be seen in Arizona,<sup>26</sup> where statutes provide that while a grandparent may be granted visitation with a grandchild, when the grandchild subsequently is adopted, the visitation order is terminated. Arizona state law provides no further rights to petition.

New York remains the only state that allows a grandparent to petition for visitation where an intact family exists. The New York legislature has created a very broad statute and given deference to the court in granting visitation to grandparents.<sup>27</sup> The New York statute in part, reads, "petitions may be brought where circumstances show that conditions exist which equity would see fit to intervene."<sup>28</sup> In 1984, in the case of *In Re Larusso*, the court stated, "The mere fact that the parents and grandparents have had a falling out and that animosity exists between them should not preclude visitation if the court finds that visitation would be in the best interest of the children."<sup>29</sup>

In response to the ruling in *Larusso*, the parents in *Frances E. v. Peter E.*<sup>30</sup> brought suit stating that a court's award of visitation, over the objection of the parents, violated their Fourteenth Amendment rights to raise their children as they see best. The family court, in response, disputed the need for one rule for those living in an intact family and those who are not. The court stated, "This right to be free from state interference, however, inures to all parents and should have no greater application to parents who are married and residing together in an intact family. To assert that, as a matter of law, a widowed, divorced, remarried or unmarried parent is subject to greater state interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child."<sup>31</sup>

### Will This Trend Toward Expanding Grandparents' Rights Continue?

The question confronting grandparents regarding visitation is, Will the Wisconsin rules, the New York rules, or some other rules guide the future? There is evidence in the research to suggest that the New York rules will not prevail nationwide, but

there is also evidence to suggest that they may. New York has been granting this "extended" right since 1984. Fourteen years later, they are still the only state to set forth such broad visitation guidelines. On the other hand, there is evidence to suggest this may be the future for grandparents in other states. In Wisconsin, courts have held that grandparents can petition the court even if they cannot meet the statutory guidelines. The court's handling of such cases expands an opportunity for visitation to grandparents beyond the scope of the specific statutory definitions.

Additional evidence to support a trend toward a nationwide expansion of grandparents' visitation rights is the broad range of diverse groups who are working to advance the issues of older Americans. Groups such as the American Association of Retired Persons (AARP) and the Grandparents Coalition are now taking a strong stance on the issue of visitation and making it one of their top priorities.

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### Endnotes

1. See Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L. Q. 59.
2. See generally *Murphy's Law Grandparents' Visitation Rights Are Open to Interpretation*, THE PATRIOT LEDGER, Dec. 6, 1997.
3. See Theresa Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30 FAM. L. Q. 753, 755 (Fall 1996).
4. See *id.* at 755.
5. *Barstad v. Fraser*, 118 Wis. 2d 549, 568, 348 N.W.2d 479, 489 (1984).
6. See *United States v. Orito*, 413 U.S. 139, 142 (1973).
7. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
8. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
9. See generally Burns, *supra* note 1.

10. *See id.* at 70.
11. *See id.* at 59.
12. *See id.* at 166.
13. Holtzman v. Knott, 193 Wis. 2d 649, 668, 533 N.W.2d 419, 425 (1995).
14. *See id.* at 675.
15. *See* Richard Victor, *Grandparent Rights to Visitation*, 16 SUM. FAM. ADVO. 40, 41 (Summer 19\_\_).
16. *See id.*
17. Holtzman v. Knott, *supra* note 13.
18. *See* Sorgel v. Raufman, 154 Wis. 2d 564, 573, 453 N.W.2d 624, 627 (1990).
19. *See* C.G.F. v. T.F. and D.L., 168 Wis. 2d 62, 483 N.W.2d 803 (1992).
20. *See id.* at 68.
21. Marquardt v. Hegemann-Glascock, 190 Wis. 2d 447, 526 N.W.2d 834 (1994).
22. C.G.F. v. T.F. and D.L., *supra* note 19.
23. *See* Sorgel v. Raufman, 154 Wis. 2d 564, 567, 453 N.W.2d 624, 629 (1990).
24. *See id.* at 567, 629.
25. MS. Code Ann. § 93-16-7 (1998).
26. *See* AZ. Rev. Stat. § 25-409 (1998).
27. *See* Art. 13, NY Domestic Rel. Law, Burns, *supra* note 1, at 77.
28. *Id.* at 77.
29. *Id.*
30. Frances E. v. Peter E., 125 Misc. 2d 164, 479 N.Y.S. 2d 319 (1984).
31. *Id.*