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**GRANDPARENT VISITATION STATUTE FACES
CONSTITUTIONAL QUESTION**

SUMMER 2001



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GRANDPARENT RIGHTS NEWS 1

Grandparent Visitation Statute Faces Constitutional Question

By Gerard Wallace

Since June 2000, when the U.S. Supreme Court handed down its decision in *Troxel v. Granville*¹ regarding the constitutionality of a Washington State visitation statute, at least four New York lower courts have ruled on the constitutionality of New York's grandparent visitation statute, Domestic Relations Law § 72. These decisions are split; two for the statute's constitutional validity and two against. As a result, both parents and grandparents face exceptional uncertainty in disputes about visitation. Until appellate decisions bring clarity to the controversy, the law regarding visitation petitions by grandparents remains unclear.



The controversy arises because the U.S. Supreme Court's decision is not easily understood. In *Troxel*, the Supreme Court reviewed the decision of Washington State's highest court that had found its own visitation statute unconstitutional. That statute permitted "any person" at "any time" to petition for visitation with children, despite the united opposition of the parents. The statute also mandated that visitation should be decided solely upon consideration of what is in the child's best interest.

The grandparents in *Troxel* sought increased visitation with the daughters of their deceased son and were resisted by the mother. While these facts are typical of many grandparent visitation statutes, Washington State's statute was not typical of the narrower grandparent visitation statutes enacted in most states. Still, many thought that the U.S. Supreme Court intended to resolve the constitutionality of state grandparent visitation statutes.

Washington State's highest court found the Washington State statute invalid because it violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.² The Washington State Supreme Court interpreted past U.S. Supreme Court decisions to mandate that a state cannot interfere with parental autonomy unless the state shows that its interference prevented a harm or a potential harm to a child. Using this reasoning, the Washington State Supreme Court declared the Washington State statute unconstitutional because the court found no harm to be prevented.

However, contrary to expectations, the U.S. Supreme Court did not address the harm standard. The nine justices on the nation's highest court were unable to find much common ground upon which to build an opinion. Justice O'Connor writing for herself and three other justices (JJ. Rehnquist, Ginsberg, and Breyer) acknowledged that "normally" a state cannot interfere with fit parents, but she then asserted that, in this instance, the "problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all" to the parent's determination of the children's best interest. The issue was not the state's right to interfere, but how it had interfered. The plurality opinion found that the trial judge applied Washington State's visitation statute in an unconstitutional manner. The judge failed to give "special weight" to the parent's decision to deny visitation. The grandparents, not the parent, should have borne the burden of proving that the decision by the parent to deny visitation was not in the best interest of the children. Because there was no deference to the parent's decision, the plurality agreed that the statute, *as applied*, was unconstitutional.

The two concurring judges did not join in this reasoning but offered separate opinions for finding the statute unconstitutional. Justice Thomas came close to endorsing the harm standard, declaring that parents' fundamental liberty interest deserved the highest protection. Justice Souter found the statute unconstitutional because it empowered an overly broad category of persons with the opportunity to seek visitation.

The disunity in the Supreme Court's reasoning and the plurality's failure to clearly indicate the circumstances under which states could interfere in parental autonomy directly contributed to the conflicting decisions by New York judges.

New York's statute limits visitation petitions to grandparents, but does not provide clear standards which must be met before courts can consider whether visitation is in the best interest of a child. Neither does it indicate that special weight should be given to parental decisions to deny visitation during a court's best interest analysis. The statute only declares that "where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene," then judges should inquire whether it is in the best

interest of children for grandparents to have visitation.

In *In re Emanuel S. v. Joseph E.*,³ New York's highest court interpreted this provision to mean that, when both parents were alive, only grandparents who had a relationship with their grandchildren or who sought to have a relationship but were prevented by the parents could go forward with their petitions. Thus, New York courts must hold a preliminary hearing on these issues before inquiring into the best interest of a child. The New York Court of Appeals has not endorsed any rule of deference to parents during the best interest phase of visitation proceedings.

So far, two judges have ruled that New York's statute is unconstitutional based on the statutory failure to mandate sufficient deference to parental autonomy, and two judges have ruled the statute to be constitutional based on a review of case law which showed that trial judges, in applying the statute, do defer to parents.

In *Hertz*, a grandfather's petition was brought against parents united in opposition. The Kings County trial judge found that the statute's failure to recognize that the parent's decision is entitled a presumption of validity or added weight resulted in unconstitutional state interference with a fit parent's right to raise their children.⁴ A second trial judge went further. In a case involving a paternal grandmother and the widowed mother, the judge declared that there must be a finding of parental unfitness before the state can "exercise its judgment and discretion on the issue of a child's best interest relative to grandparent's visitation. . . ."⁵

Two other decisions reach the opposite conclusion. In *Smolen v. Smolen*,⁶ an Onondaga County dis-

pute between two grandparents and their daughter, the Family Court judge noted that "a review of later case law, however, reveals that Domestic Relations Law § 72 has generally been interpreted to require substantial deference to the authority of parents in both aspects of the analysis." In fact, decisions have limited awards of visitation to situations where "there is possible harm to the child, or where the parental decision making is based on factors which are immaterial to the child's best interest." In *Fitzpatrick v. Youngs*,⁷ a Jefferson County contest between the paternal grandfather (the father is deceased) and the natural mother, the presiding judge asserted that "*Troxel* cautions that parental decision making must be given some deference, and as applied this has occurred in New York." Looking at the statute's application, these two judges denied the parent's motion to dismiss based on the unconstitutionality of the statute.

Since the four decisions are all by trial courts, they do not bind other trial judges. Although judicial reasoning may be of assistance in another court's deliberations, at present, New York trial judges are still interpreting *Troxel* without guidance from higher courts. Of the four lower court cases, *Smolen* and *Fitzpatrick* are not being appealed. *Hertz* is being appealed. The petitioner in *Levy* has yet to decide whether to appeal.

Endnotes

1. 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49.
2. *In re Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998).
3. 78 N.Y.2d 178, 573 N.Y.S.2d 36, 577 N.E.2d 27.
4. *Hertz v. Hertz*, 717 N.Y.S.2d 497 (Sup. 2000).
5. *Levy v. Levy*, Kings Co. Supreme Court, 38897/99.
6. 713 N.Y.S.2d 903 (Fam. Ct. 2000).
7. 717 N.Y.S.2d 503 (Fam. Ct. 2000).

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