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Bar Associations in Focus on Aging and the Law

Grandparent Rights

Obtaining Visitation With or Custody Of Grandchildren

By Jeff Atkinson

A Connecticut grandmother sought visitation with her four-year-old granddaughter, who was born out of wedlock. The child had been placed in foster care at the age of four months, and the mother's parental rights were terminated. The child's father (who had never lived with the mother) established paternity through a blood test. He then gained

visitation with the child, followed a few months later by sole custody. During the more than two years the child was in foster care, the maternal grandmother visited with the child in the grandmother's home twice every week for three hours per visit. When the father gained sole custody of the child he cut off visits with the grandmother.

The grandmother sought court ordered visitation with her grandchild. The trial court found that visitation would be in the grandchild's best interests and ordered visits on the third Saturday of each month from 10:00 a.m. to 4:00 p.m. in the grandmother's home. The father appealed, and the Connecticut Supreme Court reversed. *Crockett v. Pastore*, 789 A.2d 453 (Conn. 2002). The court held that under the U.S. Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000), granting visitation to the grandmother violated the constitutional right of the father to raise his daughter as he saw fit. The Connecticut Supreme Court held that the grandmother was not entitled to visitation because she did not establish that she "had a parent-like relationship with the child" and that "the child would suffer real and significant harm if the trial court were to deny visitation."

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Impact of *Troxel v. Granville*

The Connecticut Supreme Court's decision reflects a change in the law that has come in the wake of *Troxel*. Prior to *Troxel*, courts in most states would have granted visitation in such circumstances. Between 1966 and 1986, all 50 states enacted grandparent visitation statutes. (The District of Columbia did not enact a grandparent visitation statute.) In most states, all that was required for a grandparent to obtain court-ordered visitation was a showing of some disruption in the family—such as separation, divorce, or death of a parent—coupled with a showing that visitation would be in the child's best interests.

The decision in *Troxel* changed that. A plurality decision written by Justice Sandra Day O'Connor held that a court must give deference to the decision of a fit parent regarding the raising of a child. In *Troxel*, a mother had denied the paternal grandparents the amount of visitation the grandparents had sought following the father's death. The grandparents sought two overnight visits per month, and the mother wished to limit visits to one daytime visit per month.

The Supreme Court held that:

so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

The Court did not preclude grandparent visitation in all cases. Rather, the Court suggested that "special factors" must be shown and that deference must be given to a parent's decisions.

The shift in state laws following *Troxel* has come in legislatures and in court decisions. Some states modified their grandparent statutes to provide more explicit protections to the rights of parents. In a few states, courts struck down the grandparent visitation statutes as overly broad, but in a larger number of states courts added requirements of what grandparents must show before being granted court-ordered visitation. The new requirements have included specific presumptions that the parent's decision is correct and provisions that the grandparent must prove their case by clear and convincing evidence. Some states, such as Connecticut,

require that a grandparent prove the child will be harmed if visitation is not granted.

The U.S. Supreme Court, however, did not require that states go that far. In striking down the Washington State grandparent visitation statute as applied, the

Court in *Troxel* said it did not need to reach the issue of "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."

When Visitation May Be Granted

An example of special circumstances in which a grandparent still can obtain visitation came from the Supreme Judicial Court of Maine. In *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), the maternal grandparents had helped raise their grandchildren, who were ages 13, 11, and 7, at the time of hearing. The oldest child was born when the mother was a 16-year-old high school student, unmarried, and living at home. During the first seven years of the oldest child's life, and for lesser periods for the younger children's lives, the grandparents were, in the words of the court, the children's "primary caregivers and custodians," including during time periods when the children's mother left the home. In later years, the mother and children lived in the grandparents' home when the mother was having marital difficulties.

At the time of the hearing on visitation, the mother and father had reconciled, "appear to have enjoyed a stable home life," and lived in their own home with their children. Both parents opposed visitation with the maternal grandparents. In holding that the grandparents were entitled to obtain visitation, the state supreme court said:

The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing

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a forum for those grandparents having such a “sufficient existing relationship” with their grandchildren.

Another circumstance in which grandparents obtained visitation involved a case in which a mother was dying of cancer and the grandparents cared for the children for a substantial period of time. Following the mother’s death, the father obtained custody. Disputes arose between the father and the grandparents, and the father cut off contact between the grandchildren and the grandparents. In this circumstance, given the particularly close relationship between the grandchildren and grandparents, the courts have allowed visitation.

In some states, a parent who is on active military duty can designate a person to exercise visitation rights while the parent is unavailable. The person exercising visitation could be a grandparent or a new spouse, for example. Granting visitation in such circumstances is viewed as a way of implementing the absent parent’s right to raise his or her child rather than as an exercise of the third party’s independent rights (which may not exist, absent special circumstances).

Effect of Antagonism

If a dispute regarding grandparent visitation is headed to court, there obviously is antagonism between parent and grandparent. A moderate amount of antagonism that does not have a major impact on the child will not preclude court-ordered visitation. But if the level of antagonism is too high, that could result in denial of visitation. For example, grandparents who have used their time with a grandchild to undermine the child’s relationship

with the parent or to try to gather incriminating evidence against the parent, have lost visitation. In another case, a seven-year-old boy, who was caught in the crossfire between his grandparents and parents, developed a speech impediment and intestinal problems. The boy said he did not want to visit his grandparents. The problems subsided when visitation was discontinued, so the court made the discontinuation permanent.

In any grandparent visitation case, the focus should remain on what is best for the child. To that end, grandparents and parents should consider alternative dispute resolution. A family therapist or expert in child development could be consulted to help calm the waters and develop a solution that is beneficial to all.

Custody for Grandparents

The law regarding grandparents obtaining custody of grandchildren is similar to the law regarding visitation for grandparents. Parents and grandparents are free to enter into voluntary arrangements regarding who has custody of or time with the children, but if a dispute arises regarding the children, the rights of the parents are paramount, at least initially. The automatic preference for parental custody has been called a “natural right,” “superior right,” “*prima facie* right,” or “presumption.” If a child is in the custody of a parent, and a grandparent seeks custody over parental opposition, the grandparent generally must show that the parent is unfit. Circumstances of unfitness include drug abuse, alcoholism, severe mental illness, or abuse of the child.

A different situation is presented, however, if the grandparents have been raising their grandchild for a significant period of time, such as more than four years. In that circumstance, the grandchild has come to regard the grandparents as the primary parental

figures, and grandparents are likely to retain custody even if the parents are considered fit. The views of the grandchild are important, and the grandparents’ case will be strengthened if the grandchild wishes to remain in the grandparents’ custody.

Another important factor in custody disputes involving a grandparent who has been raising grandchildren is the degree to which the parent has remained involved in the child’s life. A parent who has had regular (and positive) contact with the child is more likely to gain custody than a parent whose contact with the child has been only sporadic.

In a case decided before *Troxel*, the Supreme Court of New Jersey spoke of the benefits of contact between grandchildren and grandparents: “Visits with a grandparent are often a precious part of a child’s experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.” *Mimkon v. Ford*, 332 A.2d 199, 204 (N.J. 1975). Following the Supreme Court decision in *Troxel*, the benefits of contact remain, but courts are obliged to give much more deference to the decisions of a parent.

Note

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