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Goldberg, Michael K. (2009) "A Survey of the Fifty States' Grandparent Visitation Statutes," *Marquette Elder's Advisor*: Vol. 10: Iss. 2, Article 4.

Available at: <http://scholarship.law.marquette.edu/elders/vol10/iss2/4>

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A SURVEY OF THE FIFTY STATES' GRANDPARENT VISITATION STATUTES

Michael K. Goldberg*

America has a strong tradition of affirming biological parents' power over the care, custody, and control of their children. However, in light of significant changes to the prototypical American family, and the implications those changes have on issues relating to the care of children, legislatures and courts across the country have begun to limit that power. Persons outside the traditional nuclear family are called upon with increasing frequency to take part in the tasks of child rearing, and grandparents are first and foremost among that group. Over the last forty years, the structure of the American family has changed, often to include grandparents in day-to-day care of children.¹ In 2007, over 6.2 million American grandparents reported living with their minor grandchildren, and over 2.5 million grandparents reported being responsible for the care of their minor grandchildren.² Just one year prior, in 2006, over 6

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1. Stephanie O'Connor, *Grandma Gets Devoured All Over Again and This Time the Huntsman Is Not Around to Save Her: An Analysis of Michigan's Grandparent Visitation Statute and a Comparison with Statutes of Other Jurisdictions*, 84 U. DET. MERCY L. REV. 383, 386 (2007).

2. U.S. CENSUS BUREAU, 2007 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES: TABLE S1002 GRANDPARENTS, *available at*

<http://factfinder.census.gov/servlet/>

STTable?_bm=y&geo_id=01000US&q_ name=ACS_2007_1YR_G00_S1002&ds_name=ACS_2007_1YR_G00_-&-_lang=en&-redoLog=false (last visited March 18, 2009).

million U.S. grandparents reported living with their minor grandchildren, and over 2.4 million grandparents reported being responsible for their minor grandchildren.³ It is suggested that this increase is the result of a higher divorce rate, more out-of-wedlock births, more single parents, an increase in drug use, and a troubled economy.⁴ As a result, a growing number of grandparents have become more involved in their children's and grandchildren's lives.⁵ Beginning in the 1960s, state legislatures began to respond to this change in the American family, and began enacting grandparent visitation statutes.⁶

THE EFFECT OF *TROXEL V. GRANVILLE* ON GRANDPARENT VISITATION STATUTES

Although, every state has enacted a grandparent visitation statute within the past decade, not every grandparent visitation statute is currently in effect. In 2000, in *Troxel v. Granville*, the United States Supreme Court struck down a Washington State visitation statute because it unconstitutionally infringed upon a parent's fundamental right to the care, custody, and control of their children.⁷ The Court found the Washington State statute to be "breathhtakingly broad," in that it allowed any third party seeking visitation to subject to judicial review a parent's decision concerning visitation.⁸ The Court determined that the Washington State statute failed to give the parent's decision any special weight, and thus, violated the parent's fundamental right to the care, custody, and control of her children.⁹ The *Troxel*

3. U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY: TABLE S1002 GRANDPARENTS, available at http://factfinder.census.gov/servlet/STTable?_bm=y&geo_id=01000US&qr_name=ACS_2006_EST_G00_S1002&-ds_name=ACS_2006_EST_G00_-&-_lang=en&-redoLog=false (last visited March 18, 2009).

4. TRACI TRULY, GRANDPARENTS' RIGHTS: YOUR LEGAL GUIDE TO PROTECTING YOUR RELATIONSHIP WITH YOUR GRANDCHILDREN 1-2 (Sphinx Publishing 2006) (1995).

5. See O'Connor, *supra* note 1, at 386.

6. *Id.*

7. *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

8. *Id.* at 67.

9. *Id.* at 68.

opinion begins by observing the metamorphosis of the traditional American nuclear family. Justice O'Connor wrote that:

the demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children -- or 5.6 percent of all children under age 18 -- lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. (1998).¹⁰

The evolving structure of the American family-in which children frequently develop significant relationships with adults who have no traditional legal right to spend time those children-has created a friction between the well-established fundamental right of parents to raise children as they see fit and has increased the role that non-parents are playing in the lives of those children. Today, a diversity of perspectives on morality and individual freedoms has produced a spectrum of views on what constitutes a family.¹¹ Families whose heads of household are gay or lesbian are just one part of that spectrum. Between one and nine million children in the United States are estimated to have at least one gay or lesbian parent.¹²

10. *Troxel*, 530 U.S. at 64.

11. William C. Duncan, *Don't Ever Take a Fence Down: The "Functional" Definition of Family-Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57, 66 (2001).

12. *Coparent or Second-Parent Adoption by Same-Sex Parents* (Committee on

As a result of the Court's ruling in *Troxel v. Granville*, many states' statutes have been attacked based upon constitutional grounds that the statutes unjustly interfere with the parent's fundamental rights. Currently, in three states, Hawaii, Washington, and Florida, the state courts have struck down the states' grandparent visitation statutes as unconstitutional and the states' legislatures have failed to enact new grandparent visitation statutes.¹³ As a result, Hawaii, Washington, and Florida, do not have a valid grandparent visitation statute, and therefore, currently do not have any recourse for grandparents who are denied visitation with their minor grandchildren.

UNCONSTITUTIONAL GRANDPARENT VISITATION STATUTES

In 2007, the Hawaii Supreme Court ruled the Hawaii Grandparent Visitation statute was unconstitutional because the statute did not include a provision requiring a "harm to the child" standard and because this provision could not be read into the statute without making a substantive amendment.¹⁴ Hawaii has not yet enacted a new grandparent visitation statute.¹⁵

In 2005, the Washington State Supreme Court ruled that the Washington Grandparent Visitation statute was unconstitutional because it presumed that grandparent visitation is in a child's best interest, even if a parent opposes the visitation.¹⁶ Washington has not yet enacted a new grandparent visitation statute.¹⁷

In Florida, the Florida Supreme Court has

Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics), (Vol. 109, No. 3, 2002).

13. See *Von Eiff v. Azicri*, 720 So.2d 510, 516-17 (Fla. 1988), *Onesko v. Adoption of B.M.O.* 611 So.2d 1283 (Fla. App. 2 Dist. 1992), *In re Custody of B.S.Z.-S.*, 875 P.2d. 693, 696 (Wash. App. Div. 1 1994), and *Doe v. Doe*, 172 P.3d 1067, 1069 (Haw. 2007).

14. *Doe*, 172 P.3d at 1080.

15. See, e.g., *id.* at 1069.

16. *In re Parentage of C.A.M.A.*, 109 P.3d 405, 411 (Wash. 2005).

17. See, e.g., *In re Custody of B.S.Z.-S.*, 74 P.2d. at 696.

consistently held all statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child standard . . . to be unconstitutional.

. . . .

. . . [W]e likewise held facially unconstitutional the provision of 752.01(1) authorizing grandparent visitation where the marriage of the child's parents had been dissolved. These decisions are based on the fundamental right of parents to raise their children, which is grounded under Florida law in the right of privacy found in article I, section 23 of the Florida Constitution.¹⁸

The Florida Supreme Court has consistently found that all of the grandparent visitation statutes lacked "a requirement for a showing that harm to the child will result from a denial of grandparent visitation."¹⁹ Currently, there is no valid grandparent visitation statute in Florida.²⁰

In addition to the grandparent visitation statutes being struck down as facially unconstitutional,²¹ several other state supreme courts have found their grandparent visitation statutes unconstitutional as applied.²² Furthermore, in several states, there is currently proposed legislation to change the current grandparent visitation statutes.²³ Nonetheless, these grandparent visitation statutes remain valid to date.

A REVIEW OF THE REMAINING GRANDPARENT VISITATIONS STATUTES IN EFFECT

As for the remaining statutes still in effect across the states, there is not one uniform type of statute utilized for determining

18. *Cranney v. Coronoda*, 920 So.2d 132, 134 (Fla. Dist. Ct. App. 2006).

19. *Id.* at 135.

20. *See, e.g., Onesko*, 611 So.2d at 1283.

21. *See, e.g., In re Parentage of C.A.M.A.*, 109 P.3d at 411, *Doe*, 172 P.3d at 1080, *Cranney*, 920 So.2d at 134.

22. *See Roth v. Weston*, 789 A.2d 431, 453 (Conn. 2002); *See also Koshko v. Haining*, 921 A.2d 171, 195 (Md. 2007).

23. *See, e.g., 2009 IN H.B. 1290, 2009 MN H.B. 46, 2009 MS S.B. 2136.*

grandparent visitation. In fact, the statutes vary greatly from state to state, in not only the language of the statutes and the standards required, but also, in how each state's courts interpret the statutes. The rest of this article will examine the current states' grandparent visitation statutes.

THE FIRST THRESHOLD: MEETING THE STANDING REQUIREMENT OF A GRANDPARENT VISITATION STATUTE

Before any court can make a determination as to whether grandparent visitation will be granted or denied, the grandparents petitioning the court must meet the standing requirements of the statute(s), if any. An example of a standing requirement could be that a parent must be incarcerated, before a grandparent can petition the court for grandparent visitation and have the court make a determination regarding grandparent visitation.²⁴ Almost half of the states permit grandparents to petition the court for grandparent visitation, if one of the parents is deceased,²⁵ or if the parents are divorced, legally separated, or a divorce is pending.²⁶ Other examples of standing requirements

24. *See, e.g.*, TEX. FAM. CODE ANN. § 153.433(A) (2008); *see also* LA. REV. STAT. ANN. § 9:344(A) (2008).

25. ALASKA STAT. § 25.45.150(a) (2008); ARIZ. REV. STAT. ANN. § 25-409(A)(2) (2008); ARK. CODE ANN. § 9-13-103(a)(1)(A) (2008); COLO. REV. STAT. § 19-1-117(1)(c) (2008); 750 ILL. COMP. STAT. ANN. § 5/607(b)(1)(C) (West 2008); IND. CODE ANN. § 31-17-5-1(a)(1) (2007); LA REV. STAT. ANN. § 9:344(A) (2009); ME. REV. STATE. ANN. tit. 19A, § 1803(1)(A) (2008); MASS. GEN. LAWS ANN. ch. 119, § 39D (2008); MINN. STAT. ANN. § 257C.08(1) (2009); MISS. CODE ANN. § 93-16-3(1) (2007); MO. ANN. STAT. § 452.402(1)(2) (West 2008); NEB. REV. STAT. § 43-1802(1)(a) (2004); NEV. REV. STAT. ANN. § 125C.050(1)(a) (LexisNexis 2004); N.H. REV. STAT. ANN. § 461-A:13(I) (2008); N.M. STAT. ANN. § 40-9-2(B) (LexisNexis 2008); N.Y. DOM. REL. LAW § 72(1) (Consol. 2008); OHIO REV. CODE ANN. § 3109.11 (LexisNexis 2008); OKLA. STAT. ANN. tit. 10, § 5(A)(1)(a)-(c)(3) (West 2009); R.I. GEN. LAWS § 15-5-24.1(7) (2003); TENN. CODE ANN. § 36-6-307 (2008); and TEX. FAM. CODE ANN. § 153.433(2)(A)

26. ALASKA STAT. § 25.45.150 (2008); ARIZ. REV. STAT. ANN. § 25-409(A)(1) (2008); ARK. CODE ANN. § 9-13-103(a)(1)(A) (2002); COLO. REV. STAT. § 19-1-117(1) (2008); GA. CODE ANN. § 19-7-3(b) (2004); 750 ILL. COMP. STAT. ANN. § 5/607(b)(1)(A) (West 2008); IND. CODE ANN. § 31-17-5-1(a)(2) (2007); LA. REV. STAT. ANN. § 9:344(D) (2009); MASS. GEN. LAWS ANN. ch. 119, § 39D (2008); MO. ANN. STAT. § 452.402(1)(1) (West 2008); NEB. REV. STAT. § 43-1802(1)(b) (2004); NEV. REV. STAT. ANN. § 125C.050(1)(b) (LexisNexis 2004); N.H. REV. STAT. ANN. § 461-A:13(I) (2008); OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(1) (West 2009); S.D. CODIFIED LAWS §

include the following: a parent has been established as missing for a specified amount of time;²⁷ a parent has abandoned or deserted the grandchild;²⁸ the grandchild was born out-of-wedlock;²⁹ a parent is incarcerated;³⁰ a parent has been determined to be incompetent as a matter of law;³¹ the child is being raised outside of either parent's care;³² a parent's parental rights have been terminated;³³ there has been a denial or restriction of grandparent visitation;³⁴ the grandchild resided with the grandparent for a specified period of time;³⁵ or the grandparent has established that there is a sufficient grandparent-grandchild relationship, or at least an attempt to establish such a relationship has been made.³⁶ In addition, two states, New Hampshire and New York, have broader standing requirements.³⁷ In New Hampshire, a grandparent may petition the court whenever there exists a "cause" that creates an

25-4-52 (2004); TENN. CODE ANN. § 36-6-307(6) (2008).

27. ARIZ. REV. STAT. ANN. § 25-409(A)(2) (2008); 750 ILL. COMP. STAT. ANN. § 5/607(b)(1)(B) (West 2008); TENN. CODE ANN. § 36-6-307(7) (2008).

28. OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(6) (West 2009).

29. ARIZ. REV. STAT. ANN. § 25-409(A)(3) (2008); ARK. CODE ANN. § 9-13-103(a)(1)(C)-(D) (2002); 750 ILL. COMP. STAT. ANN. § 5/607(b)(1)(A) (West 2008); IND. CODE ANN. § 31-17-5-1(a)(3) (2007); LA. REV. STAT. ANN. § 9:344(B) (2009); MASS. GEN. LAWS ANN. ch. 119, § 39D (2008); NEB. REV. STAT. § 43-1802(1)(c) (2004); NEV. REV. STAT. ANN. § 125C.050(1)(c) (LexisNexis 2004); OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(7) (West 2009).

30. LA. REV. STAT. ANN. § 9:344(A) (2009).

31. TEX. FAM. CODE ANN. § 153.433(2)(A) (2008).

32. COLO. REV. STAT. § 19-1-117(1)(b) (2008) and OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(5) (West 2009).

33. GA. CODE ANN. § 19-7-3(b) (2004); MISS. CODE ANN. § 93-16-3(1) (2007); NEV. REV. STAT. ANN. § 125C.050(1)(d) (LexisNexis2004); N.H. REV. STAT. ANN. § 461-A:13(I) (2008); and OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(8) (West 2009).

34. ME. REV. STATE ANN. tit. 19A, § 1803 (2008); MISS. CODE ANN. § 93-16-3 (2007); OKLA. STAT. ANN. tit. 10, § 5 (West 2009); OR. REV. STAT. § 109.119 (2007); TENN. CODE ANN. § 36-6-307 (2005).

35. MINN. STAT. ANN. § 257C.08 (West 2009); MO. ANN. STAT. § 452.402(3) (West 2008); N.M. STAT. ANN. § 40-9-2(C) (LexisNexis 2008) and 23 PA. STAT. ANN. § 5313(a) (West 2008).

36. ME. REV. STATE ANN. tit. 19A, § 1803(B)-(C) (2008); MISS. CODE ANN. § 93-16-3(2)(a) (2009); OKLA. STAT. ANN. tit. 10, § 5(A)(1)(c)(6) (West 2009); OR. REV. STAT. § 109.119 (2007); and TENN. CODE ANN. § 36-6-307(1) (2005).

37. See N.H. REV. STAT. ANN. § 461-A:13 (2008); see also N.Y. DOM. REL. LAW § 72 (Consol. 2008).

"absence of a nuclear family."³⁸ In New York, a grandparent may petition the court whenever "conditions exist [in] which equity would see fit to intervene."³⁹ If a grandparent cannot meet the standing requirements, a grandparent may not petition the court for grandparent visitation.

THE SECOND THRESHOLD: PROVING TO THE COURT THAT GRANDPARENT VISITATION SHOULD BE GRANTED

After a grandparent has established that he or she has standing to bring a petition for visitation, the court can make a determination as to whether the petition will be granted or denied. As stated before, the grandparent visitation statutes vary from state to state, and how a court will determine whether or not a grandparent is granted visitation will depend upon what state in which the suit is being brought. Many states inquire as to whether visitation by the grandparent is in the grandchild's best interest.⁴⁰ A majority of the states require that the grandparent visitation be not only in the child's best interest, but also something extra (i.e., in addition to grandparent visitation being in the child's best interest, a finding of parental unfitness).⁴¹ A few states require evidence that if grandparent visitation is denied, the child will be harmed,⁴² and at least one state requires a showing that the grandparent-grandchild relationship is beneficial to the grandchild.⁴³

THE BEST INTERESTS ONLY STANDARD FOR DETERMINING GRANDPARENT VISITATION

The best interest statutes require the courts to determine

38. N.H. REV. STAT. ANN. § 461-A:13(I) (2008).

39. N.Y. DOM. REL. LAW § 72(1) (McKinney 2008).

40. See, e.g., ALASKA STAT. § 25.45.150(a) (2008), ARIZ. REV. STAT. ANN. § 25-409(A) (2008), DEL. CODE. ANN. tit. 10, §1031(7)(a) (1999), MICH. COMP. LAWS ANN. § 722.27 (West 2008), and WIS. STAT. ANN. § 767.43(3) (West 2008).

41. See, e.g., OKLA. STAT. ANN. tit. 10, § 5(A)(1)(b) (West 2009).

42. *Id.*

43. See, e.g., NEB. REV. STAT. § 43-1802(2) (2008).

that grandparent visitation is in the child's best interest. Most states define "best interests" somewhere in the state's statutes or in the state's case law.⁴⁴ Most of the states' definitions of best interests are similar, and most definitions contain a catchall provision that would include any other relevant facts.

An example of one state's definition of "best interest" is:

(1) the physical, emotional, mental, religious, and social needs of the child; (2) the capability and desire of each parent to meet these needs; (3) the child's preference if the child is of sufficient age and capacity to form a preference; (4) the love and affection existing between the child and each parent; (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health of or safety of either the parent or the child; (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents; (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child; (9) other factors that the court considers pertinent.⁴⁵

The following states currently utilize a best interests standard for determining grandparent visitation rights: Alaska;⁴⁶ Arizona;⁴⁷ California;⁴⁸ Colorado;⁴⁹ Delaware;⁵⁰ Idaho;⁵¹

44. See, e.g., VA. CODE ANN. § 20-124.3 (2008), see also, e.g., *Vibbert v. Vibbert*, 144 S.W.3d 292, 295 (Ky. App. 2004).

45. ALASKA STAT. § 25.45.150 (2008).

46. ALASKA STAT. § 25.45.150 (2008).

47. ARIZ. REV. STAT. ANN. § 25-409(A) (2008).

48. CAL. FAM. CODE § 3103(a) (West 2008) (during divorce or other court proceeding).

49. COLO. REV. STAT. § 19-1-117(4) (2008).

50. DEL. CODE ANN. tit. 10, § 1031(7)(a) (1999).

Kentucky;⁵² Louisiana;⁵³ Massachusetts;⁵⁴ Michigan;⁵⁵ Missouri;⁵⁶ Montana;⁵⁷ New York;⁵⁸ North Carolina;⁵⁹ Ohio;⁶⁰ Vermont;⁶¹ Virginia;⁶² Wisconsin.⁶³

In Alabama, the Alabama Grandparent Visitation Statute was found to be unconstitutional as applied in *R.C.S. v. J.B.C.* The Alabama appellate court determined that the statute's rebuttable presumption, favoring grandparent visitation, was unconstitutional as applied because it opposed "the traditional presumption that a fit parent will act in the best interests of his or her child."⁶⁴ However, the Alabama Appellate Court concluded in a similar case, *L.B.S. v. L.M.S.*, that "the remainder of the statute was enforceable because" it provided a standard of factors for which the court could rely on to determine grandparent visitation, and because there existed a catch-all provision for "other relevant factors," that allowed Alabama "courts to construe Alabama's grandparent-visitation statute so as to encompass necessary constitutional requirements."⁶⁵ In addition, the *L.B.S.* court noted, "harm or detriment is always a factor to be considered in a best-interest analysis."⁶⁶ Furthermore, in 2004, in *Vibbert v. Vibbert*, the Alabama Appellate Court determined that Alabama courts must:

consider a broad array of factors in determining

51. IDAHO CODE ANN. § 32-719 (2006).

52. KY. REV. STAT. ANN. § 405.021(1) (LexisNexis 1999).

53. LA. REV. STAT. ANN. § 9:344(A)-(D) (2009).

54. MASS. GEN. LAWS ANN. ch. 119, § 39D (2008).

55. MICH. COMP. LAWS ANN. § 722.27(Sec. 7)(1) (West 2008).

56. MO. ANN. STAT. § 452.402(2) (West 2008) (or alternatively, a harm standard).

57. MONT. CODE ANN. § 40-9-102(4) (2007) (if the parent is fit).

58. N.Y. DOM. REL. LAW § 72(1) (McKinney 2008).

59. N.C. GEN. STAT. ANN. § 5 0-13.2(a)-(b) (West 2007).

60. OHIO REV. CODE ANN. § 3109.12(B) (LexisNexis 2008).

61. VT. STAT. ANN. tit. 15, § 1013(a) (2008).

62. VA. CODE ANN. § 20-124.2(E) (2008).

63. WIS. STAT. ANN. § 767.43(1) (West 2008).

64. *R.S.C. v. J.B.C.*, 812 So.2d 361, 371 (Ala. Civ. App. 2001) (quoting *Troxel*, 530 U.S. at 69).

65. *L.B.S. v. L.M.S.*, 826 So.2d 178, 187 (Ala. Civ App. 2002).

66. *Id.* at 186.

whether the visitation is in the child's best interest, including but not limited to: the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; the wishes and preferences of the child. The grandparent seeking visitation must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child.⁶⁷

Formerly, in Kentucky, grandparent visitation was determined using a broad best interest standard.⁶⁸ However, in *Scott v. Scott*, the Kentucky Appellate Court determined that grandparents were required to prove that harm would result to the grandchild, if the grandparents were denied visitation.⁶⁹ In 2004, the Kentucky Appellate Court overruled their decision in *Scott v. Scott*, and determined that the requirement for a showing of harm to the child, as a result of grandparent visitation being denied, was "too narrow," and it did "not adequately take into account a situation where visitation is withheld by the parents out of vindictiveness."⁷⁰ The Kentucky appellate court returned to utilizing a best interest standard for determining whether grandparent visitation should be granted, finding that a "modified" best interest standard satisfies all of the constitutional requirements of giving deference to a parent's decision.⁷¹ By "modified," and similarly to Alabama, the Kentucky appellate court meant that a "broad array of factors" should be used to determine whether the grandparent visitation is in the child's best interest, including but not limited to:

67. *Vibbert v. Vibbert*, 144 S.W.3d 292, 295 (Ky. Ct. App. 2004).

68. Act of Apr. 9, 1996, ch. 302, KRS 405.021(1) (best interest of the child standard amended).

69. *Scott v. Scott*, 80 S.W.3d 447, 447 (Ky. Ct. App. 2002).

70. *Vibbert*, 144 S.W.3d at 295.

71. *Id.* at 294.

the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and school arrangements; the wishes and preferences of the child.⁷²

Also, in Vermont, the Supreme Court there ruled that in order to overcome a parent's decision regarding grandparent visitation, the grandparent "must show circumstances, like parental unfitness . . . or significant harm that would result to the child in the absence of a visitation order."⁷³

Similarly, in Colorado, the Colorado Supreme Court limited the Colorado Grandparent Visitation statute based upon constitutional requirements that the parents' decisions and wishes must be given special significance to accommodate both the state 'best interests of the child' standard and the federal due process requirement that 'special weight' be accorded parental preferences as to care and custody of their children.⁷⁴ The Colorado Supreme Court construed Colorado's Grandparent Visitation statute to require:

(1) a presumption in favor of the parental visitation determination; (2) to rebut presumption, a showing by grandparents through clear and convincing evidence that the parental determination is not in child's best interest; and (3) placement of the ultimate burden on grandparents to establish by clear and convincing evidence that the visitation schedule they seek is in best interests of the child.⁷⁵

Essentially, these states' courts did not strike the grandparent visitation statutes, but instead, found that the definition of "best interests" included factors that defer to the

72. *Id.* at 295

73. *Glidden v. Conley*, 820 A.2d 197, 205 (Vt. 2003).

74. *In re Adoption of C.A.*, 137 P.3d 318, 319 (Colo. 2006).

75. *Id.*

parents' decision regarding grandparent visitation, and therefore, the grandparent visitation statutes were constitutional.

THE "BEST INTERESTS-PLUS" STANDARD FOR DETERMINING GRANDPARENT VISITATION

The "best interests-plus" statutes require not only that the court make the finding that the grandparent visitation would be in the grandchild's best interest, but also, something more. This "plus" factor is what is seen to give parents that "special weight" to their parental decisions regarding grandparent visitation, so that their fundamental parental rights will not be violated and thus complying with the holding of *Troxel*.⁷⁶ What the "plus" factor is will vary from state to state.

A handful of states require that the grandparent show that they have already established a relationship with the grandchild, or at the least, the grandparents have attempted to establish such a relationship (Alaska,⁷⁷ California,⁷⁸ Iowa,⁷⁹ Kansas,⁸⁰ Maine,⁸¹ Mississippi,⁸² and Oregon⁸³).

In particular, the Arkansas Grandparent Visitation statute contains a rebuttable presumption that a custodian's decision regarding grandparent visitation is in the child's best interest. In order to rebut the presumption, the grandparent must prove, by a preponderance of the evidence, that (1) the grandparent has established a "significant and viable" relationship with the grandchild; and (2) that grandparent visitation is in the grandchild's best interest.⁸⁴ The statute provides for what

76. *Troxel*, 530 U.S. at 70.

77. ALASKA STAT. § 25.20.065(1) (2008).

78. CAL. FAM. CODE § 3104(1) (West 2008) (after a divorce or for a child born out-of-wedlock).

79. IOWA CODE ANN. § 600C.1(3)(a) (West 2008).

80. KAN. STAT. ANN. § 38-129(a) (2000).

81. ME. REV. STAT. ANN. tit. 19-A, § 1803(1)(B) (2008).

82. MISS. CODE ANN. § 93-16-3 (2009).

83. OR. REV. STAT. § 109.119(1) (2007) (or establish a child-parent relationship).

84. ARK. CODE ANN. § 9-13-103(c)(2)(A)-(B) (2008).

constitutes a "significant and viable" relationship, and at the same time, considers any facts that would prove harm to the grandchild would result because of the denial of grandparent visitation and the loss of the grandparent-grandchild relationship.⁸⁵ As well, a similar number of states require a showing that grandparent visitation with the grandchild has been unreasonably denied or unreasonably restricted (Nevada,⁸⁶ Alabama,⁸⁷ Illinois,⁸⁸ Mississippi,⁸⁹ Missouri,⁹⁰ and South Dakota⁹¹). Also, it should be emphasized that these statutes require *both* a finding that grandparent visitation is in the child's best interest, and the additional factor(s). For example, in Kansas, the Kansas Grandparent Visitation statute requires a finding of *both* that grandparent visitation is in the child's best interest *and* that a substantial relationship has been established between the grandparents and the grandchild.⁹²

Several states require a showing that grandparent visitation would not significantly interfere with any parent-child relationship (Maine,⁹³ Minnesota,⁹⁴ North Dakota,⁹⁵ Pennsylvania,⁹⁶ South Carolina,⁹⁷ South Dakota,⁹⁸ West Virginia,⁹⁹ and Wyoming¹⁰⁰). For example, the North Dakota Grandparent Visitation statute provides that "grandparents and great-grandparents of an unmarried minor may be granted

85. See ARK. CODE ANN. § 9-13-103.

86. NEV. REV. STAT. ANN. § 125C.050(4) (LexisNexis 2004).

87. ALA. CODE § 30-3-4 (LexisNexis 1975) (repealed) 30-3-4.1(b)(5) (LexisNexis 1999).

88. 750 ILL. COMP. STAT. ANN. § 5/607 (2008).

89. MISS. CODE ANN. § 96-16-3 (2009).

90. MO. ANN. STAT. § 452.402(4) (West 2008).

91. S. D. CODIFIED LAWS § 25-4-52(2) (2004).

92. State Dep't. of Social and Rehab'n Servs. v. Paillet, 16 P.3d 962, 964 (Kan. 2001).

93. ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (2008).

94. MINN. STAT. ANN. § 257C.08(1) (West 2009).

95. N. D. CENT. CODE §14-09-05.1 (2004).

96. 23 PA. CONS. STAT. ANN. §§ 5311-5312 (West 2008).

97. S.C. CODE ANN. § 63-3-530(33) (West 2002).

98. S. D. CODIFIED LAWS § 25-4-52(1) (2008).

99. W. VA. CODE ANN. § 48-10-502(5) (2004).

100. WYO. STAT. ANN. § 20-7-101(a) (2007).

reasonable visitation rights to the minor by the district court upon a finding that visitation would be in the best interests of the minor and would not interfere with the parent-child relationship.”¹⁰¹

Very few states require a grandparent to prove that the parent making the decision/objecting to grandparent visitation is unfit (Iowa,¹⁰² Montana,¹⁰³ and Oklahoma¹⁰⁴). Montana’s Grandparent Visitation statutes provides, in pertinent part:

(2) Before a court may grant a petition brought pursuant to this section for grandparent-grandchild contact over the objection of a parent whose parental rights have not been terminated, the court shall make a determination as to whether the objecting parent is a fit parent. A determination of fitness and granting of the petition may be made only after a hearing, upon notice as determined by the court. (3) A determination of unfitness may be made only if the court, based upon clear and convincing evidence, makes one or more of the determinations provided in 42-2-608(1) or finds that one or more of the events provided for in that subsection have occurred. (4) Grandparent-grandchild contact may be granted over the objection of a parent determined by the court pursuant to subsection (2) to be unfit only if the court also determines by clear and convincing evidence that the contact is in the best interest of the child. (5) Grandparent-grandchild contact granted under this section over the objections of a fit parent may be granted only upon a finding by the court, based upon clear and convincing evidence, that the contact with the grandparent would be in the best interest of the child and that the presumption in favor of the parent’s wishes has been rebutted.¹⁰⁵

Lastly, a few states may require more than just one “plus” factor (i.e., a grandparent visitation statute may require both a finding of an established relationship between the grandparent and the grandchild as well as a finding that the grandparent

101. N.D. CENT. CODE § 14-09-05.1 (2004).

102. IOWA CODE ANN. § 600C1(2) (West 2008).

103. MONT. CODE ANN. § 40-9-102(2) (2007).

104. OKLA. STAT. ANN. tit. 10, § 5(A)(1)(b) (West 2007).

105. MONT. CODE ANN. § 40-9-102(2)-(5) (2007).

visitation would not significantly interfere with the parent-child relationship¹⁰⁶). Four states – New Hampshire, New Mexico, Utah, and Rhode Island – and the District of Columbia stand out as requiring best interests, as well as, additional court findings, unlike any of the other states.¹⁰⁷ The statutes of these four states and the District of Columbia are as follows:

The District of Columbia Grandparent Visitation statute contains a rebuttable presumption favoring the custodial parent.¹⁰⁸ In order for a grandparent to rebut the presumption:

The court must find, by clear and convincing evidence, one or more of the following factors: (1) That the parents have abandoned the child or are unwilling or unable to care for the child; (2) That custody with a parent is or would be detrimental to the physical or emotional well-being of the child; or (3) That exceptional circumstances, detailed in writing by the court, support rebuttal of the presumption favoring parental custody.¹⁰⁹

After the grandparent has successfully rebutted the parental presumption in the District of Columbia's Grandparent Visitation statute, the court will address the best interest factors outlined in the statute.¹¹⁰

The New Hampshire Grandparent Visitation statute provides the court consider the following in granting grandparent visitation rights:

(a) Whether such visitation would be in the best interest of the child. (b) Whether such visitation would interfere with any parent-child relationship or with a parent's authority over the child. (c) The nature of the relationship between the grandparent and the minor child, including but not limited to, the frequency of contact, and whether the child has lived with the grandparent and length of time of such residence, and

106. ME. REV. STAT. ANN. tit. 19-A, § 59 (2008).

107. N.H. REV. STAT. ANN. § 461-A:13(II)(a)-(h) (2008); N.M. STAT. ANN. § 40-9-2(G)(1)-(8) (2008); UTAH CODE ANN. § 30-5-2 (1963)(2)(a)-(g); R.I. GEN. LAWS § 15-5-24.3 (2003); D.C. CODE § 16-831.05(a) (2008).

108. D.C. CODE § 16-831.05(a) (2008).

109. D.C. CODE § 16-831.07(a)(1)-(3) (2008).

110. D.C. CODE § 16-831.05 (2008); D.C. CODE § 16-831.08 (2008).

when there is no reasonable cause to believe that the child's physical and emotional health would be endangered by such visitation or lack of it. (d) The nature of the relationship between the grandparent and the minor child, including friction between the grandparent and the parent, and the effect such friction would have on the child. (e) The circumstances which resulted in the absence of a nuclear family, whether divorce, death, relinquishment or termination of parental rights, or other cause. (f) The recommendation regarding visitation made by any guardian ad litem appointed for the child pursuant to RSA 461-A:16. (g) Any preference or wishes expressed by the child. (h) Any such other factors as the court may find appropriate or relevant to the petition for visitation.¹¹¹

Similarly, the New Mexico Grandparent Visitation statute provides:

(1) any factors relevant to the best interests of the child; (2) the prior interaction between the grandparent and the child; (3) the prior interaction between the grandparent and each parent of the child; (4) the present relationship between the grandparent and each parent of the child; (5) time-sharing or visitation arrangements that were in place prior to filing of the petition; (6) the effect the visitation with the grandparent will have on the child; (7) if the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect; and (8) if the grandparent has previously been a full-time caretaker for the child for a significant period.¹¹²

In Utah, the statute provides for an array of factors to consider, in addition to whether visitation is in the child's best interest:

There is a rebuttable presumption that a parent's decision with regard to grandparent visitation is in the grandchild's best interests. However, the court may override the parent's decision and grant the petitioner reasonable rights of visitation if the court finds that the petitioner has rebutted the presumption based upon factors which the court considers to be relevant, such as

111. N.H. REV. STAT. ANN. § 461-A:13(II)(a)-(h) (2008).

112. N.M. STAT. ANN. § 40-9-2(C)(1)-(8) (2008).

whether: (a) the petitioner is a fit and proper person to have visitation with the grandchild; (b) visitation with the grandchild has been denied or unreasonably limited; (c) the parent is unfit or incompetent; (d) the petitioner has acted as the grandchild's custodian or caregiver, or otherwise has had a substantial relationship with the grandchild, and the loss or cessation of that relationship is likely to cause harm to the grandchild; (e) the petitioner's child, who is a parent of the grandchild, has died, or has become a noncustodial parent through divorce or legal separation; (f) the petitioner's child, who is a parent of the grandchild, has been missing for an extended period of time; or (g) visitation is in the best interest of the grandchild.¹¹³

As well, in Rhode Island, the Rhode Island Grandparent Visitation statute requires a court to find the following:

(i) That it is in the best interest of the grandchild that the petitioner is granted visitation rights with the grandchild; (ii) That the petitioner is a fit and proper person to have visitation rights with the grandchild; (iii) That the petitioner has repeatedly attempted to visit his or her grandchild during the ninety (90) days immediately preceding the date the petition was filed and was not allowed to visit the grandchild during the ninety (90) day period as a direct result of the actions of either, or both, parents of the grandchild; (iv) That there is no other way the petitioner is able to visit with his or her grandchild without court intervention; and (v) That the petitioner, by clear and convincing evidence, has successfully rebutted the presumption that the parent's decision to refuse the grandparent visitation with the grandchild was reasonable.¹¹⁴

Statutory language in a few other states appears to only utilize a best interests standard. This is not the standard used because the statute has been ruled *unconstitutional as applied*, and a state court has constructed meanings and/or requirements to be read into a state's grandparent visitation statute. These additional meanings and/or requirements create "best interest

113. UTAH CODE ANN. § 30-5-2(2)(a)-(g) (2005).

114. R.I. GEN. LAWS § 15-5-24.3(a)(2)(i)-(v) (2003).

plus” statutes. The following states’ grandparent visitation statutes have been ruled *unconstitutional as applied*, and as a result, these states’ courts have found additional meanings and/or requirements for the court to consider and determine in order to grant grandparent visitation.

The Connecticut Supreme Court did not invalidate the Connecticut Grandparent Visitation statute, but instead, determined that the court could only exercise jurisdiction over a petition for third party visitation against the wishes of a fit parent only if the petition contains “specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship.”¹¹⁵ The court stated, “the petition must also contain specific, good faith allegations that denial of visitation will cause real and significant [emotional] harm to the child.”¹¹⁶ Furthermore, the court stated that the kind of harm contemplated is “that the child is ‘neglected, uncared-for or dependent,’” and it must be proven by clear and convincing evidence.¹¹⁷

In Maryland, the grandparent visitation statute merely provides that grandparent visitation may be granted, “if the court finds it to be in the best interests of the child.”¹¹⁸ In *Koshko v. Haining*, the Maryland Court of Appeals found that the Maryland Grandparent Visitation statute could be “fairly and easily . . . supplemented by judicial interpretation with an inferred presumption that parental decisions regarding their children are valid.”¹¹⁹ Instead of finding the Maryland Grandparent Visitation Statute (GVS) unconstitutional, the Maryland Court of Appeals “read into the GVS the parental presumption both as mandated by substantive due process and traditionally observed in Maryland common law,” and found the statute to be unconstitutional as applied.¹²⁰ The Maryland

115. *Roth*, 789 A.2d at 450 (Conn. 2002).

116. *Id.*

117. *Id.*

118. MD. CODE ANN. FAM. LAW § 9-102(2) (2006).

119. *Koshko v. Haining*, 921 A.2d 171, 183 (Md. 2007).

120. *Id.* at 195.

Grandparent Visitation statute is now “construed to contain a rebuttable presumption favoring [the] parental decision concerning visitation to be in the child’s best interests.”¹²¹

The Minnesota Grandparent Visitation statute provides that a court may grant grandparent visitation if “visitation rights would be in the best interests of the child and would not interfere with the parent-child relationship.”¹²² The Minnesota Grandparent Visitation statute specifically provides “[t]he court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur.”¹²³ In *Sooahoo v. Johnson*, the Minnesota Supreme Court ruled that section of the Minnesota Grandparent Visitation statute as unconstitutional because it impermissibly placed “the burden on the custodial parent to prove that visitation would interfere with the parent-child relationship,” and thus, it violated a parent’s “fundamental right to care, custody, and control of his or her child.”¹²⁴ The remaining Minnesota Grandparent Visitation Statute is still constitutional and valid.

In New Jersey, the Grandparent Visitation statute provides that grandparent visitation will be granted if the visitation is in the child’s best interests, and the statute provides certain factors to consider.¹²⁵ The New Jersey Supreme Court held the Grandparent Visitation statute was constitutional on its face, but also held “that grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child,” and further stated “that [the] burden is constitutionally required to safeguard the due process rights of fit parents.”¹²⁶

121. *Id.* at 171.

122. MINN. STAT. ANN. § 257C.08(1) (West 2007).

123. MINN. STAT. ANN. § 257C.08(7) (held unconstitutional in *Sooahoo*).

124. *Sooahoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007)

125. N.J. STAT. ANN. § 9:2-7.1 (West 2002).

126. *Moriarty v. Bradt*, 827 A.2d 203, 205 (N.J. 2003).

In South Carolina, the Grandparent Visitation statute provided that a court could order grandparent visitation, if it “would be in the best interests of the child and would not interfere with the parent/child relationship.”¹²⁷ The South Carolina Supreme Court ruled this statute as unconstitutional as applied, and stated that

[b]efore visitation may be awarded over a parent’s objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child’s best interest.¹²⁸

THE HARM STANDARD FOR DETERMINING GRANDPARENT VISITATION

The “harm” statutes require evidence that shows that not only will the grandparent visitation be in the child’s best interest, but the grandchild will be harmed (physically, emotionally, or mentally) by the denial of grandparent visitation and/or loss of the grandparent-grandchild relationship (Missouri,¹²⁹ Oklahoma,¹³⁰ Tennessee,¹³¹ and Texas¹³²).

For example, in Missouri, the Missouri Grandparent Visitation statute provides that the court shall determine grandparent visitation by either (1) whether it is in the child’s best interests, or (2) “if it would endanger the child’s physical health or impair the child’s emotional development.”¹³³

The Oklahoma Grandparent Visitation statute states that the parental presumption that parents are acting in the best interests

127. S.C. CODE ANN. § 63-3-530(33) (West 2002).

128. *Camburn v. Smith*, 586 S.E.2d 565, 568 (S.C. 2003).

129. MO. ANN. STAT. § 452.402(2) (West 2008)

130. OKLA. STAT. ANN. tit. 10, § 5 (West 2007) (only if fit parent is objecting to grandparent visitation).

131. TENN. CODE ANN. §§ 36-6-306,36-6-307 (2005).

132. TEX. FAM. CODE ANN. § 153.433(2) (Vernon 2008).

133. MO. ANN. STAT. § 452.402(2) (West 2008).

of the child can be rebutted by showing the child would suffer harm, or even potential harm, if grandparent visitation was not granted.¹³⁴

THE BENEFITS STANDARD FOR DETERMINING GRANDPARENT VISITATION

The fourth and last type of statute concerns itself with the benefits that flow from the grandparent-grandchild relationship to the child. In Nebraska,

the court shall require evidence concerning the beneficial nature of the relationship of the grandparent to the child. The evidence may be presented by affidavit and shall demonstrate that a significant beneficial relationship exists, or has existed in the past, between the grandparent and the child and that it would be in the best interests of the child to allow such relationship to continue. Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.¹³⁵

OTHER MATTERS TO CONSIDER: WHETHER GREAT-GRANDPARENTS ARE INCLUDED IN GRANDPARENT VISITATION STATUTES AND THE EFFECT OF A GRANDCHILD BEING ADOPTED BY A NON-RELATED THIRD PARTY

There are two other matters to note, whether great-grandparents are included in grandparent visitation statutes and the effect of the child's adoption by a non-related third party, not a stepparent.

The following states explicitly state that grandparent visitation statutes include great-grandparents: Arizona,

134. OKLA. STAT. ANN. tit. 10, § 5(A)(1)(b) (West 2007).

135. NEB. REV. STAT. § 43-1802(2) (2004).

Arkansas, Idaho, Illinois, Iowa, Nevada, North Dakota, Oklahoma, South Dakota, and Wisconsin.¹³⁶

The following states explicitly state that adoption terminates a grandparent's rights to visitation: Arizona, Arkansas, Colorado, Illinois, Massachusetts, Michigan, Missouri, Montana, North Carolina, North Dakota, Tennessee, and Texas.¹³⁷

CONCLUSION

After reviewing the grandparent visitation statutes of the fifty states and the District of Columbia, it is clear that grandparent visitation laws are inconsistent and unstable. The aftermath of *Troxel* resulted in many constitutional attacks on states' grandparent visitation statutes, resulting in these statutes being found unconstitutional facially or as applied, or in legislators drafting new legislation to try to comport to the holding of *Troxel*. These attacks still continue to this day and the laws concerning grandparent visitation remain unsteady, and subject to change.

136. ARIZ. REV. STAT. ANN. § 25-409(E) (2008); ARK. CODE ANN. § 9-13-103(a)(1) (2002); IDAHO CODE ANN. § 32-719 (2006); 750 ILL. COMP. STAT. ANN. § 5/607(b)(1) (West 2009); IOWA CODE ANN. § 600C1 (West 2008); NEV. REV. STAT. ANN. § 125C.050(1) (LexisNexis 2004); N.D. CENT. CODE § 14-09-05.1 (2004); OKLA. STAT. ANN. tit. 10, § 5(I) (West 2007); S. D. CODIFIED LAWS § 25-4-52 (2004); WIS. STAT. § 767.43(1) (2007).

137. ARIZ. REV. STAT. ANN. § 25-409(F) (2009); ARK. CODE ANN. § 9-13-103 (1987); COLO. REV. STAT. ANN. § 19-1-117(1)(b) (West 2005); 750 ILL. COMP. STAT. ANN. § 5/607 (West 2009); MASS. GEN. LAWS ANN. ch. 119, § 39D (2008); MICH. COMP. LAWS ANN. § 722.27b (West 2002); MO. REV. STAT. § 452.402(1) (2003); MONT. CODE ANN. § 40-9-102(8) (2007); N.C. GEN. STAT. §50-13.2 (2007); N.D. CENT. CODE § 14-09-05.1 (2004); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (2005); TEX. FAM. CODE ANN. § 153.433 (Vernon 2008).

