

Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade

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I. Introduction

This article surveys the issue of grandparent visitation throughout the United States. Although the examination of this issue regularly begins with an analysis of what is commonly referred to as “grandparents’ rights,” an individual grandparent’s right to visitation invoked in such an analysis is only the right *to have standing to pursue visitation* with a grandchild. The right of a grandparent to visit with one’s grandchild is never the issue before a court. As this article explains, the more fundamental right affected by grandparent visitation jurisprudence is *the child’s right to a continuing relationship with his or her own family, namely, a grandparent*—usually over the objection of the child’s own parent. Therefore, when analyzing this issue for purposes of this article, our aim is to illuminate the fact that judges are often in the position of weighing the rights of parents versus the rights of the parents’ own children.

Another purpose of this article is to reveal the current nationwide cacophony of grandparent and third-party visitation law across the United States. The landscape of these laws across the country is as varied as the scenery itself from Maine to Alaska. There is no uniformity among state laws; and there is no authority of guidance for state legislatures. Instead, as this article explains, the entire nation is a virtual “wild west” of wide-ranging trial court interpretations and appellate court decisions that at-

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tempt to reconcile the language in the one United State Supreme Court case that has touched upon this issue.

At the center of this inconsistency are three disputes as to how courts should treat a fit parent's decision to deny their child access to another member of the child's family. Part II of this article explores the history of grandparent and third-party visitation and explains the evolution of how state courts were asked to interpret and weigh a child's right to have contact with a family member over the objection of a parent. Part III analyzes modern national and state jurisprudence, as well as recent trends throughout state legislatures, as they struggle to craft legislation that is consistent with constitutionally protected rights. Finally, the article concludes with a brief reminder regarding the seminal issue that arises in grandparent visitation cases and the dichotomy between the interests at stake in these cases.

One of the most important issues involved is the distinction between a "fit" parent and an "unfit" parent. For purposes of custody and visitation, this difference has neither been explained nor defined.¹ Second, there is the specific level of deference or "weight" that trial courts must afford a fit parent's decision to deny visitation. This too is neither elucidated nor defined in any nationally precedential jurisprudence that can assist state legislatures and courts. Third, there is the issue of what standard should be placed on the grandparent with standing to seek visitation. Should a grandparent have to prove that the denial causes the child harm or that it merely poses a risk of harm? Some states have indicated that the petitioning grandparent must show only that the denial is not in the child's best interests.² Other

¹ See *Hunter v. Hunter*, 771 N.W.2d 694 (Mich, 2009). One of the issues the court attempted to resolve was the definition of an "unfit parent" in child custody cases, which even now has only been attempted within a specific body of case law and has never been addressed by the Michigan Legislature within the confines of the Michigan Child Custody Act. See *In Re Anjoski*, 770 N.W.2d 1 (Mich, Ct, App. 2009). The Michigan Supreme Court overruled *Mason v. Simmons*, 704 N.W.2d 104 (Mich. Ct. App. 2005) and held that a biological parent's unfitness cannot be used by the court to deprive the parent of the presumption that it is in the child's best interest for custody to be awarded to the parent. Rather, the court should apply its finding of parental fitness to its overall best interest findings.

² See, e.g., MASS. GEN. LAWS. ANN. 119 § 39D (West 2008); N.M. STAT. ANN. § 40-9-2 (West 1999).

states force a grandparent to prove that the parent's decision causes a substantial risk of harm to the child.³ Last, what is the level of the burden placed on the grandparent? In some states, the grandparent must prove they have overcome the initial burden by a preponderance of the evidence; while other states require the higher, clear and convincing level of proof to rebut the presumption that a fit parent is making a decision that is in the child's best interests.⁴

Proponents of grandparent visitation legislation are rarely people who are "pro-grandparent." Instead, they are usually child advocates who are committed to protecting children from the harm that follows from the decision to cut a child off from a family member with whom the child has a history of a loving and emotionally bonded relationship. In fact, one of the most important issues to grandparent visitation advocates has nothing to do with actually obtaining visitation for the grandparent and child at all. What matters most to a child is facilitating an environment where the child's disputing family members can sit, talk, and overcome their differences in order to provide peace for the child caught in the middle of the dispute. The national non-profit Grandparent Rights Organization, which has lobbied in all fifty states for grandparent legislation, has made it clear that, "just because you have a law does not mean you have to have a lawsuit."⁵ The mere threat of litigation is often all that is needed to bring formerly feuding family members into the same room again to discuss setting aside their differences to protect the best interests of the child involved.

The harm endured by children in these cases is similar to the injury children of divorcing parents suffer as they witness their parents at odds with one another. In these cases, children are torn between their own family members whom they love, but who no longer love each other. Parents involved in high-conflict

³ See, e.g., OKLA. STAT. ANN. tit. 43 § 109.4 (West 2008).

⁴ Compare, MICH. COMP. LAWS § 722.27b (2009); N.J. STAT. ANN. § 9:2-7.1 (2009) (using a preponderance of the evidence standard), with IOWA CODE ANN. § 600C.3 (2009); NEB. REV. STAT. § 43-1802 (2009); OR. REV. STAT. § 109.119 (2009) (using a clear and convincing evidence standard).

⁵ TODD C. BERG, GRANDPARENT VISITATION LAW BACK ON THE BOOKS: PROVIDES RECOURSE WHEN VISITATION IS DENIED, available at <http://www.grandparentsrights.org>, quoting Grandparents Rights Organization founder, Richard S. Victor (2005).

divorces are not advised to just let their kids fall by the wayside as they battle it out before them; they are instructed to demonstrate a unified front to alleviate the pressure children of divorce feel of having to choose sides between one family member and another.⁶ Without grandparent legislation that effectively provides standing to grandparents to bring quarreling family members to the table to figure out a way to overcome what has caused their animosity, children are left to navigate through the scorched earth that their own family members leave behind.

Opponents of third-party visitation laws have attempted to frame the issue of grandparent visitation as contrary to a parent's right to make decisions concerning the child versus a grandparent's right to see the child.⁷ A careful examination of the jurisprudence throughout the United States reflects that, in reality, the competing rights at odds with one another are not the rights of the parent versus the rights of the grandparent. These cases are even more riveting in nature than the conflicting rights of two adults, since they are fundamentally about the right of a parent versus the right of child.

The child's right to have a relationship with her own grandparents is usually violated when the child has lost a parent due to death or incarceration, or when the child's parents are divorced and one parent has limited or no visitation rights. In these cases, either the surviving or custodial parent is no longer related to one set of the child's grandparents. The child involved in these cases does not have standing to sue her parent to allow her to have contact with her own grandparents. To protect the children in these domestic disputes, 48 states have enacted laws that grant standing to the grandparents from whom the child is being alienated so that the child's rights can be brought to the attention of the court having jurisdiction over the child.⁸ Hawai'i and Wash-

⁶ See BEEN THERE!, the parent to parent publication by the Oakland County, MI Friend of the Court provided to parents who participate in the SMILE (Start Making It Livable for Everyone) program. The SMILE program has been implemented in all 50 states and in Australia.

⁷ Brief of Amici Curiae for the Majority of the Family Law Section of the State Bar of Michigan at 2-3, *Hunter v. Hunter*, 771 N.W.2d at 694.

⁸ All grandparent visitation statutes contain provisions regarding jurisdiction. None of these laws grant jurisdiction over the case based on where the grandparent lives—jurisdiction is based on where the child resides. The fact that courts first consider where the child resides is circumstantial proof of the

ington are the only states that do not have a grandparent visitation statute in effect.⁹

To fully understand how these disputes are now resolved across the country, it is essential to be familiar with the origins and history of third-party and grandparent visitation cases. It is also important to recognize that as the traditional American family has transformed from a two-parent nuclear home to the multiple variations of the American family that exist today, the risk to children has increased as they grow up being raised by and establish close and continuing bonds with people other than their biological parents. Finding a balance between this reality and the fundamental right a biological parent has over a child is essentially what courts have been trying to do for the past forty years. However, the rights of a child to have his or her best interests considered have trumped the right of the parents to the control of their children for over a century.¹⁰

fact that the court's inquiry is focused on the child, and not the grandparent. See, e.g., KY. REV. STAT. § 405.021(1) (West 2009); MICH. COMP. LAWS § 722.27b (2009).

⁹ In *Doe v. Doe*, 172 P.3d 1067 (2007), the Supreme Court of Hawai'i held the state's statute permitting grandparent visitation unconstitutional on its face in light of *Troxel v. Granville*, 530 U.S. 57 (2000). The case was initiated by grandparents who filed a petition requesting visitation after the parents divorced. The child's mother, the sole custodial parent, successfully moved to dismiss the petition. The Hawaiian statute permitted the court to award visitation if it was in the best interest of the child. The Court opined that the statute was not narrowly tailored to further a compelling government interest. The Supreme Court of Hawai'i went on to opine that an amendment to the statute would be necessary and that a "harm to the child" standard was constitutionally required, and could not be read into the governing statute. At the time of publication of this article, it appears that the regular session of the 2009 legislature, as a part of its working group committee, may review possible procedures for drafting a new grandparent visitation statute. In the State of Washington, legislation is currently pending legislation in the form of 2009 WA HB 2056 that will reenact a grandparent visitation statute after that state's former statute was found unconstitutional in *In re Parentage L.B.*, 122 P.3d 161 (Wash. 2005).

¹⁰ See *Legate v. Legate*, 28 S.W. 281 (Tex. 1894) (holding that "the right of the parent or the state to surround the child with proper influences is of a governmental nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived."); *Accord Ex Parte Crouse*, 4 Whart. 9, 1839 WL 3700 (Pa. 1839) (observing that when parents are incapable of fulfilling parental duties and responsibilities, the

II. History of Grandparent and Third-Party Visitation

Grandparent (and for that matter any nonparent) visitation statutes have no foundation in common law. They are the creation of individual state legislatures that have attempted to recognize the rights of children who have been amputated by a parent from other family members.¹¹ At common law, visiting with extended family was deemed a moral obligation, not a legal right.¹² Prior to 1965, third parties, including close family members, had no legal right to assert a claim that it was in a child's best interests for a court to order contact between the child and the family member over the parent's objection.¹³ The past forty years have shown drastic changes in attitudes, opinions, and judgments about what the state must do to protect children amidst their families' domestic disputes.

As rates of divorce began to rise throughout the United States in the mid-1960s, state legislatures became concerned with the impact of the dissolution of the nuclear family on children of divorcing and separating parents. In response to their concerns, states began granting relatives of these children standing to seek visitation in custody and marriage dissolution proceedings.¹⁴ The following thirty years saw steady changes to the reality, and thus the concept, of traditional family life;¹⁵ while simultaneously, with increased longevity, society has seen a dramatic increase in the number of citizens who are grandparents.¹⁶ This combination

biological parents can "be superseded by *parens patriae*"); *In re Waldron*, 13 Johns. 418 (N.Y. 1816) (finding that it is in the best interests of the child to remain with grandfather rather than be placed in the care of the father); *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1815) (using best interests of the child over parental rights to decide child custody issues).

¹¹ *White v. Jacobs*, 243 Cal. Rptr. 597, 597 (Cal. Ct. App. 1988).

¹² *See Succession of Reiss*, 15 So. 151, 152 (La. 1894).

¹³ MARTIN GUGGENHEIM, ALEXANDRA DYLAN LOWE & DIANE CURTIS, *THE RIGHTS OF FAMILIES* 19 (1996).

¹⁴ Brief of Amici Curiae of AARP and Generations United in Support of Petitioners at 6, *Troxel v. Granville*, 530 U.S. at 57.

¹⁵ JASON FIELDS, U.S. CENSUS BUREAU, *CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002* (2003) (discussing various characteristics of children's home life, including the presence of grandparents).

¹⁶ The United States has seen a rapid growth in its elderly population during the twentieth century. The number of Americans aged sixty-five and

of events has led to monumental changes in family dynamics and the role that grandparents play in the lives of their grandchildren.¹⁷ Between 1990 and 2000, the number of children being raised in grandparent-headed households increased by 29.7 percent, and the number of American children being raised solely by their grandparents in 2010 is expected to reach 590,000.¹⁸ That grandparents are playing an increasingly important role in the lives of their grandchildren is helpful to understand why an increasing number of children are at risk if their relationships are terminated. But what is even more crucial is the fact that these children—many of whom have been abandoned or neglected by a parent—may someday have their relationship with their grandparent subjected to the whim of the same parent who could not properly care for them in the first place.

Not only are more children being raised by their grandparents, they are also being raised by them for sustained periods of time. In October, 2003, the Census Bureau calculated that 39 percent of the children being raised by their grandparents had been in grandparent-headed households for at least five consecutive years.¹⁹ These trends are likely to continue as drugs, poverty, and single parenthood put grandparents in positions of establishing custodial environments for their grandchildren, marked by characteristics of the grandchildren looking to their grandparents for guidance, discipline, comfort, and the necessi-

older climbed from 3.1 million in 1900 to 35 million in 2000. During the same time, the ratio of elderly Americans to the total population jumped from 1 in 25 to 1 in 8. U.S. Society, Census, & Demographics, *available at* <http://www.usembassy.de/society-demographics.htm> (last visited Feb. 22, 2009). By 2010, AARP projects the number of grandparents will reach 80 million.

¹⁷ More than six million children—approximately 1 in 12—are living in households headed by grandparents (4.5 million children) or other relatives (1.5 million children). In many of these homes, grandparents (approximately 2.4 million) and other relatives are taking on primary responsibility for the children's needs. Often they assume this responsibility without either of the child's parents present in the home, *available at* http://www.grandfactsheets.org/state_fact_sheets.cfm (last visited Feb. 22, 2009).

¹⁸ AARP Grandparent Information Center, Census 2000 Number and Percentage Change Since 1990 Children Under 18 Living in Grandparent-headed Households, http://assets.aarp.org/www.aarp.org/_articles/careandfamily/table_1.pdf (last visited Apr. 2, 2009).

¹⁹ Grandparents Living with Grandchildren: 2000 Census 2000 Brief, <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf> (last visited Feb. 22, 2009).

ties of life.²⁰ But it does not take an extreme example such as living with a grandparent for five years for a child to form a strong emotional bond with a grandparent.

For over thirty years, courts have recognized that visits (several over an extended period of time or fewer of greater duration) with a grandparent are often a precious part of a child's experience and emotional growth and that there are benefits which devolve upon the grandchild from the relationship with her grandparents which she cannot derive from any other relationship.²¹ When legislatures first granted standing to grandparents allowing courts to hear these cases, courts were given great latitude with regard to what they could consider before awarding grandparent visitation. In many cases, the court needed only to consider what was in the best interests of the child involved.²²

These cases, involving this level of analysis, combined to form almost thirty years of jurisprudence, before finally being challenged and taken up by the United States Supreme Court in *Troxel v. Granville*.²³ Ironically, *Troxel* did not actually involve a specifically designated "grandparent visitation statute." The statute analyzed by the *Troxel* Court, as discussed below, was a broad and far reaching statute that allowed any nonparent to petition the court for visitation at any time. It just so happened that in the State of Washington, because the child involved in the *Troxel* case was born out of wedlock, the grandparents were forced to seek standing under this expansive and amorphous statute that was ripe for appellate review.

Up until the time that this Washington statute was challenged, there had been near silence across the country on the issue of grandparent visitation. Trial courts usually placed the burden of proof on the grandparent-petitioners to show why visitation would be in the child's best interests. Grandparents who had an established and bonded relationship with their grandchild-

²⁰ AARP Brief, *supra* note 14, at 14.

²¹ *Mimkon v. Ford*, 332 A.2d 199, 205 (N.J. 1975).

²² *See Ingram v. Knippers*, 72 P.3d 17 (2003), which discusses the history of Oklahoma's grandparent visitation statutes, indicating that title 10, section 5 of the Oklahoma Statutes allowed a court to grant grandparental visitation with a grandchild under certain circumstances if the court deems it to be in the child's best interest. This language was later found to be unconstitutional. *Id.* at 23.

²³ *Troxel*, 530 U.S. at 57.

dren normally prevailed in obtaining some court-ordered visitation. The decision of the parent to deny the visitation was not something that courts accorded any special reverence. In fact, most courts began their inquiry with the parent, asking “why don’t you want the child to see his grandparents?” All of that changed in June, 2000.

Prior to that time, states had virtually no direction other than twenty-year old case law to support the proposition that “fit parents act in the best interests of their children.”²⁴ This problem was made even more complicated by the fact that absolutely no existing jurisprudence identified whether a judge could award custody of a child to a non-parent without giving any deference or “weight” to the parent, simply as a matter of mere biology. In most states’ statutes, judges were instructed to engage in a straightforward best interest analysis and then award visitation based on this analysis.²⁵

The struggle between parents’ due process rights and best interest determinations finally collided in June, 2000, with *Troxel v. Granville*.²⁶ The issues involved were so fundamental that the case generated six opinions from the Supreme Court. Justice Sandra Day O’Connor’s plurality opinion ruled that each state’s grandparent visitation law must afford fit parents the presumption that they will act in the best interests of their children before even engaging in a general best interest analysis when there is a competing third-party.²⁷ The *Troxel* case involved a Washington state statute that allowed “any person” to petition for visitation rights “at any time” and authorized state superior courts to grant such rights whenever visitation may serve a child’s best interest.²⁸ No language in the state’s law mandated a court do anything other than determine if visitation was in the child’s best interests—based largely on the fact that there was no precedent to

²⁴ Parham v. J.R., 442 U.S. 584 (1979).

²⁵ A good example of the statutory language that existed for several decades throughout the country is found in the Kansas grandparent visitation statute. KAN. STAT. ANN. § 38-129 (2008) states that two conditions must exist before the district court can grant visitation. A substantial relationship must exist between the grandparent and the grandchild, and the visitation must be in the best interests of the grandchild.

²⁶ *Troxel*, 530 U.S. 57.

²⁷ *Id.*

²⁸ WASH. REV. CODE § 26.10.160(3) (2005).

govern these very emotional cases where courts had to look further than a best interest determination.

Prior to *Troxel*, a significant line of cases supported the position that a court's sole inquiry must be simply to determine the best interests of the child.²⁹ The best interests of the child ceased being the court's only consideration when the *Troxel* Court recognized and affirmed a parent's right to the care, custody, and control of a child, absent a showing of unfitness or failure to protect the child's welfare. However, the *Troxel* Court left to the states the responsibility of defining "parental fitness," and even more importantly, for purposes of litigating third-party custody and visitation cases, each state is responsible for drafting and interpreting the language that their courts use when "giving deference" to a fit parent. And although the *Troxel* Court indicated that the parent's right to the care, custody, and control of a child is "fundamental," it is not "absolute."³⁰

The *Troxel* plurality left the responsibility of enacting the appropriate third-party statutes to the states, as long as those statutes addressed the plurality's constitutional concerns that due process be afforded to a fit parent's decision to deny visitation by the trial court affording the parent's decision some "special weight."³¹ But the Supreme Court did not define the level of deference state courts must afford.³² This lack of specific direction from the *Troxel* Court has created a panoply of definitions, standards, and thresholds that state courts across the country apply to grandparent visitation cases.

Some of these variances are clearly designed to allow trial courts broad discretion in order to encourage grandparent visitation, while others are so restrictive it would seem as if no grandparent would ever be able to overcome the hurdles erected by their state legislature. Most states that had grandparent visitation legislation for over thirty years faced challenges to their statutes because these laws did not contain the strict standards set forth in *Troxel*. As a result, courts of appeal throughout the country were forced to find their state's statute facially unconsti-

²⁹ *Borsdorf v. Mills*, 275 So.2d 338 (Ala. Civ. App. 1973); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

³⁰ *Troxel*, 530 U.S. 57.

³¹ *Id.*

³² *Id.*

tutional.³³ In some states, these appellate decisions gave the legislature specific instructions to make their existing statute comply with *Troxel*.³⁴ In other states, the statute was simply nullified and the legislature was left to its own devices to make sense out of the Supreme Court's opinion that a grandparent visitation statute must: 1. Afford deference to a fit parent's decision to deny visitation; 2. Place the burden of proof on the grandparent; and 3. Make certain that the burden placed on the grandparent does not violate a fit parent's due process rights.

III. Post-*Troxel* Jurisprudence—Differences in Legislation across the U.S.

After the *Troxel* opinion was published, the battleground for grandparent visitation shifted back to state courts and legislatures, where opponents of grandparent visitation statutes immediately filed actions asking courts to find their statutes unconstitutional, and then lobbied those legislatures to enact statutes that made it difficult for grandparents to gain standing to sue for visitation. The first issue that had to be reconciled was whether the existing statutes being challenged adequately deferred to a fit parent's right to make decisions concerning his or

³³ See *Hiller v. Fausey*, 904 A.2d 875, 883 (Pa. 2006), in which Justice Baer commented on *Troxel* that:

all the Justices, with the exception of Justice Scalia, recognized the existence of a constitutionally protected right of parents to make decisions concerning the care, custody, and control of their children, which includes determining which third parties may visit with their children and to what extent. Further, a majority agrees that fit parents are entitled to a presumption that they act in the best interests of their children. However, while Justices Stevens and Kennedy explicitly concluded that the Constitution did not require a third party requesting visitation to demonstrate that the child would be harmed by the lack of visitation, the plurality refused to speak on the issue. Although Justice Thomas would apply a strict scrutiny standard of review to infringements of a parent's fundamental right, the rest of the Court was notably silent on this issue. Instead, the court left the decision, at least for the present, to the states in their case-by-case application of individual statutes.

³⁴ See *DeRose v. DeRose*, 643 N.W.2d 259, 263 (Mich. Ct. App. 2002).

her children.³⁵ Some argued it was necessary to insert language that included a presumption that had to be rebutted by a competing grandparent.³⁶ The issue of a rebuttable presumption was fiercely debated because if the grandparent is unable to rebut the presumption, the court would be entirely precluded from even addressing the issue of what is in the best interests of the child. The second issue was whether the existing statutes properly placed the burden of persuasion on the grandparent. Even if the statute did not have a rebuttable presumption, in order to meet the constitutional mandates of *Troxel* and preserve the parent's due process rights, a statute had to place the burden of proof on the grandparent. The third issue was deciding what that burden should be.³⁷ If an existing statute failed to meet any of these strict criteria, it was vulnerable to another constitutional attack.

³⁵ The *Troxel* Court did not define "fitness" for purposes of according deference to the parent denying visitation. 530 U.S. at 96. This has created problems in several states since "fitness," for purposes of defining parental behavior, is relegated in most states by the body of laws that address termination of parental rights. Hence, the standard is much higher than what would be used in custody and parenting time statutes—where the result of being "unfit" is perhaps the loss of custody or parenting time, and not the complete loss of all parental rights.

³⁶ See MICH. COMP. LAWS § 722.27b(4)(b) (2006), which states:

In order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption created in this subdivision, a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health.

³⁷ In most states the debate ensued over whether the standard should be a preponderance of evidence or the higher, clear and convincing evidence. See, e.g., MICH. COMP. LAWS § 722.27b(4)(c) (2009), which states:

If a court of appellate jurisdiction determines in a final and nonappealable judgment that the burden of proof described in subdivision (b) [preponderance of the evidence] is unconstitutional, a grandparent filing a complaint or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b), (Note 35).

One of the first states to address a facial challenge to its grandparent visitation statute was Illinois.³⁸ The Supreme Court of Illinois invalidated its former statute as unconstitutional on its face because it placed, “the parent on equal footing with the party seeking visitation rights.”³⁹ However, no instruction was given to the Illinois legislature as to how to remedy the problem—and the Illinois Supreme Court never even broached the subject of whether the balance of the existing statute would be able to survive a constitutional challenge if had it provided for some special weight to the parent. The same result occurred as well in the state of Maryland.⁴⁰

In Iowa, the state supreme court also found that its statute was “fundamentally flawed,” but went on to explain in detail that it was, “not because it fails to require a showing of harm, but because it does not require a threshold finding of parental unfitness before proceeding to the best interest analysis.”⁴¹ What is interesting about this decision (and further demonstrates the varying interpretations of *Troxel*) is that a finding of “parental unfitness” is not something that the *Troxel* Court deemed necessary before a state court could entertain a petition for grandparent visitation.⁴² Compared to other state court of appeals rulings, one might think differing states reviewed different drafts of the *Troxel* opinion.

In Kansas, the grandparent visitation statute was appealed less than a year after *Troxel*.⁴³ Despite not placing the burden on the grandparent, not mandating any special weight be given to the parent’s decision, and not identifying the standard of proof by which the grandparents must prove their case, the Supreme Court of Kansas upheld the constitutionality of its statute because it held that its statute *presumes* that a fit parent will act in the best interests of his or her child.⁴⁴

³⁸ Wickham v. Byrne, 769 N.E.2d 1 (Ill. 2002).

³⁹ *Id.* at 7.

⁴⁰ Brice v. Brice, 754 A.2d 1132 (Md. Ct. Spec. App. 2000).

⁴¹ Santi v. Santi, 633 N.W.2d 312 (Iowa 2001).

⁴² *Troxel*, 530 U.S. at 72-73.

⁴³ KAN. STAT. ANN. § 38-129 (2008). *See also supra* discussion in note 25.

⁴⁴ State Dept. of Soc. & Rehabilitation Servs. v. Paillet, 16 P.3d 962 (Kan. 2001).

Not all courts of appeal were as forgiving as the Supreme Court of Kansas. As other appellate courts across the country struck down their third-party visitation statutes as unconstitutional in the wake of *Troxel*, state legislatures were faced with the daunting challenge of either amending their flawed laws or starting from scratch. Some states went without grandparent visitation statutes for several years as state legislatures wrestled with fashioning statutes that protected a parent's right to due process, while at the same time protecting a child from being amputated from a family member.⁴⁵ Ultimately, some of the most ferocious debates pertained to whether a grandparent must prove that the child would be harmed if visitation was not awarded.

Whether a child would be harmed by denying visitation is a question of fact—and the harm involved is rarely physical. In most cases, when deciding whether denying visitation between a child and a grandparent who have a preexisting emotional bond causes harm, the inquiry is whether the denial causes psychological, mental, or emotional harm.⁴⁶ This requirement of proof precludes alternative dispute resolution at the outset and almost mandates that grandparents begin to “arm” themselves with proof to prepare for litigation. The disparity among states on this issue is alarming.⁴⁷

⁴⁵ For example, the State of Michigan did not enact a new grandparent visitation statute until 2005 after its previous statute was held unconstitutional in 2002. MICH. COMP. LAWS § 722.27b (2006).

⁴⁶ To prove psychological, mental, or emotional harm, a petitioning grandparent would have to employ an expert (usually in the field of child psychology) to overcome this hurdle.

⁴⁷ Since *Troxel*, the following states have required a finding of harm before permitting a grant of custody or visitation to a third party: ALASKA STAT. § 25.20.060(a) (2008); ARK. CODE ANN. § 9-13-101 (2008); CONN. GEN. STAT. ANN. § 46b-56 (West 2008); FLA. STAT. ANN. § 61.13 (West 2008); GA. CODE ANN. § 15-11-58(3) (2008); 750 ILL. COMP. STAT. 5/607 (2008); IOWA CODE ANN. § 600C.3 (West 2009); MASS. GEN. LAWS ANN. ch. 119 § 39D (2008); MICH. COMP. LAWS § 722.27b (2009); N.J. STAT. ANN. § 9:2-7.1 (West 2002) (in intact families); OKLA. STAT. ANN. tit. 43 § 109.4 (West 2008); S.C. CODE ANN. § 25-4-52 (2009); TENN. CODE ANN. § 36-6-306 (2007). The following states either have not required a finding of harm or have identified that harm exists upon the mere denial of visitation with a third party: KY. REV. STAT. ANN. § 405.021 (1996); KAN. STAT. ANN. § 38-129 (2008); ME. REV. STAT. ANN. tit. 22 § 4005-E (2008); N.J. STAT. ANN. § 9:2-7.1 (2002) (in non-

One of the most important features of a law that is designed to protect a child from an intra-family dispute is whether it has the ability to avoid a lawsuit altogether. Assuming that when it comes to family law matters, a state's principal objective is avoiding the tumult created in a child's life when family members are at odds with one another, it is crucial that the laws governing these disagreements are crafted carefully so as to encourage facilitation and mediation of these disputes via alternative dispute resolution if a lawsuit cannot be avoided. It is not hard to imagine how quickly feuding former in-laws can become entrenched in their positions, often to the detriment of the child each party claims they are trying to protect.

The importance of avoiding judicial interference in favor of helping family members resolve issues on their own cannot be overstated. This section of the article examines what states across the country have done since *Troxel* in furtherance of enacting legislation that tries to balance a fit parent's constitutional rights, a child's right to have a relationship with his own family, and further attempts to resolve these disputes without forcing the issue to go before a judge who, compared to the children's own family members, is not best equipped to make the decision that is in the child's best interests. Unfortunately, because of the ambiguous nature of *Troxel* and the understandably cautious nature of state legislatures in the wake of that case, many statutes have done more to guarantee litigation, rather than avoid it.

For example, the state of Iowa, which was previously discussed, now has one of the most stringent grandparent visitation statutes in the country. Iowa Code section 600C.1 states that:

2. The court shall consider a fit parent's objections to granting visitation under this section. A rebuttable presumption arises that a fit parent's decision to deny visitation to a grandparent or great-grandparent is in the best interest of a minor child.
3. The court may grant visitation to the grandparent or great-grandparent if the court finds all of the following by clear and convincing evidence:
 - a. The grandparent or great-grandparent has established a substantial relationship with the child prior to the filing of the petition.

intact families); OHIO REV. CODE ANN. § 3109.051 (West 2004); OR. REV. STAT. § 109.119 (2009); W. VA. CODE § 48-10-1102 (2009).

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- b. The parent who is being asked to temporarily relinquish care, custody, and control of the child to provide visitation is unfit to make the decision regarding visitation.
- c. It is in the best interest of the child to grant visitation.⁴⁸

This statute does all but set fire to each party's house. To prove by clear and convincing evidence that the parent is unfit means that grandparents have to unload all the ammunition in their arsenal against the child's parent before even asking for the case to be referred for available alternative dispute resolution or mediation. This is by its very nature contrary to the best interests of the child of that parent.

To a somewhat lesser extreme, the state of Oklahoma has enacted a statute that makes the showing of parental unfitness optional. Oklahoma Statutes title 43 section 109.4 states that a grandparent of an unmarried minor child may seek and be granted reasonable visitation rights to the child; these visitation rights may be independent of either parent of the child if it is in the best interest of the child, and there is a showing of parental unfitness, or the grandparent has rebutted, by clear and convincing evidence, the presumption that the fit parent is acting in the best interests of the child by showing that the child would suffer harm or potential harm without the granting of visitation rights to the grandparent of the child.⁴⁹ In this case, it is helpful to the child for the grandparent to be able to rebut the presumption without having to make allegations that the parent is unfit.

An example of a "middle ground" is Michigan's statute, which does not require any showing of unfitness to rebut the presumption in favor of the parent, and further sets the burden by which the grandparent must show that the denial creates a "substantial risk of harm to the child's mental, physical, or emotional health" at a preponderance of the evidence.⁵⁰ To defer to the decision of two fit parents to deny visitation however, the Michigan statute states that "if two fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time."⁵¹ In Michigan cases, though, grandparents

⁴⁸ IOWA CODE ANN. § 600.C.1 (West 2009).

⁴⁹ OKLA. STAT. ANN. tit. 43 § 109.4 (West 2008).

⁵⁰ MICH. COMP. LAWS § 722.27b(4)(b) (2009).

⁵¹ *Id.* at § 722.27b(5).

still are encumbered with the constraint to retain a psychological expert to prove the “substantial risk of harm” to the child.⁵²

In a twist of statutory serendipity, one of the first states to invalidate its grandparent visitation statute after *Troxel* is on the way to amending its post-*Troxel* statute to make it easier for grandparents to obtain visitation. In January, 2007, Illinois amended the statute it enacted after *Troxel* to extend standing to grandparents of children whose parents are still in the process of a divorce or custody proceeding in order to expedite matters pertaining to children, since the Illinois found that such disputes can take years to complete, and it is, “harmful to a child to make that child wait to enjoy an important relationship until the end of a protracted legal proceeding.”⁵³ This amendment came without the post-*Troxel* version being challenged in any way after courts recognized the problem created by the delay of waiting for a final custody order from pending cases.

On the other end of the statutory spectrum is the grandparent visitation statute enacted in Minnesota in 2007. Minnesota Statutes section 257C.08 states that if “a parent of an unmarried minor child is deceased, the parents and grandparents of the deceased parent may be granted reasonable visitation rights to the [child] upon finding that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship.”⁵⁴ Interesting is that when this statute was enacted, it had an additional provision which stated that the “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.”⁵⁵

Florida is perhaps the most forward-thinking state when it comes to the best way to resolve disputes involved in grandpar-

⁵² Absent a finding of physical harm to a child, MICH. COMP. LAWS § 722.27b requires a showing of mental or emotional harm.

⁵³ Michael K. Goldberg, *New Amendments to the Illinois Grandparent Visitation Statute*, 94 ILL. B.J. 660 (Dec. 2006).

⁵⁴ MINN. STAT. § 257C.08 (2006).

⁵⁵ This provision was held unconstitutional in the case of *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007), because it placed the burden on the parent and was therefore did not provide due process protection for the parent.

ent visitation cases. In 2008, Florida passed section 752.015 of its Domestic Relations Act which states:

It shall be the public policy of this state that families resolve differences over grandparent visitation within the family. It shall be the further public policy of this state that when families are unable to resolve differences relating to grandparent visitation that the family participate in any formal or informal mediation services that may be available. When families are unable to resolve differences relating to grandparent visitation and a petition is filed pursuant to § 752.01, the court shall, if such services are available in the circuit, refer the case to family mediation in accordance with rules promulgated by the Supreme Court.⁵⁶

Florida has also recently proposed Senate Bill 1052 which would authorize the appointment of a guardian ad litem to represent the best interests of the child.⁵⁷ The recognition of the litigating intra-family disputes will not lead to resolving them in a manner that is consistent with protecting the best interests of the children involved is perhaps the most important factor that will dictate the success or failure of new legislation in this area of the law.

Conclusion

Grandparent visitation cases are intergenerational. There is no escaping the reality that the cases that involve the death of a parent also, and unfortunately, involve the death of a son or daughter. There is no way to prevent these human tragedies but that does not mean that the effects of these events do not deserve responsible and thoughtful responses by our state legislatures. Our legal system is not designed to solve the problems that are caused when dysfunctional families are brought together by tragedy. The manner in which these cases are resolved has the power to affect the generations of children, grandchildren, and great-grandchildren that will follow.

The mandatory use of alternative dispute resolution by state courts is the best way to prevent further devastation to a child's family. These matters need to be addressed outside the courtroom and away from litigation that only causes more damage and heartache for the families and children involved. Family court judges need to acquaint themselves with the mediation services

⁵⁶ FLA. STAT ANN. § 752.015 (West 2008).

⁵⁷ S.B. 1052, 111th Cong, (Fla. 2009).

available to them in their community. Lawyers need to advise their clients at the outset that just because a law exists by which litigation could be started, that does not mean that filing a lawsuit will solve the underlying problems that bring the clients to their office in the first place.

Most importantly, everyone involved in any legal process that addresses issues like grandparent visitation, needs to be respectful of that no matter what it is called (grandparenting time, third-party custody, etc.) what is being negotiated and adjudicated is actually the child's time. The primary focus of any case involving a child is the inherent right of a child to be protected from anyone acting contrary to the child's best interests. Viewing these cases through the eyes of a child and not through the adults fighting over them is the only way to truly protect the child's best interests in any dispute in which children, by no choice of their own, find themselves because their own family has not been able to figure out a way to resolve their disputes so that the children involved can feel free to love everyone in their family—even if those people are no longer family themselves.

