Have State Judiciaries Become Legislatures When Grandma Comes to Court?: State Court Decisions in the Post-Troxel Era

Paula A. Lorfeld
HAVE STATE JUDICIARIES BECOME LEGISLATURES WHEN GRANDMA COMES TO COURT?: STATE COURT DECISIONS IN THE POST-TROXEL ERA

Paula A. Lorfeld*

Set against the background of evolving technologies and shifting societal norms, the American family has been redefined. The traditional notion of a family has been abandoned as society has moved away from a June and Ward Cleaver family model toward an inclusive model consisting of one-parent families, combined or mixed families, and even same-sex parenting units. The transition reflects a rise in divorce rates, one-parent families or non-marital relationships, stepfamilies, and the increasing mobility of the average American citizen. In response to the re-definition of the American family, grandparents have found themselves taking on larger and more complex roles in the lives of their grandchildren.1 Instead of living autonomously from the lives of their children and grandchildren where contact is of an arms-length supportive nature, grandparents have taken on roles in the redefined American family that range from completely absent to primary caregiver, and all levels in between.

As grandparent roles are redefined along with the American family, the rights of grandparents to obtain visitation with grandchildren over the objection of parents has become an issue of great debate. Disputes between parents and grandparents regarding the appropriate role of non-parents in children’s lives have surfaced in state legislatures and courts.2 Many states have enacted legislation that employs a “best interest of the child”

*Paula A. Lorfeld received her undergraduate degree in Psychology from Gustavus Adolphus College in Minnesota. She graduates from the Marquette University Law School in May 2004, and will begin her professional career in June 2004, with the firm of Herrling, Clark, Hartzheim & Siddall, Ltd., in Appleton, Wisconsin.

test or a “harm standard” that attempts to weigh state intervention on behalf of grandparents against parental constitutional rights in determining the scope of non-parent visitation.\(^3\) The question posed frequently to legislatures and courts is whether state statutes enacted to provide for grandparent visitation have tread too heavily upon the fundamental constitutional rights of parents to direct the upbringing of their children.

**The Crux of Troxel**

In *Troxel v. Granville*,\(^4\) the U.S. Supreme Court held that non-parent visitation statutes were not unconstitutional as a per se matter, but mandated that the statutes be applied with a presumption in favor of a fit parent’s rights. The lead opinion in *Troxel* specifically directs that non-parent visitation statutes must hold a presumption in favor of a fit parent’s judgment when analyzing the application of the statutes. The Court relied upon the central themes of its past cases such as *Meyer v. Nebraska*, *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, and *Prince v. Massachusetts*, in which the Court validated parents’ constitutional right to direct the upbringing of their children and restricted state intervention that would hinder such upbringing.\(^5\) But, the *Troxel* Court did not direct an overriding criterion that a court must employ in its ultimate decision with regard to non-parent visitation. Although *Troxel* addressed the “best interest of the child” standard and spoke to its inadequacy if it lacked consideration of a parental presumption, the opinion’s vagueness allows state courts to resolve questions of grandparent visitation on a case-by-case basis. It also implied that courts have the ability to find a parental presumption in a statute that literally did not include such a presumption. Thus, instead of directing legislatures to redraft the non-conforming statutes, *Troxel* has effectively allowed courts to construe legislative intent into statutes that never existed.

Given the less than clear standard that the Court relates in that case, it is not surprising that state courts continue to differ in their interpretation and application of *Troxel*. All courts seem to cling to *Troxel’s* holding that visitation statutes are not uncon-

---

5. See generally, 262 U.S. 390 (1923); 262 U.S. 390 (1923); 321 U.S. 158 (1944).
stitutional per se, but that the statutes must provide a presumption in favor of a fit parent’s rights concerning grandparent or third-party visitation. Yet, many state courts have not called for a redrafting of their visitation statutes in an effort to comply with Troxel. Instead, the Court’s holding has been interpreted to vest state courts with a quasi-legislative role that allows them to narrowly interpret their state statutes and read into them a presumption in favor of parents that was not originally intended by the drafting legislatures. Thus, in an effort to find a state’s non-parent visitation statute constitutional and avoid a legislature redrafting of the statute, the application of Troxel has vested state courts with enormous discretion that prevents a uniform standard for non-parent visitation to emerge across the states. Troxel has effectively allowed state judiciaries to step out of their judicial roles and into the roles of state legislatures. This discretion leaves both parents and grandparents unsure of where they stand with regard to their relationships with familial children.

This Comment examines the different approaches state courts have taken in the analysis of their grandparent and third-party visitation statutes in the post-Troxel era.

THE APPLICATION OF TROXEL IN STATE COURTS

In the post-Troxel era, state courts have found themselves struggling with the application of Troxel to their non-parent and grandparent visitation statutes. The courts analyze their statutes for validity pursuant to their own state constitutions and the Due Process Clause of the Fourteenth Amendment. As a result, state courts have reached different conclusions concerning their visitation statutes. These different conclusions can be attributed to the different interpretations each court has arrived at as being the law set forth in Troxel.

In the state court decisions discussed below, it can be shown that state courts analyze their visitation statutes pursuant to an interpretation of Troxel and reach one of two outcomes. First, a court may hold that the non-parent visitation statute is facially unconstitutional under the state constitution, the federal Constitution, or both. Alternatively, the court may find that the visitation statute is facially constitutional if the court holds that the statute has an implicit presumption in favor of a fit parent’s de-

6. Troxel, 530 U.S. at 73.
cisions regarding the upbringing of a child.

VI**SITATION STATUTES HELD FACIALLY UNCONSTITUTIONAL**

In the first line of cases discussed, the state courts have held non-parent visitation statutes, either in their entirety or in sections, facially unconstitutional in light of *Troxel*. In these instances, the courts have rejected the statutes' validity and directed the legislatures to amend the statutes to include a presumption in favor of a fit parent to bring their non-parent visitation statutes in line with the requirements of *Troxel*.

The Supreme Court of Illinois held section 607(b)(1) of the Illinois Compiled Statutes, which authorizes grandparent visitation, was unconstitutional on its face for lack of a presumption in favor of the parent. *Wickham v. Byrne* is a consolidated action where grandparents filed for visitation rights with grandchildren. In the first petition, a grandmother filed for visitation rights with her grandchild pursuant to section 607(b)(1) after the death of her daughter. In the daughter's last will and testament, she expressed a wish for frequent visitation between her child and her mother. After the daughter's death, the child's father attempted to restrict visitation between the grandmother and the grandchild and the grandmother filed for visitation. The district court ordered visitation, and the father appealed. The appellate court reversed the ruling in favor of the father, and the grandparents appealed to the Illinois Supreme Court. In the second case, grandparents filed for visitation with their two grandchildren after their son died and their daughter-in-law attempted to restrict the amount of time the children spent with them. The trial court ordered visitation, and the mother appealed. The appellate court reversed, and the grandparents appealed. The Illinois Supreme Court proceeded to find the grandparent visitation statute unconstitutional on its face.

Interestingly, *Wickham* was not the first case in which the court addressed the Illinois grandparent visitation statute. In 2000, the court decided that the statute was constitutional as applied in the case of *Lulay v. Lulay*, but the court did not address the facial constitutionality of the statute as it stated that the query was not before the court. In *Wickham*, the court analyzed

---

8. 769 N.E.2d 1 (Ill. 2002).
the facial validity of the statute pursuant to *Troxel*. Section 607(b)(1) allows for visitation by grandparents, great-grandparents, and siblings of minor children when a court determines such visitation is in the best interest of the child.\(^{10}\) The court identified the Illinois statute as parallel to the Washington statute at issue in *Troxel* to the extent it was breathtakingly broad and that the statute did not contain a presumption in favor of a fit parent's decision.\(^{11}\) The court went on to state that the flaw in the statute is that it "places the parent on equal footing with the party seeking visitation."\(^{12}\) Such a situation would allow the state to infringe upon a fit parent's Fourteenth Amendment rights. Therefore, the court found the grandparent visitation statute facially unconstitutional and did not further consider whether the statute had been unconstitutional as applied.

The Supreme Court of Iowa similarly held its grandparent visitation statute to be unconstitutional after the *Troxel* decision in two recent cases. In *Santi v. Santi*,\(^{13}\) the court examined section 598.35(7) of the Iowa Code.\(^{14}\) The statute allows for an order of visitation if the parents of the child unreasonably refuse or restrict visitation, if the grandparents have a substantial relationship with the child, or if the visitation would be in the child's best interests.\(^{15}\) In *Santi*, grandparents petitioned for visitation pursuant to section 598.35(7) when the grandchild's parents refused to allow contact between the grandparents and the child.\(^{16}\) Unlike in many of the cases involving such disputes, both parents of the child were still living and none of the parties were even marginally unfit to supervise a child. Unfortunately, many small and insignificant disputes over how much fast food the child should have at grandma and grandpa's, whether the grandparents could take the child to see Santa Claus, and who would buy the child's first pair of shoes, escalated into the parties coming before the court.

The district court held that the statute was facially unconstitutional under the state constitution because absent a requirement of harm, it deprived parents of their fundamental right to

---

10. Wickham, 769 N.E.2d at 7.
11. *Id.*
12. *Id.*
13. 633 N.W.2d 312 (Iowa 2001).
14. *IOWA CODE § 598.35(7) (1999).*
15. *Id.*
16. Santi, 633 N.W.2d at 312.
determine their child’s upbringing. The grandparents appealed. The Iowa Supreme Court affirmed the holding. The court held that the statute specifically contravened Troxel’s holding, which requires a grandparent visitation statute to include a presumption in favor of a fit parent. Instead, it allowed a court to substitute its judgment with regard to the best interests of the child. The court stated that because Troxel was unclear as to the standard of scrutiny that a non-parent visitation statute should be held to, it would hold that such an intrusion by the state into a parent’s rights specifically violates the Iowa constitution and must survive a strict scrutiny analysis to be valid. Therefore, the court held that the statute was facially unconstitutional.

In a second and more recent case in Iowa, the supreme court again held that its grandparent visitation statute was unconstitutional on its face. In Marriage of Howard, the court held that section 598.35(1) of the Iowa Code, which permits grandparents to petition for visitation when the parents of the child divorce, was unconstitutional. The district court initially denied the visitation because it granted joint custody to each parent and the court presumed that the paternal grandparents could spend time with the child when she was staying with her father. Unfortunately, the child’s father did not get treatment for a substance abuse problem and the contact between the father and child waned. This alternatively affected the paternal grandparents’ visitation with the child, and they renewed their petition for independent visitation. The district court then granted limited visitation, stating that the supreme court’s ruling in Santi was inapplicable to the case before it. The mother appealed.

The Iowa Supreme Court reiterated its holding in Santi, and further stated that in the situation of divorced parents, the statute was also deficient because it failed to afford fit parents a presumption in their favor. The court held that to substitute parents’ judgment with the court’s judgment is an infringement upon parents’ fundamental right to direct the upbringing of their children. Therefore, the statute was held facially unconstitutional and the district court’s order of visitation was reversed.

17. Id. at 315.
18. Id. at 320.
19. Id. at 318.
20. 661 N.W.2d 183 (Iowa 2003).
VISITATION STATUTES HELD FACIALLY CONSTITUTIONAL

The second line of cases that are discussed below demonstrate that a majority of state courts have interpreted Troxel to allow them the extent of judicial discretion needed to read into their existing non-parent visitation statutes the parental presumption requirement of Troxel. The courts have then found their state statutes constitutional, but may find the statutes have merely been unconstitutionally applied.

In Roth v. Weston, the Connecticut Supreme Court held that its grandparent visitation statute was unconstitutional as applied. The trial court granted visitation to the maternal grandmother and aunt of the children pursuant to section 46b-59 of the Connecticut statutes, which allows for visitation by relatives if a court determines it is in the best interest of the child. The mother of the grandchildren committed suicide, and the father refused to allow contact between the children and the petitioners. In analyzing the facial constitutionality of the statute, the court stated that it had two options when addressing the deficiencies of the statute with regard to the parental presumption mandated by Troxel. First, it could hold the statute facially unconstitutional and unconstitutional as applied. Or, second, it could interpret the statute to be constitutionally compatible with Troxel and parents' due process rights and allow the statute to continue functioning within constitutional bounds. The court chose the latter. The court construed the visitation statute to include a presumption in favor of a fit parent's fundamental right to direct the upbringing of a child that will then be implicit in the statute. The court held that such construction would narrow the statute sufficiently to align it with the holding in Troxel. Further addressing the application of the statute, the court found that the trial court had not afforded the fit parent the presumption required beneath Troxel and instead decided the case solely upon a best interest of the child standard. Thus, the court found the statute facially constitutional, but unconstitutional as applied when a parental presumption was read as implicit in the

---

22. 789 A.2d 431 (Conn. 2002).
23. CONN. GEN. STAT. ANN. §§ 46b-59 (West 2002).
24. Roth, 789 A.2d at 435.
25. Id. at 449.
26. Id. at 437-38.
27. Id. at 444.
statute as according to *Troxel*.

The Supreme Court of Kansas visited the topic of grandparent visitation rights in *Skov v. Wicker*. The maternal grandmother and great-grandmother of a child filed a consolidated motion for visitation with the child pursuant to section 60-1616(b) of the Kansas Statutes. The statute stated that grandparents and stepparents shall be given visitation without restrictions. The district court overruled the petition and the consolidated action was appealed to the supreme court.

The supreme court analyzed the statute and found that it could construe it to be constitutional beneath the parental presumption requirement mandated in *Troxel* if the court held the statute contained an implicit presumption in favor of a fit parent’s rights when contemplating non-parent visitation. The court went on to explain that it would construe section 60-1616(b) according to section 38-129(a) of the Kansas Statutes, which held that the visitation must be in the best interest of the child and that there is a substantial relationship between the parties. The court, deferring the parental presumption of *Troxel*, instructed the lower courts to give special weight to the parent’s decision regarding the upbringing of the child. Thus, the Kansas court utilized judicial discretion that would allow it to interpret the statute in a constitutionally valid light.

The California Court of Appeals likewise held that its grandparent visitation statute was facially constitutional, but unconstitutional as applied. In *Punsly v. Ho*, paternal grandparents petitioned for and received visitation beneath section 3102 of the California Family Code after their son died and his ex-wife restricted visitation. The statute states that the parents of a deceased child may have reasonable visitation with their grandchildren if visitation would be in the best interest of the child. The court, like the Connecticut Supreme Court, construed the statute in light of the requirements set forth in *Troxel* to find the statute facially constitutional. Specifically, the court interpreted the statute with a presumption in favor of a fit par-

---

28. 32 P.3d 1122 (Kansas 2001).
29. KAN. STAT. ANN. § 60-1616(b) (Supp. 2000).
30. Skov, 32 P.3d at 1125-27.
32. Skov, 32 P.3d at 1127.
34. CAL. FAMILY CODE § 3102 (West 2001).
35. *Id.*
ent’s decision. Upon application, the court held that it could not rely solely upon the best interest of the child, but must consider a presumption in favor of a fit parent to safeguard the parent’s Fourteenth Amendment rights. Therefore, the court held that the statute was unconstitutionally applied in the superior court because the judge did not apply a presumption in favor of the fit parent’s decision.36

The Supreme Court of Vermont upheld the constitutionality of the state’s grandparent visitation statute, but found the statute unconstitutional as applied. In Glidden v. Conely,37 a maternal grandmother sought and was granted visitation in trial court pursuant to section 1011(a) of the Vermont Code.38 The grandmother in this case had been guardian and primary caregiver of the child until the child’s father was awarded primary physical custody when the child was seven years old. Section 1011(a) employs a best interest of the child standard in evaluating visitation. The father petitioned the court to reconsider the visitation, and his claim was dismissed. He appealed. The Supreme Court of Vermont considered 1011(a) in light of Troxel and held that the court could, and should, interpret 1011(a) to contain a presumption of deference to a fit parent’s decision-making regarding the upbringing of a child.39 Therefore, although the court held 1011(a) to be constitutional, it found the application unconstitutionally infringed upon the father’s rights under the Due Process Clause of the Fourteenth Amendment.40 In an effort to correct the unconstitutional application of the statute, the court reversed the lower court’s holding and instructed that a presumption in favor of a fit parent be implicit in the visitation statute.

Similarly, the Wisconsin Court of Appeals held its grandparent visitation statute to be facially constitutional in In re Paternity of Roger D.H.41 In 1997, Roger was the subject of a paternity action. After determining paternity, the paternal grandmother and Roger’s mother entered into a stipulated visitation agreement.42 Later the mother refused visitation, and the grandmother sought to enforce visitation pursuant to section

37. 820 A.2d 197 (Vt. 2003).
38. VT. STAT. ANN. TIT. 15 § 1011(a) (2003).
39. Glidden, 820 A.2d at 204.
40. Id. at 207.
41. 641 N.W.2d 440 (Wis. App. 2002).
42. Id. at 442.
Section 767.245(3) of the Wisconsin Statutes applies a best interest of the child standard and lists several other factors that a court is to consider. The factors do not specifically mention a parent's interest in the child's rearing. Upon petition, the trial court vacated the stipulated agreement for visitation holding that the grandmother did not demonstrate that Roger's mother was "unfit." The guardian ad litem appealed on the grandmother's behalf. The court of appeals discussed the nature of grandparent visitation in light of the decision reached by the U.S. Supreme Court in Troxel. The court held that Troxel encourages state courts to read in a presumption that a fit parent acts in the best interests of a child and give such presumption special weight. The court held that such presumption be read into the statute and applied accordingly. Because the lower court did not specifically read in a presumption in favor of Roger's mother when applying the visitation statute, the court reversed the lower court's holding and remanded it on the grounds that the court had applied an erroneous standard. Therefore, the court interpreted 767.245(3) narrowly to avoid facial unconstitutionality as allowed by Troxel and established that the statute held a presumption in favor of a fit parent.

The Post-Troxel Era and the Resulting Judicial Legislation

Post-Troxel decisions clearly demonstrate that courts realize a fit parent's rights cannot be eclipsed by a court's willingness to substitute its judgment for that of a parent. The courts have abided by this presumption even when they may implicitly favor a continuing relationship between grandparent and grandchild generations. Yet, in light of Troxel's ambiguous holding and its failure to specify how courts may come to a uniform criteria when applying grandparent visitation, state courts have found different ways to implement the central theme of the Troxel decision.

As a general trend, it can be discerned that most courts have expressed an overwhelming unwillingness to find their state's non-parent visitation statutes facially unconstitutional. Of the cases discussed above, only the supreme courts of Illinois and

44. Roger D.H., 641 N.W.2d at 445.
45. Id.
Iowa held that their non-parent visitation statutes were unconstitutional on their faces because the statutes lacked a specific presumption in favor of the parent. In contrast, the other state courts, a few of which are discussed above, have merely read in a presumption for the parent or even interpreted such a presumption to exist in their statutes. Thus, the courts saved the constitutionality of the statutes and then struck down any application of the statute that did not consider the parental presumption.

One may then ask whether this reading in or interpretation of such a presumption by the courts is the most appropriate approach. Or, is this approach merely allowing for a breadth of judicial discretion that the Troxel court never contemplated? These queries remain the crux of the problem with Troxel and its holding's inability to create a uniform standard for non-parent visitation rights across the states. The ambiguities that it has left in its wake have made its application undirected for the most part and left a place in state family law in which judicial activism has the potential to be extreme.

CONCLUSION

It is apparent that Troxel and post-Troxel decisions addressing the constitutionality of non-parent visitation statutes have responded to society's growing concern that parental rights are being diminished as the demographics of the American family change. The decisions demonstrate a deference that the legal system has determined must be afforded to parents' rights over the desires of non-parents. The mandatory parental presumption that Troxel set forth for non-parent visitation statutes has carried into state courts' decisions in an attempt to secure parent rights, but Troxel's holding has left discretion to courts in determining the comprehensive analyses of visitation statutes. The ambiguities of Troxel and the lack of a uniform standard for grandparent visitation have ultimately disappointed parents who believe that they have the ultimate right to raise their children as they see fit and also grandparents who believe that they

46. Several other states have also found their grandparent visitation statutes to be unconstitutional, including Michigan, but a majority of the state court decisions addressing non-parent visitation and the application of Troxel have found their statutes constitutional if the court chooses to read a parental presumption into the statute.

47. See Roberts, supra note 2, at 25.
have a right to a relationship with a grandchild.

With all of this said, it can be seen that Troxel does not resolve the status of non-parent visitation statutes and grandparent privileges. In fact, the breadth of judicial discretion that Troxel seems to vest with the courts in their ability to read into statutes legislative intent that was not part of the original drafting will certainly not promote any emergence of a uniform standard for non-parent visitation analysis across the states. Only time, additional legislative redrafting, and further judicial consideration regarding the status of non-parent visitation statutes will determine the constitutional rights of parents, the privileges of grandparents, and a uniform criteria to be used in state courts in the analysis of these rights.