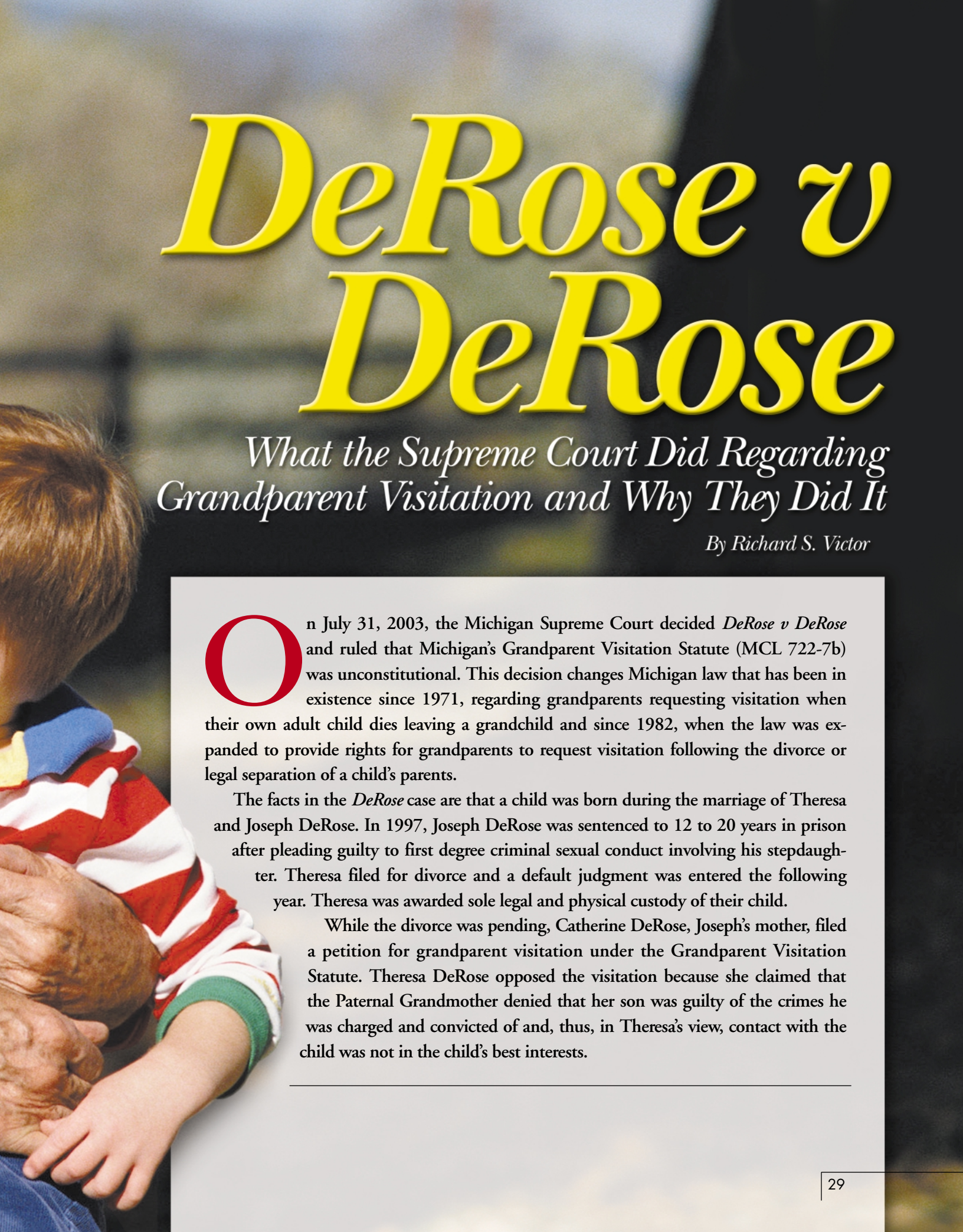


DeRose v DeRose

What the Supreme Court Did Regarding Grandparent Visitation and Why They Did It

By Richard S. Victor

On July 31, 2003, the Michigan Supreme Court decided *DeRose v DeRose* and ruled that Michigan's Grandparent Visitation Statute (MCL 722-7b) was unconstitutional. This decision changes Michigan law that has been in existence since 1971, regarding grandparents requesting visitation when their own adult child dies leaving a grandchild and since 1982, when the law was expanded to provide rights for grandparents to request visitation following the divorce or legal separation of a child's parents.

The facts in the *DeRose* case are that a child was born during the marriage of Theresa and Joseph DeRose. In 1997, Joseph DeRose was sentenced to 12 to 20 years in prison after pleading guilty to first degree criminal sexual conduct involving his stepdaughter. Theresa filed for divorce and a default judgment was entered the following year. Theresa was awarded sole legal and physical custody of their child.

While the divorce was pending, Catherine DeRose, Joseph's mother, filed a petition for grandparent visitation under the Grandparent Visitation Statute. Theresa DeRose opposed the visitation because she claimed that the Paternal Grandmother denied that her son was guilty of the crimes he was charged and convicted of and, thus, in Theresa's view, contact with the child was not in the child's best interests.

FAST FACTS:

- *Michigan's Grandparent Visitation Statute was ruled unconstitutional.*
- *Grandparent advocates feel that the Child Custody Act did provide the safeguards required by the* DeRose *decision and there was no need to throw out a law that has worked effectively for Michigan families for three decades.*
- *Opponents believe that the Constitution provides them with a fundamental right to raise their children, which includes control over who their children see.*

The matter was referred to the Wayne County Friend of the Court where a recommendation was made that the grandmother be granted two hours of supervised visitation with the child on alternate Saturdays, increasing to four hours after an eight month period. The mother objected to the recommendation and the case proceeded to the Wayne County Circuit Court. Contrary to the Statute, which required a hearing to be held, no testimony or evidence was presented and the trial court granted the grandmother's petition. This was where the first mistake in the *DeRose* case occurred. MCL 722.27b sets forth that in a disputed case, a hearing should be held where parties submitting affidavits are allowed to testify pertaining to the request. Had a hearing been held in this matter, a record would have been made as to why the trial court granted grandparent visitation. It also may have provided evidence for the trial court to deny Mrs. DeRose's request for visitation following a finding on the best interests of the child pursuant to MCL 722.23, which is part of the Child Custody Act and which governs MCL 722.27b. Since no hearing was held, no record was made as to whether or not the court's decision in granting the grandparent visitation request, over mother's objection, was appropriate and what evidence was presented to overcome the mother's determination that no visitation should occur. MCL 722.25(t) sets forth that:

> *If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child shall control. If the child custody dispute is between the parent or parents, and an agency or third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.*

At the time this matter was heard by the Michigan Supreme Court, it was argued by attorneys for the grandparents that the Child Custody Act, which the Grandparent Visitation Statute is part of, is controlled by the legislative intent of providing a presumption in favor of a parent's position over any third party if a dispute occurs where the Child Custody Act is utilized. Even though the specific statute in question addresses "custody" cases, it was argued that custody and parenting time is interchanged within the Child Custody Act. In support of that position, they cited the case of *Stevenson v Stevenson,*[1] which set forth:

> *Since 1971, the Child Custody Act has governed disputes over child visitation. While the Act focuses on custody disputes there can be little doubt that the act was intended to control visitation privileges, as well.*

The absence of any trial court record of a hearing precludes the opportunity to determine whether or not the grandparent would have been able to overcome this presumption. Advocates for the grandparent requested that the Supreme Court reverse the court of appeals decision, which ruled, in a 2–1 decision, that the Grandparent Visitation Statute was unconstitutional and requested that the matter be remanded to the trial court for an evidentiary hearing and a determination on whether the grandparent would have been able to prevail utilizing this standard.

In writing for the majority, Justice Clifford Taylor analyzed the United States Supreme Court decision of *Troxel v Granville.*[2] In *Troxel,* the United States Supreme Court held, in a plurality decision following six written opinions, that a Washington State Law that provided "any person at any time" requesting visitation of another person's child, was facially unconstitutional as applied to that case only. Justice Taylor, writing for the Michigan majority in *DeRose* about the *Troxel* case, stated:

> *The Supreme Court's holding, while clear regarding the outcome, is, unfortunately, written in so many voices that a unifying rational is difficult to discern.*

However, Justice Taylor interpreted the *Troxel* decision in holding that the Washington State Law was so overbroad that it caused a violation of parental liberty interests that are protected by the due process guarantees of the United States Constitution. He went on to describe as a "fundamental right" the opportunity for parents to raise their children. This includes the right to make decisions for children, and such decisions must be accorded deference or weight, he said. The Court went on to hold that Michigan's Grandparent Visitation Statute failed to provide deference to the decisions of fit parents regarding third-party visitation. In Justice Weaver's concurring opinion, she urged the Michigan Legislature to amend Michigan's Statute to alleviate the constitutional flaws the *DeRose* decision described were inherent in Michigan's law. Justice Weaver, agreeing with the majority in *DeRose,* set forth that:

> *. . . the statutes may be written in such a way that they comply with constitutional requirements.*

. . . Therefore, I urge the Legislature to amend Michigan's Statute to alleviate the constitutional flaws in the statute.

While Michigan's Statute is narrower than the statute at issue in Troxel, the statute is, nonetheless flawed for the following reasons:

(1) the statute does not provide a presumption that fit parents act in the best interests of their children; (2) the statute fails to accord the fit parent's decision concerning visitation any "special weight"; and (3) the statute fails to clearly place the burden in the proceedings on the petitioners, rather than the parents.

Grandparent/grandchild advocates who supported the grandparent in the *DeRose* matter did not necessarily disagree with the Court's holding but took the position that these requirements were already contained within Michigan's Grandparent Visitation and Michigan's Child Custody Act. It was their position that

The position of grandparent advocates is that the Child Custody Act did provide the safeguards required by the Supreme Court in the* DeRose *decision and there was no need to throw out a law that has worked effectively for Michigan families for three decades.

long-standing Michigan law clearly indicates that a statute passed by the legislature is constitutional unless there can be no way that the law can be conformed to meet constitutional muster. In *People v Abraham,*[3] this long standing law of juris prudence was reaffirmed. The Court held:

Statutes are presumed constitutional and courts must construe a statute as constitutional if at all possible.[4]

In addition:

The challenger to the face of a statute must establish that no circumstances exist under which it would be valid.[5]

Other cases have held:

When construing a statute, the primary goal is to ascertain and give effect to the intent of the legislature.[6]

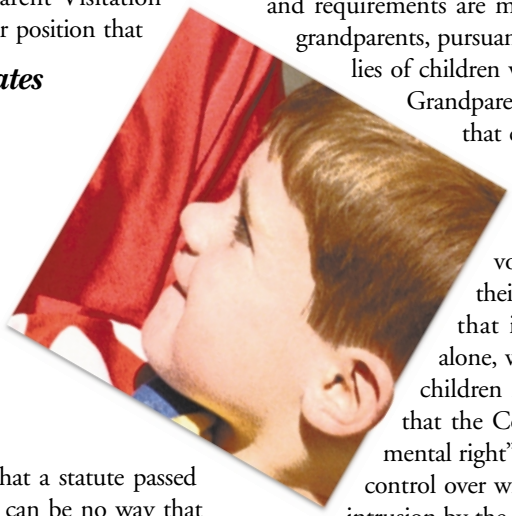
In addition, in *People v Riley,*[7] and *Rinaldi v Livonia,*[8] it was held:

Appellate Courts should avoid deciding constitutional issues where the case may be decided on other grounds.

It was the position of the grandparent advocates in *DeRose* that the Child Custody Act must be looked at in its entirety to determine whether or not the requirements, as outlined by the *DeRose* majority, were present before the Grandparent Visitation Statute was held unconstitutional.[9] Further, in accordance with *Dept of Natural Resources v Seaman,*[10] the Court held:

(1) the Act must be read as a whole; (2) the Act carries a presumption of constitutionality; and (3) the standards must be as reasonably precise as the subject matter requires or permits.

The position of grandparent advocates is that the Child Custody Act did provide the safeguards required by the Supreme Court in the *DeRose* decision and there was no need to throw out a law that has worked effectively for Michigan families for three decades. However, since no objection to those requirements, as outlined by Justice Weaver in her concurring opinion, are going to be made by grandparent/grandchild advocates, the Michigan Legislature has been asked to amend the Grandparent Visitation Statute and provide those requirements in order to reinstate the rights of grandparents to file grandparent visitation requests as long as the conditions and requirements are met. This limited intrusion on the part of grandparents, pursuant to the Michigan Statute, pertain to families of children where there has been a death or a divorce. Grandparent/grandchild advocates are also requesting that children born out of wedlock be protected in any amended law. Advocates opposing grandparent visitation requests do not necessarily believe that grandparent involvement in children's lives is contrary to their best interests on its face but rather believe that it should be the parent, and the parent alone, who will make the decision as to who their children have contact with and visit. They believe that the Constitution provides them with a "fundamental right" to raise their children, which includes this control over who their children see. They argue that any intrusion by the state in this area is a violation of their constitutionally protected rights.



The trend around the United States, following the *Troxel* decision, is that the *Troxel* statute, which was interpreted by the United States Supreme Court, is so unlike the Grandparent Visitation Statutes in the individual states that the *Troxel* holding does not and should not control in order to invalidate state statutes, which are not as open ended and "breathtakingly broad," as the one in *Troxel.* Presently, 44 states have either not challenged their grandparent visitation statute or, once a challenge has occurred, have upheld the constitutionality of their state law once the matter came to their individual state's highest court. Six states, including Michigan, have held that the legislature needs to redraft or amend their state laws in order to provide necessary protection for parents' rights, so that if a grandparent visitation dispute occurs, the court will give deference and a rebuttable presumption to a fit parent's decision regarding his or her children.

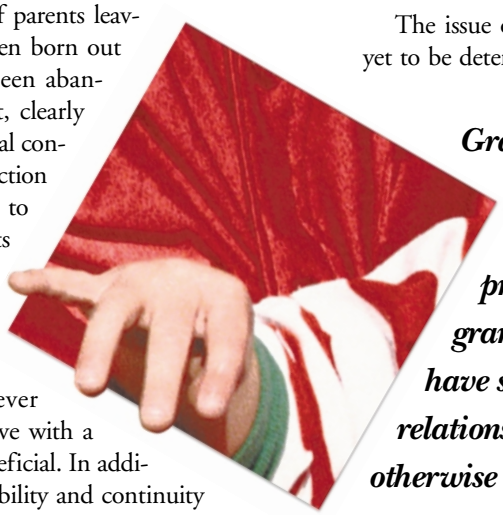
The underlying theory and support for grandparent visitation laws involves situations where a grandparent is not able to discuss seeing his or her grandchildren with the child's parent, who is the grandparent's adult child. Most of these cases involve parents who are deceased or divorced parents where the surviving or custodial parent is no longer legally related to the grandparent in question. A mother who gets custody of a child or a father who survives the

death of his wife is no longer legally or blood related to his/her former in-laws, but those individuals are legally and blood related to the parent's child. They are, and always will be family to the child. Therefore, advocates for grandparent visitation believe that the limited intrusion of grandparent visitation (unlike third-party custody, which has been held to be constitutional)[11] has a valid compelling governmental interest. Justice Marilyn Kelly, in her dissent to the *DeRose* decision, wrote:

> *It is beyond dispute that our grandparent visitation statute serves a compelling governmental interest… It promotes the well being of our children by allowing visitation between children and grandparents when visitation is in the best interests of the children… The statute must be upheld if it is narrowly tailored to serve this interest.*

Justice Kelly then went on to conclude that the Michigan Statute was narrowly tailored to meet these constitutional requirements and should not have been held unconstitutional.

Grandparent advocates cite the changing demography of the American family, which has allowed grandparents to become intricately involved in children's lives. The changes that have affected the American family due to the staggering epidemic of divorce and unfortunate deaths of parents leaving minor children, as well as children born out of wedlock or children who have been abandoned by a parent to a grandparent, clearly sets forth the need to address this social concern. Grandparents offer a vital connection to a child's future by allowing them to know their past. Many grandparents provide unconditional love to their grandchildren and, many grandparents have sustained lengthy marriages and relationships that a child of divorce may otherwise never know. The contact a child may derive with a grandparent may be significantly beneficial. In addition, children are able to perceive stability and continuity through contact with grandparents, especially after the child has suffered the trauma of losing a parent to death or suffering the tragedy of divorce. Children learn their unique heritage and history, as well as learn about getting older from actual contact with their grandparents. If children are precluded from having shared memories and experiences that they otherwise would be able to have, then there should be a good reason for such denial. Amputation of a child from his or her family on its face could result in irreparable harm that can never be replaced for a child. If the death of a grandparent takes that opportunity away from a child, then it is surely a tragedy. But, if family bickering and vindictiveness denies a child these opportunities, then that is a shame.



The result of the *DeRose* decision now puts in jeopardy all court orders that have been entered since the expansion of the Grandparent Visitation Statute in 1982. More than 21 years of court orders have been in effect with virtually tens of thousands of grandparents and grandchildren having been reunited through these court orders. Since the majority of the Michigan Supreme Court held the statute to be unconstitutional, what is the result of the prior orders that have been in effect? It is the opinion of this author that those orders are not void ab initio but, rather, will require the filing of a petition to set the order aside if a parent chooses to do so. Obviously that may result in significant judicial chaos and the opening of floodgates of litigation due to the number and enormity of prior court orders, issued over the past 21 years, that are now affected by this decision. A general rule is that judicial decisions are to be given full retroactive effect.[12] However, there have been cases in which an unconstitutional statute was not determined to be void ab initio, as well as decisions holding that a statute held to be unconstitutional should be given limited retroactivity. In *Stuark v Ozomarao,*[13] the court of appeals, in reaching a decision on the issue of retroactivity, held that the following elements should be considered:

(1) the purpose to be served by the new rules;

(2) the extent of reliance on the old rule; and

(3) the effect of retroactivity on the Administration of Justice.[14]

The issue of how this will effect grandparent visitation cases is yet to be determined. However, what is known is that these orders are vulnerable to be set aside and that future litigation will be necessary to resolve this issue.

Grandparents offer a vital connection to a child's future by allowing them to know their past. Many grandparents provide unconditional love to their grandchildren and, many grandparents have sustained lengthy marriages and relationships that a child of divorce may otherwise never know.

One way to resolve the potential chaos that will impact our court system, following *DeRose,* is quick action on the part of the Michigan Legislature to amend the Grandparent Visitation Statute in order to insert the requirements that the *DeRose* majority, through Justice Weaver's concurring opinion, delineated. It is the hope of many grandparent, grandchild, and parent advocates that this will be done and done quickly. The reason that this support is across the board, is as a result of *DeRose,* many parents find themselves in situations that they never would have thought could happen to them, even if they are the custodial parent of young children.

For example, let's say a mother has custody of two young children. She has a close relationship with her own parents and, in fact,

her parents assist in caretaking of the children while the mother is at work or otherwise involved. Further, let's say that the mother does not have a good or strong relationship with her former husband and he, in fact, has significant acrimony towards his former mother- and father-in-law. In the event of an untimely death of the custodial mother in that situation, Michigan law would require that custody of the children go directly to the surviving biological parent. He will now control whether or not those children would ever be able to see their maternal grandparents again. His sole arbitrary decision cannot be challenged by anyone, unless the *DeRose* decision is effectively voided through the enactment of properly drafted legislation.

Another example of potential harm to children was recently brought to the attention of this author. I received a call from an attorney in the Upper Peninsula telling me that he represented paternal grandparents of a child whose parents divorced and the father had just left for military action. The grandparents did not know if their son was in Kuwait or Iraq. He said that the paternal grandparents advised him that following the divorce of their son and their former daughter-in-law, they would have significant contact with their grandchildren when the father would bring them over to their home on Sunday's during his visitation to spend time together as a family. Oftentimes, the children even slept at the grandparents' home on Saturday night, giving them time alone to be with their grandparents. After dad was sent overseas, the grandparents called their former daughter-in-law and asked if they would be able to see the grandchildren in their son's absence. She told them, "she never liked them and that they would not be able to see the children until their father came home, if he comes home." Following *DeRose,* Michigan's children and grandparents are no longer protected from such abuses. The arbitrary decision of a parent will now go unquestioned.

On December 3, 2003, the Michigan House of Representatives unanimously passed HB 5039, which would amend the grandparent visitation statute to reinstate the right of grandparents to petition a court for grandparent visitation, if any of the following circumstances exist:

1. An action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court.
2. The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.
3. The child's parent who is a child of the grandparent is deceased.
4. Except as otherwise provided in the statue, legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.
5. The grandparent, at any time during the life of the child, has provided an established custodial environment for the child as described within the act, whether or not the grandparent had custody under a court order.
6. The child's parent has withheld from the grandparent opportunities to visit with the child to retaliate against the grandparent for reporting child abuse or neglect to FIA or a law enforcement agency, if the court finds reasonable cause to believe that child abuse or neglect has occurred and the court finds that denial of grandparenting time would cause harm to the child.
7. The child's parent lives separate and away from the other parent and child for more than one year.
8. The child's parents have never been married and are not residing in the same household, as long as a putative father has acknowledged paternity under law or been determined to be the father by court order.

The proposed law clearly sets forth that there is a rebuttable presumption that a fit parent's actions and decisions regarding grandparenting time are in the best interests of the child. However, the statute allows a grandparent to file an action, but sets forth the grandparent has the burden, by preponderance of the evidence, to overcome a parent's decision to deny visitation. The statue sets forth several specific criteria for the court to utilize in making its decision as to whether the grandparent should prevail. Costs, including actual attorney fees, may be assessed against a party who sets forth a position that the court believes to have been frivolous. ✦

Richard S. Victor is the founding partner of The Law Offices of Richard S. Victor, PLLC, Bloomfield Hills. His practice exclusively involves all aspects of matrimonial law. He is the current president of the Michigan Chapter of the American Academy of Matrimonial Lawyers and a former chair of the Family Law Section of the State Bar of Michigan and received their Lifetime Achievement Award in 1999. He is the founder and executive director of the national nonprofit Grandparents Rights Organization. He received the National Alumni of the Year Award, in 2000, from MSU–DCL.

Footnotes

1. 74 Mich App 656; 254 NW2d 337 (1977).
2. 530 US 57 (2000).
3. 256 Mich App 265; 662 NW2d 836 (2003).
4. *Abraham* at NW2d 846 citing *People v Hubbard* (after remand), 217 Mich App 459, 483 through 484; 552 NW2d 593 (1996).
5. *Counsel of Orgs v Governor,* 455 Mich 557, 568; 566 NW2d 208 (1997).
6. *Mantei v Michigan Public School Employee's Retirement System and Michigan Public School Employee's Retirement Board,* 663 NW2d 486 (2000).
7. 465 Mich 442, 447; 636 NW2d 514 (2001).
8. 69 Mich App 58, 69; 244 NW2d 609 (1976).
9. See *Taylor v Gate Pharmaceuticals,* 248 Mich App 472, 478; 639 NW2d 45 (2001).
10. 396 Mich 299, 309; 240 NW2d 206 (1976).
11. See *Hetzel v Hetzel,* 248 Mich App; 638 NW2d 123; appeal denied 639 NW2d 256 (2001).
12. *Michigan Educational Employee's Mutual Insurance Company v Morris,* 460 Mich 180 (1999).
13. 238 Mich App 549 (1999).
14. *Stuark* at 561.