FAST FACTS

The Child Custody Act of 1970, although limited in scope, was the first statute to grant grandparents visiting rights.

In 1982, the law was amended to expand the rights of grandparents and grandchildren.

Grandparents' rights to visit children born out of wedlock have been confusing and inadequate.

The Supreme Court in the *Troxel v Granville* case ruled that grandparent visitation laws are constitutional, but the national media misinterpreted this.

The reality of "family" has changed significantly in recent decades.

Grandparents Have Rights!

Grandparent visitation laws are constitutional, as a look at the law reveals

By Richard S. Victor, Esq.

The Michigan Legislature, as part of the original Child Custody Act of 1970 (1970 PA 91) adopted Michigan's first statute regarding "grandparent visitation." Significantly limited in scope, the original act only provided rights for grandparent visitation in the event of the death of an adult child who left a minor child surviving, as well as their parents. In 1980 PA 161, MCL 722.27 was amended to provide maternal or paternal grandparents the right to secure grandparent visitation, if it was in the best interest of the child and if there was "a child custody dispute submitted to the circuit court as an original action...or has arisen incidentally from another action."

In 1982, 1982 PA 340, Section 1, effective December 17, 1982 (MCL 722.27b) amended Michigan's law to expand the rights of grandparents and grandchildren. This second act is the basis for additional grandparent visitation. Through the use of either of these laws grandparents have a right to request grandparent visitation, with their grandchildren under any of the following conditions:

- If a natural parent of an unmarried child is deceased, a parent of the deceased person may begin an action for visitation. Adoption of the child by a stepparent does not terminate the right of a parent of the deceased person to file an action for visitation.
- The marriage of the child's parents is declared invalid or is dissolved by the courts.
- A court enters a decree of legal separation regarding the parents' marriage.
- Legal custody of the child is given to a party other than the child's parent.
- The child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or who's adoption by someone other than a stepparent has been legally finalized.
- A custody dispute is pending, initiated by one of the children's parents.

Since 1982, questions arose about whether or not a child custody dispute must be pending or a divorce/legal separation action must be pending before grandparents would have access to the grandparent visitation statute. This question was definitively decided in the matter of *Brown v Brown,* 192 Mich App 44; NW2d 292 (1991), wherein the court held that a child custody dispute was still considered to be "pending" even after a judgment of divorce was entered for the purpose of providing grandparents an opportunity to file under the grandparent visitation statute (MCL 722.27b).

Grandparent rights to visit children born out of wedlock have had some confusion under Michigan's law. As part of the 1982 amendments to the grandparent visitation statute, at Section 3, the Legislature included the following sentences:

A grandchild visitation order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed regularly to the support of the child or children. The court shall make a record of the reasons for denial of a requested grandchild visitation order. MCL 722.27b(3).

Despite this specific language pertaining to children born out of wedlock, the Michigan Supreme Court held in *Frame v Nehls,* 452 Mich 171; 550 NW2d 739 (1996), that because this was found in Section 3 of the act and not as part of Section 1, the Legislature did not intend to provide the same rights to children born out of wedlock as they did for children of divorce or legal separation. In fact, the court suggested that the Legislature cure this defect in order to protect these children.

House Bill 4283 is currently pending in our Michigan Legislature. This bill would correct the defect that grandparents/grandchildren advocates believe currently exists in Michigan where children who are born out of wedlock are treated differently than children of a marriage. It is hard to comprehend that under Michigan's current law a child not living in the home of both parents because the parents are divorced or legally separated has rights for grandparent visitation but a child not living in the home of both parents because the parents never married does not have rights for grandparent visitation.

This is unequal protection of our law and serves as significant discrimination against children who, because of nothing

they did, are denied rights because they were conceived and born to adults out of wedlock. Michigan's public policymakers, since the Supreme Court made it's decision in 1996, should be ashamed of itself for not curing this defect by this time.

In 1996, as part of 1996 PA 19, Section 1, effective June 1, 1996, the Michigan Legislature amended it's grandparent visitation statute to replace the words "grandparent visitation" with the words "grandparenting time." Thereafter, the correct term when discussing grandparents seeing their grandchildren would be "grandparenting time" and not "grandparent visitation."

Recently, the United States Supreme Court was asked to rule on whether or not grandparent visitation (grandparenting time) laws were constitutional or whether they were a violation of the Due Process Clause of the United States Constitution and therefore unconstitutional as an infringement on the rights of parents to raise children as they see fit. Fortunately for grandparents/grandchildren advocates, the United States Supreme Court, in *Troxel v Granville,* 120 S Ct 2054 (2000), in the majority opinion written by Justice Sandra Day O'Connor, held:

> *Because much state-court adjudication in this context occurs on a case-by-case basis,* ***we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a*** **per se** ***matter.*** (Emphasis added.)

Thereafter Justice O'Connor's opinion cited all 50 state grandparent visitation statutes, including Michigan's (MCL 722.27b), and held that these statutes were not unconstitutional. Despite this clear ruling, the national media incorrectly reported that the Supreme Court had narrowed or limited the rights of grandparents. The reason for their mistake was because of the confusing facts surrounding the case.

In the matter of *Troxel v Granville,* which came out of the state of Washington, the case involved children born out of wedlock to Mr. and Mrs. Troxel's son and his girlfriend. The father had a close relationship with his two daughters who spent much time at the grandparents home. Following the death of the children's father, the grandparents felt that they were being shut out of the grandchildren's lives and filed an action in the state of Washington for grandparent visitation. In Washington, the grandparent visitation law at Section 26.09.240, provided significant rights for grandparents to file a request to see their grandchildren and set specific conditions and directions for a court asked to make a decision on whether or not to grant the requested grandparent visitation.

The underlying basis however, was that the request had to be in the children's best interests. However, the state of Washington (similar to Michigan) did not provide grandparent visitation under their grandparent visitation law for children born out of wedlock. Therefore, the *Troxel* grandparents had to file their action under a different Washington state law found at

Section 26.10.160, which provided that "any person at any time" could file a request to visit with a child. This law had already been repealed in all the other statutes within the state of Washington but had not been repealed in Section 26.10.160 when the Troxel's filed their case. The lower court found that it was in the children's best interests to continue visitation with their grandparents and held accordingly. The case was then appealed by the mother to the Washington State Court of Appeals and eventually to the Washington State Supreme Court.

In its five to four decision the Washington Supreme Court ruled that the broad law of "any person at anytime" was unconstitutional and that the grandparents would have to show that there was substantial harm to a child before they would be allowed to seek and secure grandparent visitation. When the United States Supreme Court heard the case they affirmed the Washington State Supreme Court case with respect to it's decision that the "any person at any time" language was overbroad as it applied to this case only and indicated that because it only pertained to that one state statute in the state of Washington, it did not affect the grandparent visitation laws throughout the rest of the country. In fact, the grandparent visitation law in the state of Washington (26.09.240) for children of divorce was not affected by this ruling. All 50 state laws that pertain to grandparent visitation, if it is in the best interests of a child, remain intact following this United States Supreme Court decision.

When the national media reported this story on June 5, 2000, after its release from the United States Supreme Court, apparently an intern at the Associated Press only read the "headnote" of the decision and did not read the majority opinion

before reporting on the wire services that grandparent visitation laws had been drastically affected and reduced because of this decision. This mistake was then exacerbated when the national media reported the story using the wire service information alone.

Fortunately, following the initial release of the story, several of the electronic and print media corrected the misinformation and reported that this Supreme Court decision in the *Troxel* matter was limited to the *Troxel* case only and had no effect on any of the grandparent visitation laws around the country. In fact, it was later reported that these laws were all constitutional and enforceable.

One of the first opinions regarding third-party visitation following the *Troxel* decision came out of the Macomb County Circuit Court Family Division in the matter of *Terry v Affum*. This is a case where the court had previously awarded third-party visitation. The attorney for the father filed an emergency petition to set a prior third-party visitation order aside, claiming that the *Troxel* case controlled and that Michigan's third-party visitation laws were unconstitutional.

In his opinion, Macomb County Family Court Judge Antonio P. Viviano reviewed and analyzed the United States Supreme Court decision and held:

- The holding in *Troxel* is narrowly tailored to the specific statute (in Washington) at issue and the specific facts of that case.
- The United States Supreme Court refused to adopt a specific rule invalidating all nonparental visitation statutes.
- The Michigan Third-Party Visitation Statute differs significantly from the broad, sweeping statute that was challenged in the *Troxel* case.

Judge Viviano went on to hold:

> *In light of the differences set forth above,* Troxel *does not compel a determination that MCL 722.27(1)(b); MSA 25.312(7)(1)(b), is overly broad and therefore in violation of the protections of the Due Process Clause of the Fourteenth Amendment.*

Therefore, despite advocates to the contrary who are attempting to mislead the public by continuing the misrepresentations initially made by the national media when it first reported this story incorrectly, grandparent visitation statutes are constitutional.

This decision is applauded by child advocates because the reality of "family" has changed significantly in recent decades. The concept of parental autonomy, grounded in the assumption that parents raise their own children in nuclear families, is no longer to be taken for granted. Accordingly, almost absolute deference to parental rights is now less compelling because the traditional nuclear family has eroded. Third-party or grandparent visitation laws did not create that erosion. More varied and complicated family structures have arisen because of divorce, decisions not to marry, single-parent families, remarriages and step-families, parents who abandon their children to temporary caretakers, and children being raised by third parties because parents are deemed unfit.

It would be a significant disservice to the children of this country, who look at their families through their own eyes, to ignore their reality of what family is to them. We must recognize that in some families the parents are not necessarily legally related to the same people as their children. A woman who divorces her husband or a mother of children whose father has died may no longer be related to the grandparents of her children, but the children still have a connection through bloodline and heritage to their grandparents. They are family to that child.

The concept of parental autonomy, grounded in the assumption that parents raise their own children in nuclear families, is no longer to be taken for granted.

Grandparent visitation laws, conditioned on visitation being in the child's best interest, are expressing a fundamental liberty interest of both grandparent and grandchild. Should a parent, only one in the chain of three generations, be given constitutional sanction to amputate the family unit of the child? Fortunately the United States Supreme Court said no. By holding that these cases must be decided on a "case by case basis," the majority of the United States Supreme Court held that the millions of grandparents and grandchildren who have been reunited because of laws protecting their rights will not be threatened with amputation by critics who incorrectly claimed that these laws were unconstitutional. ✦

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