

TROXEL v. GRANVILLE and its Effect On the Future of Grandparent Visitation Statutes

I. INTRODUCTION

Grandparent visitation statutes, which allow grandparents to petition for visitation with their grandchildren, evoke emotional responses from both advocates of parental rights and supporters of grandparents' rights.¹ The statutes affect many Americans and reflect the states' attempts to resolve difficult issues arising from custody and visitation disputes.² When the Supreme Court granted certiorari review of *Troxel v. Granville*,³ a case involving a couple from Washington who were petitioning to receive more visitation time with their grandchildren, the decision was eagerly awaited.⁴ In *Troxel*, the Supreme Court decided that the application of the Washington visitation statute was an unconstitutional infringement on the custodial parent's rights.⁵ However, the *Troxel* Court did not find grandparent visitation statutes per se unconstitutional and refused to define the exact scope of parental rights under the Due Process Clause.⁶ In their narrow

1. See Roger K. Lowe & Frank Hinchey, *Visitation Decisions Swing Back to Parents*, COLUMBUS DISPATCH, June 6, 2000, at 1A.

2. See Lowe & Hinchey, *supra* note 1, at 1A ("The American Association of Retired Persons [AARP] estimates that 60 million Americans are grandparents. The ranks include six of the nine Supreme Court justices."); *Troxel v. Granville*, 120 S. Ct. 2054, 2059 (2000); see also *Visitation rights; A tangle of tougher issues lies ahead*, STAR TRIB. (Minneapolis), June 9, 2000 at 20A [hereinafter *Visitation rights*] ("There is nothing trivial or transitory about the issue of grandparent visitation in this age of family fragmentation and reformation.").

3. 120 S. Ct. at 2054.

4. See Lowe & Hinchey, *supra* note 1, at 1A (detailing one grandmother's wait for the ruling in *Troxel*).

5. See discussion *infra* Part III.

6. See *id.*

decision, the *Troxel* Court left several unanswered questions and encouraged state courts to evaluate visitation statutes on a "case-by-case basis."⁷ After the announcement of the decision, advocacy groups from both sides of the grandparent visitation issue supported the Supreme Court's ruling.⁸ However, the question remains: what effect will *Troxel* actually have on grandparent visitation statutes?

This paper explores the decision reached by the Supreme Court in *Troxel* and its effect on the future of grandparent visitation statutes, including the proper legislative response to the case. Specifically, Part II provides a summary of the development of grandparent visitation statutes, including the history behind the statutes and the controversial issues surrounding grandparent visitation. Part III details the decision reached by the Supreme Court and presents the background surrounding the case. Part IV analyzes the effect of *Troxel* on grandparent visitation statutes, based on the application of *Troxel* to state court cases, the questions left unanswered by the Supreme Court, and the possible legislative reform measures resulting from the case. Finally, Part V concludes with an outlook to the future of grandparent visitation statutes.

II. DEVELOPMENT OF GRANDPARENT VISITATION STATUTES

In order to understand the effect of *Troxel*, it is necessary to explore the background and development of grandparent visitation statutes. The statutes have developed mainly within the last thirty-five years and partially are an attempt by state legislatures to address problems stemming from visitation and custody disputes.⁹ However, the creation of grandparent visitation statutes has sparked controversy between supporters of parental rights and advocates for grandparents.¹⁰ Both of these factors help explain the importance of the *Troxel* case and its resulting decision.

A. History of Grandparent Visitation Statutes

The common law did not provide for grandparent visitation; current statutes allowing grandparents to petition for visitation rights are a recent creation.¹¹ State legislatures did not start passing these types of statutes until the mid 1960s.¹² Today, all states have

7. See *Visitation rights*, *supra* note 2, at 20A; *Troxel*, 120 S. Ct. at 2064.

8. See *Visitation rights*, *supra* note 2, at 20A; see also Richard Garnett, *Grandparents vs. Parents ... Or Judges vs. the Law?*, NAT'L CATH. REG., June 25 - July 1, 2000 ("[B]oth civil libertarians and conservatives can . . . cheer the result."); see also Lowe & Hinchey, *supra* note 1, at 1A (Both the AARP and the ACLU praised the *Troxel* decision. "AARP said it was 'gratified' that yesterday's ruling left the door open for narrowly drafted grandparent-visitation laws. . . . The American Civil Liberties Union praised the court for limiting the ability of governments to interfere with a parent's child-raising decision.").

9. See discussion, *infra* Part II, A.

10. See discussion, *infra* Part II, B.

11. See Jeffrey W. Doeringer, *Grandparent Visitation: Dead or Alive?*, ORANGE COUNTY LAW., Apr., 2000, at 32 (citing *Odell v. Lutz*, 78 Cal. App. 2d 104 (1947)).

12. See *Visitation rights*, *supra* note 2, at 20A; A.B.A., GRANDPARENT VISITATION DISPUTES: A

some type of legislation allowing grandparents to seek visitation with their grandchildren.¹³ Basically, the statutes allow grandparents to petition for court-imposed visitation schedules when they are not satisfied with the amount of visitation permitted by their grandchild's parent or guardian.¹⁴

Although a universal grandparent visitation statute was attempted, it was never implemented and the current applicable statutes all exist on a state by state basis.¹⁵ There is a great deal of diversity among the visitation statutes of each state.¹⁶ Some statutes allow only grandparents to petition for visitation, while others permit anyone to file suit for visitation.¹⁷ State legislatures also vary in the standards required by courts when deciding if visitation is appropriate.¹⁸ Many courts must apply a "best interests" standard and determine if visitation is in the "best interests" of the child.¹⁹ Some state legislatures outline factors for courts to consider when making this determination.²⁰ Other statutes provide little to no guidance about how to determine what is in the "best interests" of a child.²¹ Yet, still other visitation standards require grandparents to show that harm will be incurred if visitation is not permitted.²² The conflicting standards applied by various visitation statutes indicate some of the unresolved questions concerning grandparent visitation.

The recent development of grandparent visitation statutes is the result of many factors. One of these factors includes "the States' recognition of these changing realities of the American family."²³ The family composition in many households may no longer resemble that of a traditional nuclear family, and states have taken steps to acknowledge this fact.²⁴ As divorce affects many American families, it also may affect visitation between grandchildren and grandparents.²⁵ Increasingly, children, parents and grandparents are being impacted by these factors.²⁶ When parents and grandparents cannot agree on amounts of visitation time or if permission for visits should be granted at all, they

LEGAL RESOURCE MANUAL 5 (Ellen C. Segal & Naomi Karp eds., 1989).

13. See ARTHUR KORNHABER, M.D., *CONTEMPORARY GRANDPARENTING* 180 (1996).

14. See TRACI TRULY, *GRANDPARENTS' RIGHTS* 6 (2d ed. 1999).

15. See KORNHABER, *supra* note 13, at 183-84;

In 1984, a subcommittee established by the United States Senate held a hearing to assess the possibility of passing a uniform grandparent visitation law. In 1986, the House of Representatives passed Resolution 67 calling for a uniform state act to be developed and enacted, which was adopted by both the House and the Senate. In 1991, a follow-up hearing was held, but the law was never implemented.

see also A.B.A., *supra* note 12, at 5.

16. A.B.A., *supra* note 12, at 5.

17. See *id.* at 1; *infra* note 127.

18. See A.B.A., *supra* note 12, at 1.

19. See *infra* note 131.

20. See *infra* notes 136-42.

21. See *infra* notes 131-32.

22. See *infra* note 126.

23. Troxel v. Granville, 120 S. Ct. 2054, 2059 (2000).

24. See *id.*

25. See generally ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., *THE NEW AMERICAN GRANDPARENT* 136-64 (1986) (discussing the differing effects of divorce on maternal and paternal grandparent-grandchild relationships and visitation); KORNHABER, *supra* note 13, at 120 (discussing the "profound repercussions" of divorce on "all family members").

26. See KORNHABER, *supra* note 13, at 181.

take their claims to court.²⁷ However, because of the many issues surrounding the statutes, litigating grandparent visitation claims is rarely easy.

B. Issues Surrounding the Statutes

Despite the fact that every state now has in place a statute allowing grandparents to petition for visitation with their grandchildren, these statutes have not provided easy or clear-cut answers to visitation disputes.²⁸ Bickering over the roles of parents and grandparents in visitation decisions and ultimately who should control these decisions has led to a significant number of court cases.²⁹ It also has led to a polarization of the issue dividing those who advocate parents' rights and those who call for recognition of grandparent's rights.³⁰ In support of their claims, advocates of parents' rights cite the long judicial history recognizing parental rights to privacy.³¹ Yet a large number of grandparents rights groups have formed to advocate for legal recognition of the importance of the grandparent-grandchild relationship.³² These groups have a "powerful AARP-type political agenda," and are armed with statistics about "the importance of grandparents to a child's healthy development and well-being."³³

The costs of litigating a grandparent's visitation claim are extremely high.³⁴ In order to minimize some of the emotional and financial costs involved in visitation disputes, the American Bar Association (ABA) encourages all attorneys to refer the parties to mediation.³⁵ Many grandparents have chosen instead to file suit, and in recent years numerous grandparent visitation cases have made their way through the state court systems.³⁶ Grandparent visitation suits have yielded conflicting decisions, as some state courts have upheld the rights of grandparents to petition for visitation.³⁷ Yet in a substantial number of cases, state courts have struck down statutes permitting visitation

27. See *id.*

28. See KORNHABER, *supra* note 13, at 184.

29. See A.B.A., *supra* note 12, at 1.

30. See Doeringer, *supra* note 11, at 32.

31. See *id.* ("[J]udicial history is the very backbone of the parents' defense to requests for grandparent visitation.") (citations omitted).

32. See KORNHABER, *supra* note 13, at 179-81 (discussing the formation of advocacy groups and their attempts to promote grandparent visitation).

33. Doeringer, *supra* note 11, at 32; KORNHABER, *supra* note 13, at 181.

34. See Doeringer, *supra* note 11, at 32 (discussing the "huge financial impact" families may experience from litigating grandparent visitation claims.); TRULY, *supra* note 14, at 17 (suggesting that the costs of litigating grandparent visitation claims extend beyond financial matters and may do permanent harm to familial relationships).

35. See A.B.A., *Policy Resolution and Comments on Grandparent Visitation*, Feb. 7, 1989, reprinted in A.B.A., *supra* note 12, at 121.

36. See A.B.A., *supra* note 12, at 1.

37. See JOSEPH GOLDSTEIN, et. al., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 264 (1996) (citing *Beckman v. Boggs*, 655 A.2d 901 (Md. 1995)).

against the wishes of custodial parents.³⁸ State courts have utilized arguments based on parental autonomy and the right to privacy to find statutes unconstitutional.³⁹ In addition to invalidating statutes on a constitutional basis, some state legislatures have implemented standards that require grandparents to prove that their grandchildren will suffer harm without court ordered visitation.⁴⁰ This tougher standard replaces the traditional statutory requirement that visitation be assessed in terms of the "best interests" of the children.⁴¹

On September 28, 1999, the Supreme Court granted certiorari review of *Troxel*, a case involving a petition for grandparent visitation and a Washington state statute.⁴² This decision was met with high expectations from both champions of parental rights and proponents of grandparent visitation rights.⁴³ The Supreme Court's decision to review the *Troxel* case signaled the importance of examining the issues surrounding grandparent visitation statutes, including the conflicting decisions reached by state courts and the differing standards applied by state legislatures.⁴⁴ In fact, it is extremely rare that the Supreme Court hears family law cases.⁴⁵ Thus, on both sides of the visitation issue, activists promoted their positions and anxiously awaited the final *Troxel* decision.⁴⁶

III. *TROXEL V. GRANVILLE*

A. Factual Background

Although Brad Troxel and Tommie Granville were never legally married, the couple lived together and had two children.⁴⁷ In June 1991, the couple separated and Granville retained sole custody of the children.⁴⁸ At this time, Brad moved in with his parents, Jenifer and Gary Troxel.⁴⁹ During this period, he maintained frequent visitation with his daughters, Isabelle and Natalie.⁵⁰ Brad routinely brought Isabelle and Natalie to spend

38. See Doeringer, *supra* note 11, at 32 (citing *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1988); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998); *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999)).

39. See Doeringer, *supra* note 11, at 32.

40. See generally Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When The Child Would Otherwise Suffer Harm*, 48 *DRAKE L. REV.* 279 (2000).

41. See *id.*

42. See Doeringer, *supra* note 11, at 32.

43. See *Lowe & Hinchey*, *supra* note 1, at 1A.

44. See Doeringer, *supra* note 11, at 32.

45. See *id.*

46. See Timothy Egan, *After Seven Years, Couple is Defeated*, *N. Y. TIMES*, June 5, 2000, at 22A (The *Troxel* case "[g]alvanized retirement groups on their side and parents' rights organizations on the other.>").

47. See *Troxel v. Granville*, 120 S. Ct. 2054, 2057 (2000); see generally Garnett, *supra* note 8, at 9 (providing background and commentary concerning the *Troxel* case).

48. See *Troxel*, 120 S. Ct. at 2057; see generally John H. Brandt, *The Fall of Grandparent Visitation*, *FAMILY MATTERS*, (Family & Juvenile Law Section of the IND. B. A.), Summer 2000, at 1-2 (providing a general discussion of the *Troxel* case).

49. *Troxel*, 120 S. Ct. at 2057.

50. See *id.*

weekends with their grandparents.⁵¹ Two years later, in May 1993, Brad committed suicide.⁵² After his death, the Troxels regularly continued to spend time with their granddaughters.⁵³ However, this arrangement only lasted for a few months.⁵⁴ Subsequently, Granville limited the Troxel's time with the girls to one short visit per month.⁵⁵

Upon learning of the change in visitation, the Troxels brought suit in the Washington Superior Court for Skagit County.⁵⁶ Their petition, filed in December 1993, requested visitation rights with Isabelle and Natalie.⁵⁷ The Troxels sought relief based on the Washington state statutes, specifically Revised Code of Washington §§ 26.09.240 and 26.10.160(3) (1994).⁵⁸ During the trial, the main issue revolved around the amount of visitation that the Troxels would be permitted to have with their granddaughters.⁵⁹ The trial court initially granted visitation rights at a half-way point, between the Troxel's original request and Granville's preference for limited visits.⁶⁰ Granville appealed this decision.⁶¹ The case was then remanded, so that the trial court could make written findings of fact and conclusions of law.⁶² The Superior Court stated that "The Petitioners [the Troxels] are a part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in areas of cousins and music."⁶³ Based on these findings, the Superior Court stated that visitation with their grandparents was in the best interests of Isabelle and Natalie.⁶⁴ However the Washington Court of Appeals found that the Troxels lacked standing to seek visitation, and reversed the trial court's order.⁶⁵

The Troxels appealed the reversal decision, and the case was reviewed by the Washington Supreme Court.⁶⁶ The Washington Supreme Court determined that the Troxels

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* at 2058. (Granville was not opposed to the girls spending time with the Troxels. However, she preferred visits be limited to one day a month. The Troxels desired that their granddaughters spend two weekends a month with them, as well as two weeks during the summer).

60. *See id.* (The Superior Court granted the Troxels visitation with their granddaughters for one weekend per month, one week per summer, and four hours on each of their birthdays.); Brandt, *supra* note 47, at 1.

61. *See Troxel*, 120 S. Ct. at 2058.

62. *See id.*

63. *Id.*; *see also* Egan, *supra* note 45, at 22A (The Troxels have a large family, including ten grandchildren. Gary Troxel also has an unique musical background. As a founding member of the Fleetwoods rock and roll band, he earned two gold records with the popular songs "Come Softly to Me" and "Mr. Blue.").

64. *See Troxel*, 120 S. Ct. at 2058.

65. *See id.* (The Court of Appeals stated that the Troxels did not have standing to file suit, because a custody action was not pending).

66. *See id.*

did have standing to seek visitation rights.⁶⁷ However, the court ruled that the visitation statute was unconstitutional.⁶⁸ Specifically the court held "that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children."⁶⁹ Thus, the court found that the statute did not provide the Troxels visitation rights with their granddaughters.⁷⁰ The Troxels then sought review by the United States Supreme Court.⁷¹

B. Analysis Employed by the Supreme Court

Although the Troxels originally brought suit under both Revised Code of Washington §§ 26.09.240 and 26.10.160(3), only § 26.10.160(3) was under consideration by the Supreme Court.⁷² The Washington state statute provided that "[a]ny person may petition the court for visitation rights at any time including, but not limited to custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."⁷³

The Court began its analysis by emphasizing the protections provided by the Fourteenth Amendment's Due Process Clause.⁷⁴ The *Troxel* Court stated that the Due Process Clause requires protection of liberty interests and limits government interference with fundamental rights.⁷⁵ Citing the principle originally established in *Meyer v. Nebraska*,⁷⁶ the Court recognized that the right of parents concerning the "care, custody, and control of their children" is a fundamental liberty interest.⁷⁷ This liberty interest includes the right to make decisions about the upbringing and education of one's children.⁷⁸ Thus, the *Troxel* Court stated that the parent-child relationship is constitutionally protected.⁷⁹ Furthermore, the Court concluded that parents, rather than the state, should play the primary role in decision-making about their children.⁸⁰

After detailing the protected interest at stake, the Court then considered § 26.10.160(3) and its application to the *Troxel* case.⁸¹ The Court described the Washington state visitation statute as "breathhtakingly broad," and concluded that its application

67. *See id.*

68. *See id.*

69. *Id.*

70. *See id.*

71. *See id.* at 2059.

72. *See id.* at 2057.

73. *Id.* at 2057-58 (quoting WASH. REV. CODE § 26.10.160(3) (Supp. 1996)).

74. *See id.* at 2059-60; *see also* U. S. CONST. amend. XIV.

75. *See Troxel* 120 S. Ct. at 2060 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Reno v. Flores*, 507 U.S. 292, 301-2 (1993)).

76. 262 U.S. 390 (1923).

77. *Troxel*, 120 S. Ct. at 2060 (quoting *Meyer*, 262 U.S. at 399, (parents rights include the ability to "establish a home and bring up children" and "to control the education of their own.")).

78. *See Troxel*, 120 S. Ct. at 2060 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

79. *See Troxel* 120 S. Ct. at 2060 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

80. *See Troxel*, 120 S. Ct. at 2060 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder* 406 U.S. 205, 232 (1972)).

81. *See Troxel*, 120 S. Ct. at 2060.

was an infringement on Granville's parental rights.⁸² Examining the statute, the *Troxel* Court listed several reasons why its breadth was troublesome.⁸³ Section 26.10.160(3) allows third parties "seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."⁸⁴ The *Troxel* Court also emphasized that the statute did not require state courts to assume that parents' decisions were in the best interest of their children.⁸⁵ "Instead, the Washington statute places the best-interest determination solely in the hands of the judge."⁸⁶ The Supreme Court then went on to consider the statute's application to the *Troxel* case. The *Troxel* Court noted that there was no finding of Granville as an unfit parent. Considering the Superior Court's decision, the *Troxel* Court found that it disregarded the principle that a fit parent acts in his or her child's best interest.⁸⁷ The Court also noted that the Superior Court should have recognized that Granville was willing to permit some visitation between the

Troxels and the girls.⁸⁸ The Court concluded that "the combination of these factors demonstrates . . . an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."⁸⁹

C. The Supreme Court's Decision

The Supreme Court ultimately decided that the application of Revised Code of Washington § 26.10.160(3) to Granville and her daughters "exceeded the bounds of the Due Process Clause."⁹⁰ However, the *Troxel* Court did not declare that nonparent or grandparent visitation statutes are per se unconstitutional.⁹¹ Rather, the Supreme Court indicated that state courts would have to examine the statutes on a "case-by-case basis."⁹² Justice O'Connor wrote the opinion which was joined by three other justices.⁹³ In the opinion, the Court concluded that it was unnecessary to remand the case for further consideration.⁹⁴ The *Troxel* Court stated that additional litigation would serve only to

82. *Id.* at 2061.

83. *See id.* at 2061.

84. *Id.*

85. *See id.*

86. *Id.*

87. *See id.* at 2062 (citing *Parham v. J.R.*, 442 U.S. 584 (1979)).

88. *See Troxel* 120 S. Ct. at 2062-63.

89. *Id.* at 2063.

90. *Id.* at 2056.

91. *See id.* at 2064.

92. *Id.*

93. *See Troxel*, 120 S. Ct. at 2054 (Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined Justice O'Connor. Justices Souter and Thomas concurred in the judgment, but filed separate opinions. Justices Stevens, Scalia, and Kennedy filed dissenting opinions.); *see also* Lowe & Hinchey, *supra* note 1, at 1A ("Although six justices voted to strike down the Washington state law, the court was deeply divided on the legal reasoning that should be used in these matters.").

94. *Troxel*, 120 S. Ct. at 2065.

increase the burdens suffered by Granville and her family.⁹⁵ This decision brought an end to the seven-year struggle between Granville and the Troxels concerning who should control visitation with Isabelle and Natalie.⁹⁶

IV. WHAT EFFECT WILL TROXEL HAVE ON GRANDPARENT VISITATION STATUTES?

In order to understand the effect of *Troxel* on grandparent visitation statutes, it is necessary to consider several interrelated factors. The interpretation and application of the *Troxel* decision by state courts will affect grandparent visitation statutes. State court decisions will also help identify, which statutes need to be reformulated. Another factor making interpretations of *Troxel* difficult, results from the questions left unanswered by the Supreme Court. These unanswered questions will necessitate more litigation, and in turn make potential legislative reform of grandparent visitation more complicated.

A. Application of *Troxel*

Troxel's effect on grandparent visitation statutes will be partially determined by the way that state courts interpret and apply the Supreme Court's decision. Two post-*Troxel* cases have applied the Supreme Court's analysis to their state statutes.⁹⁷ However, in the cases of *Cabral v. Cabral* and *Brice v. Brice*, the *Troxel* analysis yielded different results.

The Missouri Court of Appeals, Eastern District, considered the effect of *Troxel* on the state's grandparent visitation statute in *Cabral*.⁹⁸ In this case, the court evaluated Missouri Revised Statutes § 452.402.2,⁹⁹ that allows grandparents to petition for reasonable rights of visitation.¹⁰⁰ The *Cabral* court distinguished the Missouri statute from the Washington visitation statute considered in *Troxel* based on several factors.¹⁰¹ Parental decisions are accorded more deference in the Missouri grandparent visitation statute, as compared to the Washington statute.¹⁰² The Missouri statute also offers more protection of parental rights, because it calls for the appointment of a guardian ad litem to participate in a visitation dispute.¹⁰³ The *Cabral* court also noted that the amount of visitation ordered in this case created only "a minuscule intrusion into Parent's lives, unlike the significant visitation granted in *Troxel*."¹⁰⁴ Thus, the *Cabral* court found that the application of Missouri Revised Statutes § 452.402.2 did not violate parents' consti-

95. See *id.*

96. See Egan, *supra* note 45, at 22A.

97. See *Cabral v. Cabral*, No. ED76060, 2000 Mo. App. LEXIS 1211 (E.D. Mo. Ct. App. Aug. 8, 2000); *Brice v. Brice*, 754 A.2d 1132 (Md. Ct. Spec. App. 2000).

98. See *Cabral*, 2000 Mo. App. LEXIS 1211.

99. See MO. REV. STAT. § 452.402.2 (Supp. 1999).

100. See *Cabral*, 2000 Mo. App. LEXIS 1211, at *7.

101. See *id.* at *12-*15.

102. See *id.* at *13.

103. See *id.*

104. *Id.* at *16.

tutional rights.¹⁰⁵

Although the Missouri Court of Appeals found the state's grandparent visitation statute to be constitutional, the Court of Special Appeals of Maryland reached a different result when applying *Troxel* to the Maryland state statute.¹⁰⁶ In *Brice*, the Court of Special Appeals considered the constitutionality of Annotated Code of Maryland § 9-102.¹⁰⁷ The *Brice* court determined that the Maryland state statute was unconstitutionally applied in this case, as was the Washington statute in *Troxel*.¹⁰⁸ Both the Maryland and Washington state statutes allowed visitation rights to be granted to grandparents when determined to be in the "best interests" of the child.¹⁰⁹ However, neither statute provided any guidelines for the court when considering the "best interests" standard.¹¹⁰ The appellate court noted that the facts in *Brice* were "strikingly similar to those in *Troxel*."¹¹¹ In *Brice*, the custodial parent was considered fit and favored a low level of grandparent visitation.¹¹² The *Brice* court, guided by the *Troxel* decision, found the court-ordered visitation imposed by the trial court to be an unconstitutional application of Annotated Code of Maryland § 9-102.¹¹³

As these two cases indicate, *Troxel's* effect on grandparent visitation statutes will depend upon the statute under consideration. Statutes resembling Missouri Revised Statutes § 452.402.2 that offer more protection of parental rights are less likely to be affected by the *Troxel* ruling. However, statutes that create the possibility for greater interference with the rights of parents are apt to come under question when courts apply the *Troxel* decision. Statutes with broad language such as Annotated Code of Maryland § 9-102 are likely to be found unconstitutional in their application.

B. Unanswered Questions

Both the *Cabral* and *Brice* courts alluded to the fact that the *Troxel* decision left several issues unresolved.¹¹⁴ In fact, the *Troxel* decision is notable not only for the questions it resolved concerning grandparent visitation, but also for the many questions it failed to answer. These unanswered questions will also affect the future of grandparent visitation statutes and potential legislative reform measures.

In considering the Washington statute, the *Troxel* Court left several issues involving

105. See *id.* at *1.

106. See *Brice v. Brice*, 754 A.2d 1132 (Md. App. 2000).

107. See *id.*; MD. CODE ANN., FAM. LAW § 9-102 (1999).

108. See *Brice*, 754 A.2d at 1133.

109. See MD. CODE ANN., FAM. LAW § 9-102 (1999); WASH. REV. CODE § 26.10.160(3) (Supp. 1996).

110. See *id.*

111. *Brice*, 754 A.2d at 1136.

112. See *id.*

113. See *id.* at 1133.

114. See *Cabral v. Cabral*, No. ED76060, 2000 Mo. App. LEXIS 1211, *11 (E.D. Mo. Aug. 8, 2000); *Brice*, 754 A.2d at 1135.

grandparent visitation statutes unresolved.¹¹⁵ The *Troxel* Court did not address the main question of the Washington Supreme Court.¹¹⁶ The *Troxel* Court declined to decide “whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”¹¹⁷ By refusing to address this question, the *Troxel* Court does not provide definitive guidance about the type of standards courts should use to decide if visitation is appropriate.¹¹⁸ The *Troxel* Court does not suggest that statutes that utilize a “best interests” standard for determining when to grant visitation rights are per se unconstitutional.¹¹⁹ Yet, the Court did find that the Washington statute’s standard allowing visitation whenever it “may serve the best interest of the child” to be “breathtakingly broad.” This creates confusion about the type of standard courts should apply when faced with visitation decisions, and the type of standards and factors legislatures should include in grandparent visitation statutes. Another unanswered question by the *Troxel* Court concerns the scope of parental due process rights. The *Troxel* Court “did not provide us with any specific due process guidelines for establishing when non-parental visitation is appropriate.”¹²⁰ This leaves courts and legislatures with the uneasy knowledge that the Supreme Court declines to specify exactly what the due process rights of parents are, but if they step too heavily on parental rights the Court will certainly point that out.¹²¹

The questions left unanswered in *Troxel* create compelling issues and may make the legislative reform of grandparent visitation statutes more difficult. Issues surrounding the type of standards that courts should apply to visitation decisions for states and the scope of parental rights under the Due Process Clause will necessitate more litigation, in order to define more precise boundaries between parental rights and the ability of grandparents to petition for visitation.¹²² As the *Troxel* court indicated, many of these questions will have to be resolved on a state-by-state and “case-by-case basis.”¹²³

C. Legislative Reform

As noted earlier, the language and scope of grandparent visitation statutes vary from state to state.¹²⁴ The *Troxel* Court did not find grandparent visitation statutes to be unconstitutional per se, and the Court also acknowledged the need for this type of statute.¹²⁵ Therefore, states should reexamine their grandparent visitation statutes and determine if reform is necessary. In doing so, state legislatures will have to grapple with the questions left unanswered by *Troxel*, and attempt to define the appropriate standards to apply

115. See *Troxel v. Granville*, 120 S. Ct. 2054, 2064 (2000); Brandt, *supra* note 47, at 1.

116. See *Troxel*, 120 S. Ct. at 2064.

117. *Id.*

118. See Brandt, *supra* note 47, at 1.

119. See *Troxel*, 120 S. Ct. at 2064.

120. Brandt, *supra* note 47, at 1.

121. See *id.*

122. See Lowe & Hinchey, *supra* note 1, at 1A; see also *Visitation rights*, *supra* note 2, at 20A (“A vast thicket of litigation lies ahead, and few cases that reach the Supreme Court will be as easy as this one.”).

123. *Troxel*, 120 S. Ct. at 2064.

124. See A.B.A., *supra* note 12, at 5.

125. See *Troxel*, 120 S. Ct. at 2064.

in grandparent visitation disputes.

Although *Troxel* does not answer all the potential questions involved in the interplay between parental rights and grandparent visitation statutes, it does provide some guidance to state legislatures. The *Troxel* Court identified several factors that contributed to the unconstitutional application of the Washington state statute.¹²⁶ Using these factors, it is possible to make some recommendations about potential revision of grandparent visitation statutes.¹²⁷ Statutes that permit anyone to petition for visitation, like the Washington statute described as "breathtakingly broad" in *Troxel*, should consider limiting the parties who can seek visitation rights.¹²⁸ States legislatures whose grandparent visitation statutes do not include any standards for deeming visitation appropriate should consider reformulating their statutes to provide more in-depth guidance.¹²⁹ As restated in *Troxel*, there is a presumption that parental decisions are in the best interests of the child, and grandparent visitation statutes should acknowledge this precept.¹³⁰ Statutes should not assume that grandparent visitation is in the best interests of the child.¹³¹ States whose statutes apply merely a "best interests" of the child standard should also consider reforming their statutes to provide more guidelines for courts making visitation decisions.¹³² Grandparent visitation statutes that offer little protection to parental decisions are also good candidates for reform.¹³³ The *Troxel* Court criticized the Washington stat-

126. See *supra* p. 12-13.

127. It is also possible to identify a small category of grandparent visitation statutes that are unaffected by the ruling in *Troxel*. Grandparent visitation statutes that require a showing of harm incurred by the child if visitation does not occur should adequately protect parental rights. See, e.g., *Troxel*, 120 S. Ct. at 2064, 2078 (citing GA. CODE ANN. § 19-7-3 (1991) & VA. CODE ANN. § 20-124.2 (1995)); see generally Bohl, *supra* note 39, at 279 (discussing case law which interprets TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999) (amended 2000) and VA. CODE ANN. § 20-124.2 (1995) as requiring a showing of harm incurred without visitation)).

128. See, e.g., CONN. GEN. STAT. § 46b-59 (1995).

129. See, e.g.; IND. CODE § 31-17-5-1 (1999); see also Brandt, *supra* note 47, at 1 (suggesting that the Indiana grandparent visitation statute is unconstitutional as written).

130. See *Troxel*, 120 S. Ct. at 2061 (quoting *Parham v. J.R.*, 442 U.S. 584 (1979)).

131. See *id.* at 2062 (citing CAL. FAM. CODE ANN. § 3104(e) (West 1994); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (Supp. 1999); UTAH CODE ANN. § 30-5-2 (1998)).

132. See e.g., ARK. CODE ANN. § 9-13-103 (Michie 1998); COLO. REV. STAT. § 19-1-117 (1999); DEL. CODE ANN., Tit. 10, § 1031(7) (1999); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (1999); KY. REV. STAT. ANN. § 405.021 (Baldwin 1990); MD. FAM. LAW CODE ANN. § 9-102 (1999); MASS. GEN. LAWS § 119:39D (1996); MICH. COMP. LAWS ANN. § 722.27b (Supp. 1999); NEV. REV. STAT. § 125C.050 (Supp. 1999); N.Y. DOM. REL. LAW § 72 (McKinney 1999); N.C. GEN. STAT. §§ 50-13.2, 50-13.2A (1999); ORE. REV. STAT. § 109.121 (1997); S.D. CODIFIED LAWS § 25-4-52 (Michie 1999); VT. STAT. ANN., Tit. 15, §§ 1011-1013 (1989); W. VA. CODE §§ 48-2B-1 to 48-2B-7 (1999).

133. See e.g., statutes cited *supra* notes 128-132; *Troxel*, 120 S. Ct. at 2063, 2078 (citing KAN. STAT. ANN. § 38-129 (1993); IOWA CODE § 598.35 (1999); MISS. CODE ANN. § 93-16-3 (1994); N. C. GEN. STAT. §§ 50-13.2, 50-13.2A, 50-13.5 (1999); WIS. STAT. §§ 767.245, 880.155 (1993-1994)); (Statutes that require proof of a "substantial relationship" between grandchild and grandparent, in order to meet the "best interests" standard offer little protection of parental decisions. These grandparent visitation statutes should also be reformed to safeguard parental rights.); see generally Suzanne Valdez Carey, *Grandparent Visitation Rights in Kansas: A review of Troxel v. Granville*, J. KAN. B. ASS'N., Oct., 2000, at 14 (suggesting that the Kansas

ute for granting judges too much decision-making ability concerning the "best interests" of the child.¹³⁴ Therefore, states should also determine the amount of latitude granted to the judge when making decisions about grandparent visitation. If the statute places a great deal of power in the judge's hands, the state should consider providing alternate protections for parental rights, such as appointing a guardian ad litem to the case.¹³⁵

Applying the factors outlined by the *Troxel* Court offers some guidance for the revision of statutes, but it still leaves some complicated questions for state legislatures.¹³⁶ Many grandparent visitation statutes provide guidance for courts applying the "best interests" standard to visitation disputes. State legislatures enjoin courts to consider such factors as fitness of parents,¹³⁷ the existing relationship between the grandparent and grandchild,¹³⁸ the wishes of the child,¹³⁹ the health of the petitioning grandparents,¹⁴⁰ the geographic location of parties involved,¹⁴¹ the health and well-being of the child,¹⁴² and the motivations of all parties involved¹⁴³ when making visitation decisions. As a result of *Troxel*, state legislatures and state courts are left with the difficult job of deciding if these factors provide enough protection of parental rights. Other statutes permit visitation when it is in the "best interests" of the child, but mandate that the visitation must not cause "interference with the parent-child relationship."¹⁴⁴ State legislatures must also decide if this standard adequately safeguards parental rights.

Ultimately, the question concerning the scope of due process parental rights and the effect of the interplay between these rights and grandparent visitation will have to be resolved. However, this will require more litigation by courts at all levels. In the mean time, state courts must struggle to apply *Troxel* to existing grandparent visitation statutes, while state legislatures should try to adequately protect parental rights and reform

grandparent visitation statutes are unconstitutional).

134. See *Troxel v. Granville*, 120 S. Ct. 2054, 2061 (2000).

135. See, e.g., MO. REV. STAT. § 452.402 (Supp. 1999); MONT. CODE ANN. § 40-9-102 (1997); N. H. REV. STAT. ANN. § 458:17-d (1992).

136. See *Visitation rights*, *supra* note 2, at 20A.

137. See, e.g., TEX. FAM. CODE ANN. § 153.433 (West Supp. 2000).

138. See, e.g., ARIZ. REV. STAT. ANN. § 25-409 (West 1994); LA. CIV. CODE ANN., art. 136 (West Supp. 2000); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999-2000); N.M. STAT. ANN. § 40-9-2 (Michie 1999); OHIO REV. CODE ANN. § 3109.051 (West Supp. 1999); OKLA. STAT. ANN., tit. 10, § 5 (West 1998 & Supp. 2000); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999).

139. See, e.g., ALA. CODE § 30-3-4.1 (1989); 750 ILL. COMP. STAT., § 5/607 (West 1998); LA. CIV. CODE ANN., Art. 136 (West Supp. 2000); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West Supp. 1999); OKLA. STAT. ANN., tit. 10, § 5 (West 1998 & Supp. 2000); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999).

140. See, e.g., ALA. CODE § 30-3-4.1 (1989); 750 ILL. COMP. STAT., § 5/607 (West 1998); LA. CIV. CODE ANN., Art. 136 (West Supp. 2000); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West Supp. 1999); OKLA. STAT. ANN., tit. 10, § 5 (West 1998 & Supp. 2000).

141. See, e.g., OHIO REV. CODE ANN. § 3109.051 (West Supp. 1999).

142. See, e.g., ALA. CODE § 30-3-4.1 (1989); 750 ILL. COMP. STAT., § 5/607 (West 1998); LA. REV. STAT. ANN. § 9:344 (West Supp. 2000); LA. CIV. CODE ANN., ART. 136 (West Supp. 2000); MO. REV. STAT. § 452.402 (Supp. 1999).

143. See, e.g., ARIZ. REV. STAT. ANN. § 25-409 (West 1994).

144. See, e.g., *Troxel v. Granville*, 120 S. Ct. 2054, 2062 (2000) (citing ME. REV. STAT., ANN. tit 19A, § 1803(3) (West 1998); MINN. STAT. § 257.022 (1998); NEB. REV. STAT. § 43-1802 (1998); N. H. REV. STAT. ANN. § 458:17-d (1992); 23 PA. CONS. STAT. §§ 5311-5313 (1991); S. C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 1999); WYO. STAT. ANN. § 20-7-101 (Michie 1999)).

their grandparent visitation statutes.

V. CONCLUSION

In the last thirty-five years, grandparent visitation statutes have become commonplace. In a time of increasingly fragmented homes, statutes are necessary to settle difficult issues that arise from visitation disputes. *Troxel* is noteworthy because it calls attention to the conflicting standards applied by various grandparent visitation statutes and to the confusion surrounding the scope of due process parental rights. It also serves to establish that when applying grandparent visitation statutes, state courts must safeguard the rights of parents.

However, the questions left unanswered by *Troxel* also illustrate the potential troublespots that may affect grandparent visitation statutes. Until a uniform standard for grandparent visitation statutes is determined and due process parental rights are more clearly defined, state legislatures will face difficulties in reforming their current statutes. Speaking on the role of the judiciary, Supreme Court Justice Ruth Bader Ginsburg states that the Court should "participate in a dialogue with other organs of government."¹⁴⁵ The *Troxel* case is best viewed as opening a dialogue between the judiciary and state legislatures concerning parental rights and their interplay with grandparent visitation. As state legislatures make changes to their statutes, they must formulate the standards that should be used to guide judges' decisions when faced with visitation disputes. Perhaps, working together, state courts and state legislatures can define a more precise scope of parental rights in visitation decisions and determine how this affects the ability of grandparents to seek visitation with their grandchildren.

Sara Elizabeth Culley*

145. Supreme Court Justice Ruth Bader Ginsburg, Speaking in a Judicial Voice, Address before the New York University School of Law (March 9, 1993), in 67 N. Y. U. L. REV. 1185, at 1204.

* Candidate for Juris Doctorate, Notre Dame Law School, 2002; B.A., University of Kansas, 1999. I would like to thank Professors Judith Fox, Richard Garnett, and John Smithburn for providing sources and insight concerning grandparent visitation, as well as my parents Kay and Wayne Culley and my sister Mindy for their continuing love and guidance.