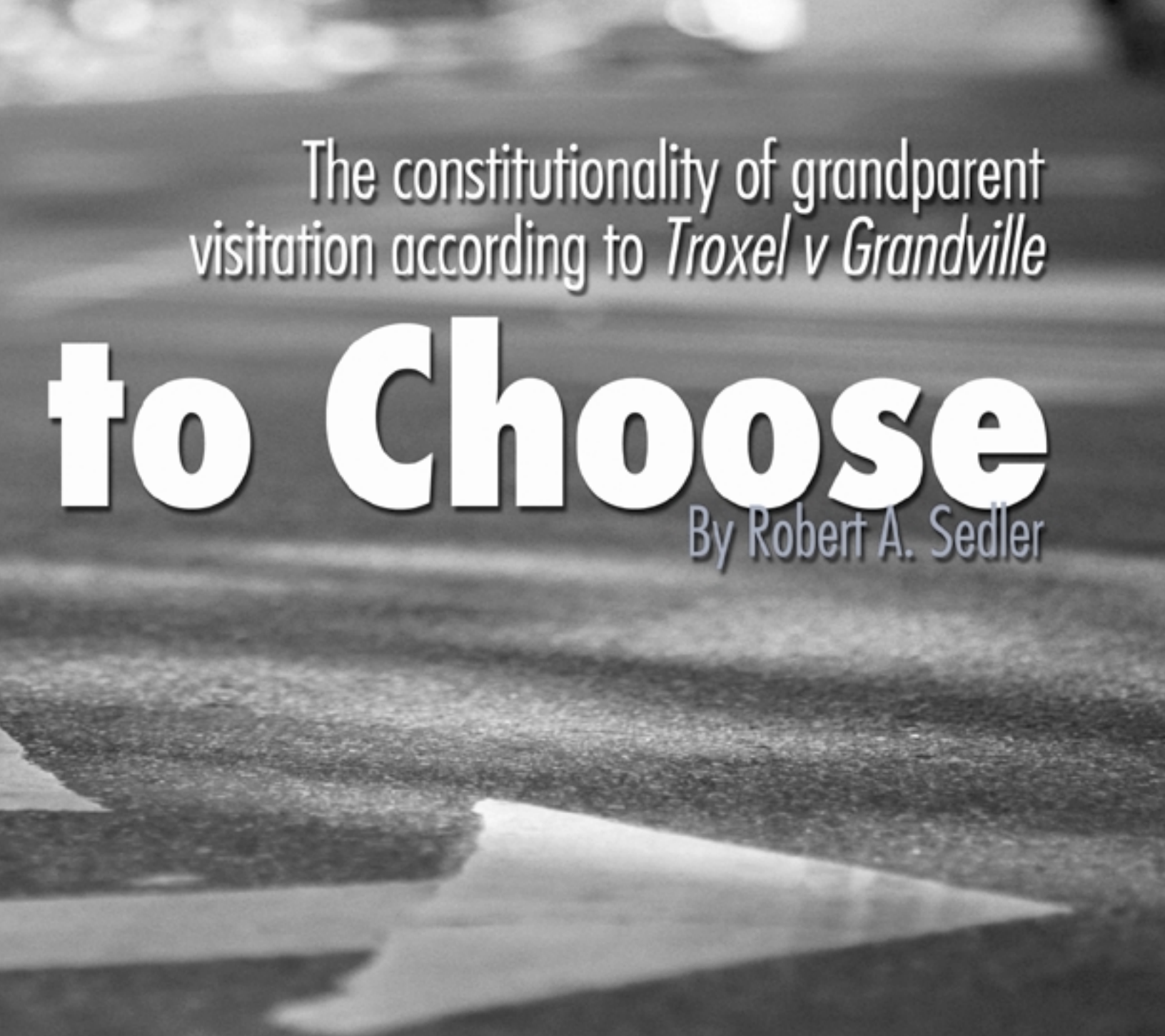
A Parent's Right

The Constitution changes everything. The decision of the United States Supreme Court in *Troxel v Granville*,[1] will change grandparent visitation in Michigan as we know it. No longer will judges, using the amorphous "best interests of the child" test,[2] be able to override the decisions of custodial parents concerning the extent and conditions of grandparent visitation, and in some cases whether there should be grandparent visitation at all. In making any decision concerning a request for grandparent visitation, judges will now have to observe a number of constitutionally-mandated strictures. They will have to proceed on the assumption that fit parents have a fundamental right to make decisions concerning the custody, care, and control of their children and that fit parents will act in the best interests of their children. They must accord "special weight" to a parent's decision to limit or deny grandparent visitation, and a judge may not interfere with that decision simply because the judge believes that a better decision could be made. The Constitution does not permit the state to balance the rights of parents against the claimed rights of grandparents and children and to restrict parental decisionmaking "in the best interests of the child."



The constitutionality of grandparent visitation according to *Troxel v Grandville*

to Choose

By Robert A. Sedler

In *Troxel*, the Supreme Court stated that the interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[3] As a constitutional matter, as well as under Michigan law,[4] the state may not remove a child from the custody of a parent unless the parent has been determined by clear and convincing evidence to be unfit to maintain custody of the child. A fit parent may not be denied custody on the ground that a judge concludes that the "best interests of the child" would be served by giving someone else custody.[5] And when a parent who has temporarily lost custody seeks to regain it, there is a presumption that custody should be returned.[6]

Because the right to parent is a fundamental right, any state interference with that right must be justified under the exacting compelling governmental interest standard of review. Some examples of constitutionally permissible actions by the state in opposition to the parents' wishes would be a requirement that the child attend school or receive a life-saving blood transfusion or an inoculation against disease. But the state's generalized assertion of "the best interests of the child" cannot constitute a compelling governmental interest to override the fundamental right to parent.

Grandparent visitation laws exist in all 50 states. The underlying premise of all grandparent visitation laws is that the grandparent and the child have an independent interest in maintaining their relationship, and that a court can order visitation over the objection of the custodial parent. As Justice O'Connor pointed out in *Troxel*, "[t]he State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship." Any court order for grandparent visitation, therefore, seriously interferes with the power of the custodial parent to make a decision concerning the custody, care, and control of that child and so has implicated the constitutional right to parent.

In *Troxel*, the Supreme Court strongly affirmed the constitutional right to parent and held that any court order for grandparent visitation was subject to significant constitutional constraints. The crux of the case, as Justice O'Connor put it, "involves nothing more than a simple disagreement between the Washington Superior Court and Granville [the custodial parent] concerning her children's best interests." Granville wanted to limit the grandparents' visitation to one day per month with no overnight stay, but the trial court's order required visitation for one weekend per month, one week during the summer, and on both of the grandparents' birthdays. The Washington Supreme Court held that the Washington law allowing the judge to award visitation to "any person" under the amorphous "best interests of the child" standard unconstitutionally infringed on the fundamental right of parents to rear their children.

In a 6–3 decision, the Supreme Court affirmed the decision of the Washington Supreme Court. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, wrote the principal opinion. She found that the law, as applied in this case to override the custodial parent's wishes about grandparent visitation, "unconstitutionally infringes on the fundamental parental right to make decisions concerning the care, custody, and control of their children."

This was so for three reasons. First, the law contained no requirement that the judge accord any "special weight" to the parent's own determination as to what was in the best interests of the child and places the best interests determination solely in the hands of the judge. Second, the trial judge failed to adhere to the presumption that fit parents act in the best interests of their children, and in effect put the burden on the mother to show that visitation would not be in the daughters' best interests. Third, the trial judge failed to take into account the fact that the mother was willing to permit some visitation. The Due Process Clause, said Justice O'Connor, "does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."

Justice Souter found that the Washington law was unconstitutional on its face because it authorized any person at any time to request and a judge to award visitation under the "best interests of the child" standard. Justice Thomas concurred on the ground that since neither party had argued that the right to parent was not a fundamental right, the compelling governmental interest standard applied, and the State of Washington "lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." Justices Stevens and Kennedy dissented and maintained that the case should be remanded to the state court for a specific determination of whether the visitation order violated the mother's right to parent. Justice Scalia dissented on the ground that the right to parent should not be recognized as a fundamental right.

In my opinion, the precedential effect of *Troxel* is found in the O'Connor opinion. All of the Justices except Scalia agreed that the right to parent was a fundamental right and that grandparent/third-party visitation laws implicated that right. The six Justices voting to affirm agreed that the visitation order in that case violated the constitutional rights of the mother, and neither the Stevens nor Kennedy dissents said that the order was constitutional. Finally, the four Justices in the O'Connor plurality and Justice Souter, agreed that the state could not use a generalized "best interests of the child" standard to determine third-party visitation. The Court did not hold, however, that grandparent or third-party visitation orders were unconstitutional in all circumstances, and Justice O'Connor stated that she agreed with Justice Kennedy that the constitutionality of any standard for awarding visitation "turns on the specific manner in which that standard is applied."

Therefore, the holding of *Troxel* imposes three very significant constitutional constraints on the application of grandparent visitation laws. First, the judge must proceed on the assumption that fit parents will act in the best interests of their children, and the judge must accord "special weight" to a parent's decision to limit or deny grandparent visitation. Second, the judge cannot use the "best interests of the child" standard to override the decisions of the custodial parent with respect to grandparent visitation. Third, any visitation order must not interfere with the parent-child relationship or with the parent's rightful authority over the child.

It is clear after *Troxel* that Michigan's grandparent visitation law cannot constitutionally be applied as written. The law allows a judge to order grandparent visitation without regard to the wishes

Fast Facts:

Troxel v Granville imposes three constitutional constraints on the application of grandparent visitation laws:

- The judge must proceed on the assumption that fit parents will act in the best interests of their children.
- The judge cannot use the "best interests of the child" standard to override the decisions of the custodial parent.
- Any visitation order must not interfere with the parent-child relationship or with the parent's rightful authority over the child.

They will have to proceed on the assumption that fit parents have a fundamental right to make decisions concerning the custody, care, and control of their children and that fit parents will act in the best interests of their children.

of the custodial parent in any case in which the judge concludes that grandparent visitation is "in the child's best interests." The judge is not required to accord any weight, let alone "special weight," to a parent's decision to limit or deny grandparent visitation. And there is no requirement that the visitation order not interfere with the parent-child relationship or with the parent's rightful authority over the child. In short, Michigan's law contains all the constitutional defects of the Washington law invalidated in *Troxel*. *Troxel* requires that existing grandparent visitation orders be reconsidered in light of constitutional requirements.

However, following the precedent set by the Michigan Supreme Court when it held, following *Roe v Wade*,[7] that Michigan's anti-abortion law could be applied within constitutional limits,[8] the Michigan courts can in effect interpret the grandparent visitation law to incorporate the constitutional constraints of *Troxel*, and then apply the law within constitutional limits. In my opinion, a grandparent visitation order may be constitutionally permissible in the circumstances discussed by Justices Kennedy and Stevens in their dissent in *Troxel:* when the custodial parent has denied any grandparent visitation at all and the denial of grandparent visitation reflects an "arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."

Let me now suggest how a court can proceed in a constitutional manner when presented with a petition for grandparent visitation after *Troxel*. The court should deny the petition when the custodial parent is willing to allow some grandparent visitation, since this enables the grandparent-child relationship to be preserved. But the custodial parent must be free to decide the nature, extent, and terms of the visitation. The judge cannot constitutionally substitute his or her judgment for that of the custodial parent with respect to what visitation is "reasonable." The Constitution requires that this matter be left to the judgment of the custodial parent.

If the custodial parent has denied visitation entirely, the court should then consider whether there has been a substantial existing relationship between the grandparent and the child. If no such relationship has existed, it is the right of the custodial parent to decide that it is not in the best interests of the child to establish a new relationship, even with a grandparent. A judge cannot constitutionally override that decision because the judge thinks that children should have a relationship with their grandparents.

If there has been a substantial existing relationship between the grandparent and the child and the custodial parent cuts off that relationship completely, we have a situation in which a visitation order may be constitutionally permissible. Suppose that a couple has been married for a number of years and the father's parents have enjoyed a substantial grandparenting relationship with the children. The father abandons the family and leaves the state. The mother then informs the fathers' parents that they will "never see the children again." The fathers' parents petition for grandparent visitation.

At first glance this seems like an appropriate case for a grandparent visitation order. It would appear to an objective observer that the mother is being spiteful and is depriving the children of a relationship with their grandparents in order to "get back" at her husband. But the judge must proceed cautiously, being mindful of the constitutional constraints imposed by *Troxel*. The judge must presume that the mother is acting in the best interests of the children and must give "special weight" to her determination that it is in the best interests of her children to cut off contact with their grandparents after their son has deserted the family. The burden is on the grandparents to show that mother is acting purely out of spite and in a way that is clearly harmful to the children. If the judge, after reviewing all the evidence, concludes that in this case there has been "an arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child," it is constitutionally permissible for the judge to order that the grandparents have some visitation with their grandchildren.

The final constitutional requirement is that the court-ordered visitation not interfere with the parent-child relationship or with the parent's rightful authority over the child. The judge should direct the custodial parent to present a plan for grandparent visitation under which the parent will decide the nature, extent, and terms of such visitation. The judge should accept the plan unless it is so patently unreasonable as to be an effective denial of grandparent visitation. The judge cannot constitutionally decide what amount of grandparent visitation is "reasonable" or the circumstances in which it shall take place.

As the above discussion makes clear, the circumstances in which a court can constitutionally order grandparent visitation over the objections of the custodial parent are very limited. The Constitution does indeed change everything and in our constitutional system, decisions about the relationship between children and their grandparents belong to the custodial parent. ✦

Robert A. Sedler is Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties at Wayne State University, where he teaches constitutional law and conflict of laws.

Footnotes

1. 530 US 57 (2000).
2. See MCL 722.27b.
3. See *Meyer v Nebraska*, 262 US 390 (1923); *Pierce v Society of Sisters*, 268 US 510 (1925); Robert A. Sedler, The Constitution and Personal Autonomy: A Lawyering Perspective [The 1993 Robert E. Krinock Lecture], 11 *Thomas M. Cooley Law Review* 773, 776–80 (1994).
4. See MCL 722.25.
5. See *Ruppel v Lesner*, 421 Mich 559,566, 364 NW2d 665, 668 (1984); *In re Baby Girl Clausen*, 442 Mich 648, 502 NW2d 649 (1993).
6. See e.g., *Huber v Huber*, 723 NE2d 973 (Ind App 2000) *Uhing v Uhing*, 241 Neb 368, 488 NW2d 366 (1992); *Litz v Bennum*, 111 Nev 35, 888 P2d 438 (1995).
7. 410 US 113 (1973).
8. *People v Bricker*, 389 Mich 524, 208 NW2d 172 (1973).