Neither Harm Nor Clear And Convincing Evidence Are Required To Meet Constitutional Requirements, Says U. S. Supreme Court Regarding Grandparent Visitation

By Richard S. Victor, Esq.

The long debate over what the United States Supreme Court held regarding grandparent visitation in its 2000 ruling in the case of Troxel v Granville, 530 U.S. 57 (2000), appears to finally be over. Since Troxel, Grandparent advocates, such as the **Grandparents Rights Organization**, and the **Detroit Area Agency on Aging**, have argued that the high court never intended laws in each state to require such strict prerequisites, as that there would have to be harm to a child before a grandparent would be entitled to see their grandchild. Or that Grandparents would have to prove, by the highest burden of proof, clear and convincing evidence, that it would be in a child's best interests, in order to overcome a denial of a custodial or surviving parent, following the death or divorce of the child's parents, to allow them to see their grandchild, in order to meet any constitutional requirement necessary to withstand a constitutional challenge to a state law that did not have such strict or high burden.

Parent right advocate groups have countered saying that the Troxel case requires state laws to have very strict guidelines and prerequisites in place if a grandparent wants grandparent visitation over a custodial parent's objection. They have said that if these strict restrictions were not part of a state law, the law would be unconstitutional, based on the U.S. Supreme Court ruling in Troxel. In fact, this argument swayed the Michigan legislature so much, that in 2005 it convinced the Michigan legislature to change Michigan's grandparent visitation law (MCL 722.27b) to require:

…(b) In order to give deference to the decisions of fit parents,

> **it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut the presumption….a grandparent filing a complaint or motion under this section must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent does not overcome the presumption, the court shall dismiss the complaint or deny the motion." (MCL 722.27(b)(4)(b)**

Prior to this new law, a grandparent only needed to show that a request for grandparenting time was in the best interests of the child, based on a set of factors that were contained within the child custody act (MCL 722.23)

Under Michigan's law now, this "harm" requirement is necessary, prior to any best interest hearing being available for a grandparent to proceed in a request to see their grandchild, following the death, divorce and often when the child is born out of wedlock. Presently 48 states allow for grandparents, and even great grandparents to request visitation following the death, divorce and often when the child is born out of wedlock. But, from all these other states, Michigan's requirement to **prove harm to the mental, physical or emotional health of a child, before the court can grant a best interest hearing,** is one of the most restrictive requirements in all of the country for a grandparent to have to prove. In fact, the parent advocate groups that convinced the Michigan legislature to pass this restrictive law even wanted it more restrictive by making a grandparent have to prove the "harm" by clear and convincing evidence, a burden that would be almost impossible for most cases to reach.

Before the legislature passed this new law, in January, 2005, it heard arguments from state senators and representatives who were convinced that these high restrictions were necessary, as well as testimony from representatives of the Family Law Section

Council of the State Bar, who believed that these high burdens were all required, based on their understanding and interpretation of what the United States Supreme Court said were necessary, following the Troxel decision, in order to make sure that Michigan's law would be constitutional. Neither the legislature nor the Governor were convinced by the arguments that came from other legislators, such as **Senator Bruce Patterson**, former **Representative James Howell**, representatives from the **Detroit Area Agency on Aging**, or myself, speaking on behalf of the **Grandparents Rights Organization**, that Troxel did not say what they said it did. We believed that Troxel, when read, only required, as Justice Elizabeth Weaver held in her concurring opinion in DeRose v DeRose, 469 Mich 320; 666 NW 2d 636 (2003) that three prerequisites needed to be in a state statute, in order for it to meet the constitutional requirements that the United States Supreme Court set forth were necessary:

> **1) If there is a petition filed it must be the grandparent who has the burden to go forward;**
>
> **2) If there is a dispute, the court shall give deference to a parent's desire; and**
>
> **3) The legislature shall provide a set of factors for the court to utilize in making its decision on whether to grant or deny a request for grandparenting time.**

The hard fight to draft legislation in order to balance the rights of parents, as required by Troxel, and the reality of the role that grandparents play in children's lives in some cases, and the need to be able to review those cases on a case by case basis without such strict and almost impossible hurdles to overcome, was lost by the individuals who, it appears now, did read and understand what the court intended the law to be following their reading of the Troxel decision. The legislature was won over by those individuals

and groups, who apparently "over read" the decision and added unnecessary burdens and requirements for grandparents and for the courts to find, before a granting of grandparent visitation could be provided. This unnecessary burden has caused cases to become much more expensive, as well as more time consuming for the parties and the courts than actually necessary. It has caused many families that have suffered loss and dysfunction, as well as acrimony, more emotional disenfranchisement for the children, with the loss of their extended family following the death or divorce of their parent(s). It has made it impossible for many grandparents and grandchildren, who have been amputated by the death or divorce of the child's parent, from ever seeing each other again because of a unilateral and sometimes irresponsible decision made by a custodial or surviving parent.

Grandparent right groups have tried to caution that the fact that there are laws does not necessarily mean that there will be lawsuits.

The reality in these cases is because grandparent visitation laws exist, it allows the ability to force families in dysfunction to come to the table and talk. These cases bring out the emotional realities that occur in the lives of adults. But what is sometimes forgotten is that children become the innocent victims of the illogical behavior of the adults. In cases of death, divorce, and children born out of wedlock, parents are no longer related to the same people as their children. If we honor family and the need for family in the lives of children, how should we define "family."? Should we look at the family through the eyes of the adult or through the eyes of the child?

It appears, the debate on what the U.S. Supreme Court really did rule and require for the individual states to have in their laws has finally been resolved, based on the action of the Court on March 6, 2006. In the case of **Collier v Harrold**, **___U.S.___**

(2006) the United States Supreme Court refused to consider making it harder for grandparents to win visitation rights, rejecting an appeal from a father who went to jail to fight court-ordered visitation. In that case, Mr. Collier had asked the justices to strike down the Ohio visitation laws, which allows the court to grant grandparent visitation based on the best interests of the child, on grounds that they interfere with parents' rights to raise their families free from government interference. The Ohio law **(R.C. Sections 3109.051** and **3109.12**) gives grandparents (as well as any person related to the child by consanguinity or affinity) the right to request visitation with a child in cases of divorce, death of a parent, or if the child is born out of wedlock, if all of the following apply:

> **The Grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights;**
>
> **The Court determines that the grandparent, relative, or other person has an interest in the welfare of the child;**
>
> The Court determines that the granting of the companionship or visitation rights is in the best interest of the child.

The statue, which was amended following the Troxel decision in 2000, goes on to state:

In determining whether to grant….companionship or visitation rights to a grandparent, relative, or other person pursuant to this section….the court shall consider all of the following factors:

> **The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;**
>
> **The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between those residences, and if the person is not a parent,**

the geographical location of that person's residence and the distance between that person's residence and the child's residence;

The age of the child;

The Child's adjustment to home, school, and community;

If the Court interviewed the child in chambers, the wishes and concerns of the child, as expressed to the court;

The health and safety of the child;

The amount of time that will be available for the child to spend with siblings;

The mental and physical health of all parties;

Each person's ability to reschedule missed visitations;

Any other factor in the best interest of the child;

If a requesting person has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; or whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child.

In addition, also added to the Ohio statute was:

In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court.

Briefly, the Harrold case facts dealt with a single mother who died of cancer in 1999, at which time her parents (grandparents) were granted temporary custody of their grandchild. Thereafter, in 2002, the father came forward and was awarded custody of his daughter. He removed her from the grandparents' home. Several months later the grandparents petitioned and were awarded visitation rights. Father, who denied the visitation, challenged Ohio's law based on his interpretation of the U.S. Supreme Court decision in Troxel, which he believed made Ohio's law unconstitutional. That set in place

the four year set of court challenges that ultimately ended on March 6, 2006 with the U. S. Supreme Court allowing Ohio's law to remain as constitutional and allowing the Ohio law to stand. Since Ohio neither has a "harm" standard nor a requirement for a grandparent to prove their case by "clear and convincing" evidence, the high court has once and for all agreed that there is no necessity for such prerequisites in state laws in order to meet constitutional requirements. Therefore, Michigan did not have to be as restrictive in the drafting of its current law and requirements as many in our legislature were forced to believe was necessary in order to pass a constitutionally sound bill.

If Michigan's legislators knew that they did not have to pass such a restrictive bill in order to have a law that would have met the constitutional requirements of our United States Supreme Court, would it have affected the vote of some of the legislators, especially legislators who represent citizens in our state who care for and are close with their grandchildren? Would this information, if known, have provided Michigan with a more user friendly, less costly and less restrictive grandparent visitation law? Should the Michigan legislature revisit this issue and propose the introduction of the exact law our sister state to the south has in place that protects its families and children with a law that we know is constitutionally sound?

Many child and grandparent advocates are asking the Michigan legislature to look hard and fast at this issue. **When this issue came before them two years ago, were they misled?**

Now that the truth is known, does Michigan really want to be the state with the most restrictive law relating to grandparents being able to continue a loving and meaningful relationship with their grandchildren, when it would otherwise be in the

child's best interests, following the death, divorce or child being born out of wedlock? We now know that there are many groups able to speak up for parent "special interests". But isn't it time that we look out for protecting the rights of children to be able to have the ability to have contact and a relationship with their family, their grandparents and even great grandparents, following the death or divorce of their parent?

If death takes a grandparent from a child, that is a tragedy. But if family acrimony or petty vindictiveness denies a child the unconditional love of a grandparent, as well as the shared memories and experiences that a child has a right to experience during their lifetime, then that is a shame.

Richard S. Victor is an Attorney with The Law Offices of Richard S. Victor, PLLC, in Bloomfield Hills, MI, concentrating in high-end divorce and child custody cases. He is also the founder/executive director of the National Nonprofit Grandparents Rights Organization. Mr. Victor is a former Chairperson of the Family Law Section of the State Bar of Michigan and recipient of their Lifetime Achievement Award as well as the 2004 Champion of Justice Award from the State Bar of Michigan. Currently he is on the National Board of Governors of the American Academy of Matrimonial Lawyers and has served as National Chairperson for Continuing Legal Education for the Academy since 2004. He can be reached at 100 W. Long Lake Road, Suite 250, Bloomfield Hills, MI 48304 (248) 646-7177.