

# ***Troxel, et vir, Petitioners v. Granville: Grandparents' Rights or Parental Autonomy?***

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In December 1993, Gary and Jennifer Troxel filed a petition in Washington Superior Court to obtain increased visitation with their two granddaughters under the provision of a Washington statute allowing any person to seek visitation of a child if the visitation could be shown to be in the child's best interest.<sup>1</sup> The trial court granted increased visitations to the grandparents. The Washington Court of Appeals and the Washington Supreme Court overturned this decision. The grandparents appealed to the U.S. Supreme Court seeking increased visitation with their granddaughters in accordance with the Washington statute. On June 5, 2000, The U.S. Supreme Court affirmed the decision of the Washington Supreme Court and held that the Washington statute relevant to the grandparents' request for visitation violated the mother's due process right to make decisions concerning the care, custody, and control of her daughters.<sup>2</sup>

## **Background of Grandparents' Visitation Rights**

The percentage of Americans age 65 or older has more than tripled in the last century. In the year 2000, this age group represents approximately 13 percent of the population and is projected to increase to 20 percent by the year 2030.<sup>3</sup> In 1996, 5.6 percent of all children lived in the household of their grandparents.<sup>4</sup> Despite the increasing influence of older

Americans in our society, grandparents do not have a recognized right under common law to visit their grandchildren.<sup>5,6</sup> Exceptions have included situations in which the child has lived with the grandparent or has developed a close personal relationship with the grandparent or the parent has been found unfit. However, visitation rights could be prevented if a fit parent opposed the visitation.<sup>7</sup> In 1976, Grandparents' Anonymous was formed to promote grandparents' visitation with their grandchildren.<sup>8</sup> This active senior lobby has played a significant role in the recent success of grandparent visitation statutes. All 50 states have enacted some form of grandparent visitation legislation.<sup>9</sup>

Grandparent visitation statutes can be classified into two basic types. In the first category, statutes grant visitation to grandparents in narrowly drawn circumstances such as a change in family circumstances or when the child has lived with the grandparent for a statutorily defined period of time.<sup>10</sup> Twenty states allow grandparents to petition for visitation rights only if a parent has died or if a parent has been deprived of custody.<sup>11</sup> In contrast, "wide-open grandparent visitation statutes" allow for visitation even when both parents are still living together and married.<sup>12</sup> Approximately 30 states allow grandparents to petition for visitation even if there is not a change in family circumstances such as a death or a divorce.<sup>11</sup> All statutes mandate a showing that the grandparents' visitation is in the best interest of the child. More restrictive statutes require an additional finding that the child will be harmed in the absence of contact with the grandparent before visitation can be ordered.

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Many statutes have no specific guidelines for the judge to consider when deciding a grandparent's visitation petition or when upholding grandparent visitation orders. In these cases, courts have considered the following nonspecific factors. First, contact with a grandparent is often presumed to provide increased stability in a child's life, particularly in view of the rising number of single and divorced parents.<sup>7</sup> Second, courts have described that a child and grandparent develop a "special bond" that provides mutual enjoyment to both.<sup>13</sup> Third, courts have commented that granting grandparent visitation prevents family quarrels "of little significance" from disrupting the grandparent-grandchild relationship.<sup>14</sup> Fourth, some judges have based their decision on a sentimental characterization of idealized grandparents without considering the possibility that not all grandparents match this description. For example, in the case of *Mimkon v. Ford*,<sup>15</sup> a maternal grandmother was ultimately granted visitation of her grandchild after the child's mother died. The New Jersey Supreme Court wrote that grandparents are "generous sources of unconditional love and acceptance, which complements rather than conflicts with the roles of the parents."

Although many grandparent visitation statutes provide no guidelines to assist a judge in determining whether to grant a grandparent's visitation petition, a few states have enumerated specific factors for the court to consider when making this decision. For example, the New Jersey grandparent visitation statute states that when deciding whether to grant the grandparent visitation, the court must consider the following: the relationship between the grandparent and child; the relationship between the child's parents and the grandparent; the time that has gone by since the child and grandparent last had contact; the effect that visitation would have on the relationship between the child and the parents; the time-sharing arrangement that exists between divorced parents; the good faith of the grandparent in filing for visitation; any history of abuse or neglect by the grandparent; and any other factor relevant to the best interests of the child.<sup>16</sup> The American Bar Association has developed a policy that provides guidelines for judges deciding grandparent visitation disputes. These factors include: the extent of the relationship between the grandparent and child; whether the child's psychological development will be promoted or disrupted by visitation; whether friction will result be-

tween the child and parent(s); whether visitation will give support and stability to a child after the disruption of the nuclear family; whether involved adults have the ability to cooperate and compromise in the future, whether the child desires the visits; and "any other factor relevant to a fair and just determination regarding visitation."<sup>17</sup>

When a grandparent petitions a court for visitation with a grandchild, this request usually signifies a disagreement with the parents' decision on how to rear their child. The principle governing a grandparent's right to visit a grandchild has traditionally arisen from a moral and not a legal obligation.<sup>5</sup> The U.S. Supreme Court has recognized that parental autonomy is a fundamental constitutional right but that the state may intrude on that "private realm of family life" in circumstances where it is necessary to protect the child from harm.<sup>18</sup> The reluctance of the government to force its wishes upon a family was further emphasized by the U.S. Supreme Court when it wrote, "the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>19</sup>

The case of *Troxel v. Granville*<sup>1</sup> brought the developing debate between parental autonomy and the constitutionality of a grandparents' visitation rights statute directly before the U.S. Supreme Court.

## Case Background

Brad Troxel had a relationship with Tommie Granville that ended in June 1991. Although they never married, they had two daughters from this relationship. After Brad and Tommie separated, Brad lived with his parents (Gary and Jennifer Troxel) and regularly brought his daughters to his parent's home for weekend visitation. In May 1993, Brad committed suicide. Following his suicide, the daughters continued to visit their paternal grandparents until October 1993 when the children's mother informed the grandparents that she wished to limit the visits to once a month.

In December 1993, the Troxels filed a petition in Washington Superior Court to obtain visitation rights with their granddaughters under two Washington statutes. The statute relevant to this case stated: "Any person may petition the court for visitation rights at any time including but not limited to cus-

tody 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.”<sup>1</sup> At trial, the judge ordered visitation that exceeded the once a month visitation suggested by the children’s mother.

The Washington Court of Appeals reversed the lower court’s visitation order and dismissed the grandparent’s petition for visitation. The Court of Appeals held that under the Washington statute, non-parents lacked standing to seek visitation unless a custody action was pending. The appellate court stated that limitation on nonparental visitation actions was consistent with the constitutional restrictions on state interference with parents’ fundamental liberty interest in the care, custody, and management of their children. The Court of Appeals did not directly address whether the Washington statute that allowed visitation was unconstitutional.

The grandparents petitioned the Washington Supreme Court for review. Upon review, the Washington Supreme Court disagreed with the ruling of the Court of Appeals that the grandparents lacked standing to seek visitation. The Washington Supreme Court found that under the statute in question, the grandparents had standing to seek visitation, irrespective of whether a custody action was pending. However, the Washington Supreme Court affirmed the lower court’s decision by ruling that the Washington statute unconstitutionally infringed on a parent’s fundamental right to rear a child. The Washington Court noted two problems with the statute. First, the U.S. Constitution permits a state to interfere with a parent’s right to rear a child only to prevent harm or potential harm to the child. Second, the Washington statute was too broad by allowing “any person” to petition for forced visitation of a child at any time with the only requirement being that the visitation serve the best interest of the child. The grandparents appealed the decision to the U.S. Supreme Court for review and *certiorari* was granted.

### **U.S. Supreme Court Holds That the Washington Grandparent Visitation Statute Is Unconstitutional**

In a 6 to 3 decision, the United States Supreme Court affirmed the decision of the Washington Supreme Court and held that the Washington statute allowing any third party to seek visitation if it was in the child’s best interest violated the substantive com-

ponent of the Fourteenth Amendment due process clause. The split decision yielded six separate opinions. Three separate majority opinions were written along with three separate dissents. In the primary majority opinion, Justice O’Connor wrote, “The liberty interest at issue in this case—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.” Justice O’Connor emphasized several prior Supreme Court cases addressing parental rights and noted, “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” Justice O’Connor outlined significant difficulties with the Washington statute and its application to this case. First, she noted that the statute was breathtakingly broad. In particular, the statute permitted any non-parent to seek visitation of a child at any time. Second, Justice O’Connor expressed concern that the statute contained no requirement that the court show any deference to a parent’s decision. According to Justice O’Connor, the statute effectively allowed the judge’s view of what was in the child’s best interest to prevail over the parent’s view. Justice O’Connor also expressed concern that the judge placed the burden on Granville to disprove that visitation with the grandparents would be in the daughter’s best interest. She emphasized that a grandparent visitation statute must “accord at least some special weight to the parent’s own determination.” Third, Justice O’Connor noted that neither the court nor the grandparents alleged that the mother was an unfit parent and therefore unable to act in the best interest of her daughters. Justice O’Connor wrote, “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.” Fourth, Justice O’Connor pointed out that Granville had never refused visitation of the grandparent’s, but had only disagreed with the amount of visitation requested. Justice O’Connor chose not to address whether the due process clause required all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.

She expressed a hesitance to hold that specific non-parental visitation statutes violate the due process clause as a *per se* matter.

In his dissent, Justice Stevens argued that the Washington State Supreme Court erred in its federal constitutional analysis. In particular, he disagreed with the opinion that the statute was invalid in all applications because "any person" could seek visitation of a child. Justice Steven wrote, "While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm." In a separate dissent, Justice Kennedy also disagreed with the Washington State Supreme Court's ruling that third parties who seek visitation must always prove the denial of visitation would harm the child. Justice Kennedy expressed concern that the State Supreme Court's holding appeared to proceed from the assumption that the parent who resists visitation has always been the child's primary caregiver and that third parties who seek visitation have no legitimate and established relationship with the child.

## Discussion

The U.S. Supreme Court's decision focused on the constitutionality of Washington State's grandparent visitation statute. The Court's finding that the Washington statute violated the Fourteenth Amendment resulted primarily from the statute's broad language allowing any person at any time to petition for visitation if a judge determined this was in the child's best interest. Although the Court's decision strengthened the concept that parents have a "fundamental right" to raise their family free from governmental interference, the decision is equally important for what was not decided. First, the impact of the ruling is limited because the Court focused on the application of the Washington state law rather than on the constitutionality of grandparent visitation laws in general. The Court did not find all grandparent visitation statutes unconstitutional. Second, the Court did not require a determination that the child would be harmed if grandparent visitations were denied.

Third, grandparents were not given any special status compared with other third parties in child visitation cases. Fourth, no general guidelines were provided to assist judges in reviewing a grandparent's visitation petition or protecting the rights of parents. Finally, the Court did not give parents absolute veto power over who visits their children.<sup>20</sup> Despite the anticipation regarding the potential outcome of this case, the Court left many questions governing grandparents' visitation statutes unanswered. Future cases will attempt to define that seemingly shady boundary between a parent's autonomy and the state's authority to make decisions regarding who visits a child.

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